



REPUBLIC OF KENYA



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**Ngibuini v Chege & 2 others (Environment & Land Case 383 of 2011)  
[2024] KEELC 3579 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3579 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 383 OF 2011  
A NYUKURI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**HUMPHREY MWANIKI NGIBUINI ..... PLAINTIFF**

**AND**

**OLIVER NDUNG’U CHEGE ..... 1<sup>ST</sup> DEFENDANT**

**THE RECEIVERS OF DRUMVALE FARMERS CO-OPERATIVE  
SOCIETY ..... 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint filed on 19<sup>th</sup> December 2011 and amended on 8<sup>th</sup> March 2018, Humphrey Mwaniki Ngibuini sued Oliver Ndungu Chege seeking the following orders;
  - a. An order compelling the defendant to forthwith deliver possession of the property known as Mavoko Town Block 12/296 to the Plaintiff.
  - b. An order do issue compelling the defendant, his servants and/or agents to forthwith vacate the premises known as Mavoko Town Block 12/296.
  - c. A permanent injunction to restrain the defendant whether by themselves their agents and servants from interfering with the Plaintiffs quiet possession of Mavoko Town Block 12/296.
  - d. Mesne profits from September 2008 till the date of judgement.
  - e. Costs of the suit.
  - f. Interests on (d) and (e) at court rates from the date of judgment until settlement in full.
  - g. Any other ancillary relief the court may be pleased to grant.



2. The plaintiff claimed to be the registered owner of all that parcel of land known as Mavoko Town Block 12/296 (hereinafter referred to as the suit property), having purchased the same in 1994 from one Dominic Mutuku Kasyoki, now deceased. He alleged that a title was issued in his name in January 2010 and that around September 2008, he was informed by neighbour that someone had moved into the suit property and was erecting temporary structures thereon. He alleged that he sought to resolve the matter unsuccessfully through the chief and filed a suit in 2010 at Kangundo Chief Magistrates court but withdrew the same for want of pecuniary jurisdiction. He stated that there was fraud on the part of the defendant because in Kangundo PMCC 87 of 2010, the defendant had produced documents showing he paid his alleged purchase price by an excess of Kshs. 65,000/=.
3. On 21<sup>st</sup> March 2012, the defendant filed a notice of motion dated 16<sup>th</sup> March 2012 seeking an injunction against the plaintiff and an order to institute a suit against the Receivers of Drumvale Farmers Cooperative Society. He also entered appearance by memorandum of appearance dated 16<sup>th</sup> March 2012 and filed on 21<sup>st</sup> March 2012. In that memorandum of appearance, the defendant introduced a “plaintiff” called Joseph Kasyoki Mutuku (suing as the legal representative of the estate of Dominic Mutuku Kasyoki). As there was no leave obtained to join this person to these proceedings, I find and hold that his addition to these proceedings is null and void and of no legal effect.
4. In addition, on 21<sup>st</sup> March 2012, the defendant opposed the suit by filing a statement of defence and counterclaim dated 16<sup>th</sup> March 2012 which was later amended on 15<sup>th</sup> April 2013. In the amended defendant’s statement of defence and counterclaim, it is not clear whether Joseph Kasyoki Mutuku or Oliver Ndungu Chege is the one who has made a counterclaim. Besides the plaintiff, the defendant added two other defendants to his counterclaim, namely; the receiver of Drumvale Farmers Cooperative society and the Attorney General. In his defence and counterclaim, the defendant denied all the averments in the amended plaint and claimed to have purchased the suit property from the original owner, the late Dominic Mutuku Kasyoki. In the alternative the defendant averred that if the plaintiff’s rights existed since 1993, such rights have been extinguished under the Limitation of Actions Act, as the defendant has been in occupation of the suit property since 1997. He further alleged that the defendants in the counterclaim had jointly and fraudulently caused the transfer of the title to the plaintiff’s name. He counterclaimed for the following orders;
  - a. A declaration that the plaintiff’s right to recover Mavoko Town block 12/296 is extinguished under the limitation of Actions Act Cap 22 Laws of Kenya. The defendant having continuously had possession of the suit property since 1997 to date.
  - b. An order restraining the defendant Humprey Mwaniki Ngibuini from alienating and or transferring Mavoko Town Block 12/296 and Nairobi Block 118/457.
  - c. A declaration that registration of Mavoko Town block 12/296 and Nairobi Block 118/457 into the name of Humprey Mwaniki Ngibuini was fraudulent.
  - d. An order to the Chief Registrar of Lands for cancellation of the fraudulent registration of Mavoko Town Block 12/296 and Nairobi Block 118/457 in the name of Humprey Mwaniki Ngibuini and rectification of the register.
  - e. Costs of the suit.
  - f. Any other relief that the honourable court deems fit to grant.
5. The 2<sup>nd</sup> defendant, the Receivers of Drumvale Farmers Co-operative Society, filed a statement of defence to the counterclaim on 12<sup>th</sup> February 2015. They denied all allegations of fraud and averred that by a special management committee meeting held on 18<sup>th</sup> May 1994, the full share of No. 418



of Mutuku Kasyoki was transferred to Humprey Mwaniki Ngibuini on payment of Ksh. 15,516.00. It was averred that the said plot was late re-allocated to Mr. Humprey based on the minutes of the committee and hence any subsequent agreement for sale of the parcel of land in issue was valid.

6. On 21<sup>st</sup> March 2014, the Attorney General entered appearance and filed the 3<sup>rd</sup> defendant's statement of defence dated 6<sup>th</sup> March 2014. He averred that he was a stranger to averments in the counterclaim and denied particulars of fraud alleged by the defendant.
7. On 23<sup>rd</sup> May 2017, the court took the position that the counterclaim was irregular and ordered the defendant to scrutinize his defence and make the necessary amendments. However, on 24<sup>th</sup> September, the parties agreed by consent that the matter proceeds as it is. Therefore, the matter proceeded to hearing by way of viva voce evidence.

### **Plaintiff's evidence**

8. Peter Woci Koburu, testified as PW-1. He adopted his Witness Statement dated 9<sup>th</sup> March 2018 as his evidence-in-chief. He averred that in 1993 Humprey Mwaniki and himself used to work together at Timsales Limited, where he was an accountant whereas the plaintiff was a director. He stated that he introduced the plaintiff to Dominic Mutuku Kasyoki the then owner of the suit property who was looking for a buyer for the suit property.
9. He further averred that on or around 18<sup>th</sup> May 1994, the plaintiff and Dominic Mutuku Kasyoki attended a board meeting of Drumvale Farmers Co-operative Society (hereinafter referred to as "Drumvale") for the purposes of completing the sale and purchase transaction. The witness in his statement explained the procedure for the sale and transfer of shares and land at Drumvale as follows;  
  
The intended Purchaser and intended Vendor would draft and thereafter execute a sale agreement as per the agreed terms and conditions of the sale and purchase. The Purchaser and Vendor would attend the Board of Directors of Drumvale where the Directors would ascertain that there was a valid agreement, consideration had been paid, and there was spousal consent to effect the transfer. Where the three requirements had been met, the Purchaser would be directed to pay the transfer costs to Drumvale's cashier's office. Once payment of the transfer costs had been made, the Board would effect the transfer and note the same in their board minutes. The Vendor would then handover to the Purchaser the Share Certificate evidencing ownership of the properties noted in Drumvale's register against said share.  
  
The Allocation List of the owners of the property would be amended to reflect the new owner of the property, which Allocation List was thereafter forwarded to the Land Registrar at Machakos Lands Office to enable registration of the subdivided land in favour of the owners and issuance of Title to that effect.
10. PW-1 further testified that the plaintiff completed the abovementioned procedure and was noted down in Drumvale's register as the owner of share No. 418 and the attendant properties therein. Further that he later received information from Jonah Mutuku Munguti, Drumvale's farm manager that the defendant had occupied the plaintiff's land and constructed temporary structures thereon as well as begun cultivating the land. That he informed the plaintiff who was then working in Tanzania.
11. Upon cross-examination, he stated that he had moved to Kamulu in 2001 and that the land he bought from Drumvale was Block 12/297. He averred that the plaintiff bought one share comprising 6 acres. He stated that the sale agreement was drawn in Kariobangi and that he could not remember the person who wrote the agreement. He stated that the people present were the buyer, seller, wife of Dominic and Titus Ngumbi. He also stated that Kshs. 150,000.00 was paid on the said date. He confirmed to



- be present during the meeting held on 18<sup>th</sup> May 1994. He stated that Anna Mutio was the wife to the late Dominic and that the spousal consent was in writing. He also testified that transfer fees was paid and the share transferred to the plaintiff.
12. On re-examination, he confirmed that the register on record showed his name and the land he owned, and that the plaintiff bought land in Mavoko and Nairobi areas, which were formerly owned by Dominic. He stated that a consent letter was a requirement for the transfer and that the sale was approved when the buyer and the seller appeared before the board of Drumvale.
  13. PW2 was Monica Mwikali Ngumbi. She adopted her witness statement made on 8<sup>th</sup> March 2018 as her evidence-in-chief. She stated that she was married to Titus Ngumbi who was an uncle to the late Dominic Mutuku Kasyoki and that there is no person by the name Mutula in their clan. She further averred that the late Dominic Mutuku Kasyoki was always known by that name, has never changed his name and there is no one in their clan going by the name Mutula as alleged by the defendant. She also testified that Anna Mutio of ID No. 6266632 was the only wife of Dominic, who is well known to her personally as she attended the dowry ceremony. She stated that she was unaware of any individual by the name Litha Mutio.
  14. On cross examination, she stated that she comes from the Kitutu clan and knew Mutuku Kasyoki as her son. She also claimed to have been present at the signing of the agreement together with Mutuku, his wife, the witnesses' husband and one Peter. She averred that she had her identity card that day and produced the same as identity card number 62xxx53. She stated that the wife of Dominic was Anna and that she was also present at the signing of the agreement and that they were paid in cash. She also averred that there is no one by the name of MUTULA in their clan. And that the share certificate was handed over at Kariobangi. On re-examination, she reiterated that the agreement was signed at Kariobangi and that the amount was handed to Dominic.
  15. PW3 was Jonah Mutuku Munguti, who claimed to have worked as manager at Drumvale and now a committee member of the same. He adopted his witness statement made on 9<sup>th</sup> March 2017 as his evidence-in-chief. He claimed to be a neighbour to the plaintiff. It was his evidence that the suit property was given to the late Dominic and that he had transferred the same to the plaintiff and the board transferred the share no.418 to the plaintiff. He also averred that that on or around July 2008, Dominic Mutuku Kasyoki the former proprietor of Mavoko Town Block 12/296 attended the Drumvale Farmers Society offices where he worked as a Farm Manager inquiring about the aforesaid property since he wanted to dispose of the same. It was stated that upon inspecting Drumvale's minute book and registers together with Dominic, they confirmed that he had already disposed of the land in 1994 and as per Drumvale's records the plaintiff was the owner of the Property.
  16. It was his testimony that on or around September 2008, on his way home which is three properties adjacent to that of the plaintiff, he noticed that someone had moved into the suit property and had erected temporary structures and began cultivating the land and upon making inquiries from the workers cultivating the land, he was informed that the defendant was the owner, which information he knew to be false since Drumvale's records had no record of approval of a transfer of the property from the Plaintiff, no such transfer had been noted in the register and title for that block had yet to be issued making a direct sale and transfer impossible.
  17. Upon cross examination, he stated that he had not carried any document to show that he worked at Drumvale and that he could not recall the date the late Dominic and the plaintiff came to the board. He also stated that in 2008 he saw someone called Chege come into the property and used a tractor to till the land. He stated that he had seen Chege at the offices and that he had informed the people



- who worked with the plaintiff. Upon re-examination, he stated that his position at Drumvale then was a manager, in charge of ensuring that people got their titles.
18. PW4 was Joseph Kituku Ivovyo. He adopted his witness statement made on 8<sup>th</sup> March 2018 as his evidence-in-chief. Therein he had stated that he is a land broker and that the defendant is well known to him as he also introduced him to Mavoko Town Block 12/296 which he had purchased. He further stated that neither him, his fellow land broker, nor the defendant visited the actual property or undertook any due diligence before engaging the person who allegedly sold the land to him, noting that they advised the defendant to undertake a search of the suit property before undertaking any purchase thereof but he refused and stated that since he had met the owner, that was sufficient for him. It was his testimony that the defendant paid a sum of Kshs. 50,000 as a deposit of the purchase price for the suit property.
  19. It was his testimony that the person who held himself out to be the owner of the property informed them and the defendant that he had not yet processed a title but allegedly had a member number at Drumvale. However, no evidence of the same was produced before them. He then stated that on 24<sup>th</sup> February 2010, together with the deceased Jacob Nzioka, they were requested by the defendant to attend a meeting at the Chief Jane Mbithi's office as his witnesses. He averred that at meeting, the Chief called for evidence from both the plaintiff and defendant to prove their claims of ownership of the suit property. According to the witness, the plaintiff provided documents showing that he owned the suit property including the sale agreement, proof of payment for transfer of shares, Minutes of Drumvale effecting share transfer, Drumvale's letter inviting the member to collect Title Deed but that the defendant was unable to produce any evidence to the satisfaction of the chief as all he had was the late Dominic Mutuku Kasyoki's Identity Card.
  20. The witness also explained the process of buying land at Drumvale as explained by PW1. He noted that at the time the defendant made the inquiry about the land in 2008, the suit property was undeveloped, that he knew the defendant having brokered for him the purchase of Mavoko Town Block 12/259 to which he followed due process. He was also clear that the defendant did not undertake any search when he allegedly purchased the suit property.
  21. Upon cross examination, he stated that he did not know the seller well and that he was not present during the signing of the agreement. Upon re-examination, he stated that he had been called by someone called Jacob Nzioka who asked him to get a customer for the land and he therefore called the defendant. He also stated that he had gone to the chief because he was involved in the land purchase and that they had asked the seller if he had a title and he had told Chege to conduct a search.
  22. PW-5 was Jane Mbithi, the chief of Katani location. She adopted her witness statement made on 8<sup>th</sup> March 2018 as her evidence-in-chief. Therein she had averred that she stays about 200m metres from where the suit property is situated. It was her testimony that on 30<sup>th</sup> December 2009, the plaintiff attended her offices together with Peter Woci Koburu and Jonah Mutuku Munguti where he informed her that his property Land Reference Number Mavoko Town Block 12/296 had been invaded and was being occupied by the defendant and he sought her assistance in recovering possession and evicting the defendant who was unlawfully and wrongfully occupying the said property. It was her evidence that she advised the plaintiff to return with his documents related to his ownership of the land at a later date which she would communicate to the parties so as to allow her summon the defendant so that he could also put forward his case on ownership.
  23. PW5 further testified that she summoned the parties to attend her office on 15<sup>th</sup> February 2010 and provide their evidence of ownership of the property and both the plaintiff and defendant attended her offices. As per the witness, the plaintiff provided the title to the property, a sale agreement dated



- 15<sup>th</sup> December 1993 and copy of a Barclays Bank Cheque to Drumvale being payment of the transfer charges upon purchase from the previous owner, Dominic Mutuku Kasyoki. That the defendant produced no documents and was thus given more time to produce the same and asked the parties to return on 24<sup>th</sup> February 2010.
24. She further averred that on 24<sup>th</sup> February 2010, the parties attended her office and the defendant stated that he had no documents save for copy of Dominic Mutuku Kasyoki's identity card, whereof they were later asked to come back on 5<sup>th</sup> March 2010. That on that date, the parties attended her offices, where the defendant came accompanied by two persons claiming to be the deceased vendor's wife and son. It was her testimony that the defendant also produced an undated agreement for Sale purportedly executed between himself and the deceased vendor, before the latter's death. She testified that when she queried the defendant on why the agreement for Sale was undated and why the purported wife and son of the deceased vendor had a different last name, Mutula, instead of the last name appearing in the undated agreement for Sale, Mutuku, the defendant was unable to provide any satisfactory answer on the same. She also noted that she had perused the defendant's List of Documents dated 6<sup>th</sup> April 2017 and stated that the agreement for sale between Dominic Mutula Kasyoki and Oliver Ndungu Chege dated 14<sup>th</sup> February 1997 is different from the agreement for sale that was produced before her on 5<sup>th</sup> March 2010. She averred that the agreement shown to her by the defendant was between Dominic Mutuku Kasyoki and Oliver Ndungu Chege and that it was undated. It was also her testimony that the letter allegedly evidencing further payment of the purchase price by the defendant was not produced at the time nor did the defendant claim its existence at the time; and the defendant did not have and did not produce any Drumvale's membership card nor did he allege its existence at the time. She opined that the documents produced by the defendant were fraudulently obtained.
25. Upon cross-examination, she averred that she became a chief in 2009 and that the suit land is within her jurisdiction. She also averred that she received the report from Humphrey in 2009. She further stated that the consideration is not mentioned in the agreement. The witness also stated that she is no longer a chief there but knows the area well, that the suit land has some trees which she does not know when they were planted. She stated further that there was a house on the suit land which she was told belonged to the defendant and that for a transfer of land, parties must come with their identity cards. On re-examination, she stated that the plaintiff had come with a cheque from Barclays Bank and she confirmed to have seen the plaintiff's documents in 2009.
26. PW-6 was Humphrey Mwaniki Ngibuini, the plaintiff in the suit. He adopted his Witness Statement made on 8<sup>th</sup> March 2018 as his evidence-in-chief. The said statement reiterated the facts as pleaded in the plaint. The plaintiff also produced documents to support his case including; documents relating to the sale transaction, minutes of Drumvale and a title deed for Mavoko Town Block 12/296. He further testified that the original sale agreement was not part of the bundle because he had surrendered it to the advocate together with the share certificate and membership card for processing of the title. It was his testimony that the said advocate has since then gone underground and has been deregistered by LSK.
27. Upon cross examination, he testified that the transaction was handled by Kiongo Advocates on behalf of Drumvale and that he had paid Kshs. 124,000/= for processing of the title. He further averred that the consideration for the share was Kshs. 125,000/= which was paid to Dominic Mutuku Kasyoka. He also stated that the share was allocated 5 acres in Mavoko and 1 acre in Nairobi and that Oliver Chege was on the Mavoko land while the Nairobi land was vacant. He also stated that the agreement and payment was witnessed by Peter Kuguru and Monica. He averred that the payment is what allowed them to appear before the Drumvale board as one cannot appear before the board before proof of payment. He further stated that he was not aware that Drumvale committed a fraud.



28. The plaintiff further stated that the name of the person that sold the land to him was Dominic Mutuku Kasyoki. He also stated that he was not doing anything on the land but used to check on it and his neighbours also checked for him and in 2008 they informed him when Chege had come and built a structure thereon. He also stated that he got the title in 2010 but it was not the reason he filed the suit. On re-examination, he maintained that Dominic Mutula is not the same as Dominic Mutuku and that when the defendant trespassed on the land, he was in Tanzania but came back immediately.
29. The evidence of one Eliud Kababu was also admitted under section 33 of the Evidence Act, since he was already deceased. In the said statement, the witness had stated that he was a former director of Drumvale and then a member of the liquidation committee for Drumvale. He outlined the procedure for sale and transfer of shares at Drumvale as laid down by PW1.
30. He averred that the sale of shares to the Plaintiff, his subsequent allocation and registration in his name regarding one of the subdivisions, namely, Mavoko Town Block 12/296 was done in strict compliance with the aforesaid procedure, which procedure included recording in Drumvale's register that he is the owner of Share no.418 and the properties to which the holder of those shares was entitled. He stated that a committee was formed to enable and ensure that Members were issued with titles and assisted in collecting the same and that until titles were issued and collected any transfer of the parcels in Mavoko Block 12 was subject to the approval of the Board. He averred that the defendant could not have bought the piece of land known as Mavoko Town Block 12/296 from the original holder of share 418 as those shares were transferred by the original holder thereof before the allocation of the said piece of land. He concluded by stating that the first allottee and first registered proprietor of that piece of land known as Mavoko Town Block 12/296 is the plaintiff.
31. That marked the close of the plaintiff's case.

#### **Defendant's evidence**

32. DW-1 was Oliver Chege Ndungu, the defendant in this suit. He adopted his witness statement dated 6<sup>th</sup> April 2018 as his evidence in chief. He testified that the agreement at page 13 of his documents was a sale agreement between himself and Dominic Mutuku Kasyoki who had sold the land to him. He also stated that Dominic Mutula Kasyoki applied to the Registrar to change his names in 2006 but that the same was declined. He also averred that the deceased's wife was not called Anna Mutio and the owner of the alleged identity card number belongs to one Ndila Masenge. He hence opined that the alleged transfer was fraudulent. It was also his testimony that he bought the suit property in 1997 and entered thereon in February 1997, having bought the share from the deceased who died in 2009.
33. Upon cross examination, he averred that he had never bought land from Embakasi Ranching and that he had sued John Kamau & Embakasi Ranching Co. Ltd in Nairobi ELC No.722 of 2013 and that he does not recall whether the application was dismissed. The witness confirmed that he has never attended any meeting of the Board of Drumvale for approval of the sale of shares owned by Dominic Kasyoki. He also confirmed that he has never paid any transfer costs of the share from Dominic Kasyoki to himself. He confirmed that he has no evidence of transfer of share No. 418 from Dominic to himself. He stated that his name was never entered into Drumvale's register as the owner of share No. 418 and the attendant properties. He also averred that there is no allocation list by Drumvale bearing his name as the person who purchased share No. 418 from Dominic Kasyoki. He further stated that he had attended the chief's meeting with the wife and son of Dominic. He acknowledged the case in Kangundo and also stated that he did not conduct a search on the land. He also averred that Dominic used to sign and also thumbprint, but there was no thumbprint in one of the documents shown to



- him in court. He also confirmed to have bought land from Grace Mbithi. He stated that the letter from Drumvale in his bundle of documents was a forgery but he had no expert evidence to that effect.
34. On further examination, the witness had a different version wherein he stated to have conducted a search on the suit property and that he had paid for the transfer but was told that the same was not effected because the chairman was not available. He also stated that the agreement showed that he had paid Ksh.200,000/= for the land but the receipts show he paid extra because the seller got sick and he had to help him.
  35. DW2 was Joseph Kasyoki Mutuku, who averred that he was a son of the late Dominic Kasyoki. He testified that they had signed the sale agreement between his father and the defendant and that the title ought to be returned to his father's name. Upon cross examination, he averred that the letters for grant of administration were issued on 29<sup>th</sup> March 2010 and that he was yet to receive a grant for distribution of the estate. He also confirmed that at the time of distribution of the estate, the father had already sold the land. He also stated that his father changed his name in 2006 and passed on in 2009. It was his testimony that he did not have a gazette notice for the change of name and that his father used to sign by thumb printing. He also stated that the documents from Drumvale are forgeries and that he was not an expert in fraud investigation.
  36. On further examination, he confirmed that his father had no title before he sold the land. On re-examination, he stated that his father was known by both names, Dominic Mutula and Dominic Mutuku. He also stated that he had not obtained any grant by the time the father sold the land, but the land had not yet been transferred. He concluded by stating that Drumvale and Humphrey committed forgery because his father sold the land to Chege and not anyone else.
  37. That marked the close of the defence case.
  38. The two defendants brought in the suit by the defendant herein did not present any evidence in defence.
  39. The parties filed submissions in support of their respective cases. On record are the plaintiff's submissions dated 11<sup>th</sup> April 2023 and filed on 13<sup>th</sup> April 2023; defendants' submissions filed on 9<sup>th</sup> May 2023 and dated 8<sup>th</sup> May 2023 and the Attorney General's submissions filed on 12<sup>th</sup> June 2023.

### **Plaintiff's submissions**

40. Counsel for the plaintiff gave a detailed background of the plaintiff's case, the proceedings in the matter and highlighted that on 27<sup>th</sup> May 2017, the court had found that the counterclaim was irregular and the same was not regularized, hence ought to be struck out. It was their submission that the plaintiff followed due process and is the absolute and indefeasible owner of the suit property, as per the procedure for land purchase at Drumvale. To support the plaintiff's claim, they cited several statutory provisions and cases which buttress the sanctity and the indefeasibility of a validly issued title. These included the Court of Appeal's decision in Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others and section 26 of the Land Registration Act.
41. It was further submitted that the defendant had not proved fraud against the plaintiff and the counterclaim ought to be struck off. They argued that the particulars of fraud were pleaded by someone who was not a party to the original suit. On the alleged change of name by the deceased, they pointed out that the same allegedly took place a month before the death of the deceased and that both DW1 and DW2 admitted not to have gazetted the same. It was also submitted that several other documents indicated the deceased's name as Dominic Mutuku Kasyoki and that the defendant also confirmed that the land was sold to him by one Dominic Mutuku Kasyoki and not Dominic Mutula Kasyoki.



42. Counsel further submitted that the defendants' claim as an owner by adverse possession had not been proved. They argued that in all the pleadings filed by the defendant, there is no prayer for orders of ownership by adverse possession. It was also argued that one cannot claim ownership by adverse possession and also claim to have purchased the land, citing the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR in support of this position.
43. As to the orders that the court should grant, they reiterated the prayers by the plaintiff as per the amended plaint and prayed that the counterclaim be struck out for failing to prove any fraud and also being on record irregularly. On the prayer for mesne profits, it was submitted that the plaintiff need not prove the same as trespass had been proved, citing the case of *Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Limited & another* [2018] eKLR to buttress their case. As for costs, they placed reliance on section 27 of the Civil Procedure Act and submitted that costs are at the court's discretion and that they should follow the cause.

### **Defendant's submissions**

44. Counsel for the defendant also gave a background of the matter and laid down 5 issues for determination by the court. It was first submitted that the plaintiff was not a bona fide purchaser for value of the suit property since the alleged sale agreement lacked in all aspects the effect to transfer any interest in land in that it is not signed by the buyer or seller, no consideration is stated and that the claimant's wife holding identity card number 6266632 is not the vendor's wife.
45. It was further submitted that there cannot be a contract without consideration, citing the effects of failure of a plaintiff to plead how much he paid as consideration. Among the cases cited to support this position was Civil Appeal No. 52 of 2017, *Daniel Otieno Migori vs Southern Nyanza Sugar* [2018] eKLR.
46. On whether the transfer by Drumvale to the plaintiff was fraudulent, it was submitted that the allegations of fraud were not proved as the person alleging the same did not testify. It was their submission that the plaintiff and Drumvale jointly made documents after the death of the owner so as to defraud the estate of the deceased.
47. As to whether the defendant had acquired adverse possession against the interests of the plaintiff, it was submitted that he had occupied the suit property since 1997 after paying for the same, whereas it is not disputed that the plaintiff came to the land in the year 2008, 14 years after the sale date. It was also argued that by the time the plaintiff was filing the case in Kangundo in 2010, the defendant was already in uninterrupted occupation of the suit land. Counsel argued that in the alternative, that section 7 of the Limitation of Actions Act prohibited the plaintiff from bringing any action for land which he had not explained why he had not utilized between 1994 and 2010.
48. On whether the plaintiff in the counterclaim is properly suited, it was submitted that the matter is now spent as the parties entered a consent to proceed as the suit was. Counsel concluded by submitting that the defendant was entitled to costs of the suit.

### **Submissions by the Attorney General**

49. The Attorney General laid down 3 issues for determination. On whether the plaintiff in the counterclaim had locus to file the counterclaim, they relied on Order 7 Rule 3 of the Civil Procedure Act which provides for a defendant in a suit to file a counterclaim and argued that the plaintiff in the counterclaim lacked locus to file the counterclaim since he was not a defendant in the original suit.



50. Their second issue was whether the plaintiff in the counterclaim had made any claim against the Attorney General. It was their submission that the plaintiff in the counterclaim had not made any claim against the 3<sup>rd</sup> defendant and as such, no adverse orders can be granted against them. It was their submission that parties are bound by their pleadings and cited the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2024] eKLR to support their argument. Their third and last submission was on costs. It was their submission that section 13A (1) of the Government Proceedings Act, Cap 40 required a party intending to sue the government to issue a 30-days' statutory notice of their intention to sue. They prayed that the suit against the 3<sup>rd</sup> defendant be dismissed with costs.

### **Analysis and determination**

51. The court has carefully considered the pleadings filed by the parties, the evidence tendered and the submissions in support of their respective cases. In my view, the issues for determination are as follows;
- a. Whether the defendant proved that the plaintiff obtained registration of the suit property by fraud.
  - b. Who between the plaintiff and defendant lawfully purchased the suit property from the late Dominic Mutuku Kasyoki.
  - c. Whether the defendant has acquired the suit property by way of adverse possession.
  - d. Whether the plaintiff is the bona fide owner of the suit property, and if yes, whether the defendant's occupation thereof amounts to trespass.
52. It is not disputed that the title of the suit property is registered in the plaintiff's name and the same was formerly owned by the late Dominic Mutuku Kasyoki, who held share No. 418 at Drumvale. What is in dispute is who between the plaintiff and defendant lawfully purchased the suit property, as both of them claim to have bought the same from the deceased. The defendant contends that the plaintiff obtained registration of the suit property by fraud and maintained that if the suit property is otherwise found to be rightly belonging to the plaintiff, then the defendant is entitled to the same under the doctrine of adverse possession.
53. The plaintiff being the registered proprietor of the suit property, has indefeasible title thereto, unless it is proved by the defendant that the same was fraudulently obtained.
54. Section 26 of the Land Registration Act of 2012 provides as follows;
26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
55. In the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR), the court held as follows;



The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurally or otherwise a product of a corrupt scheme.

56. On allegations of fraud, it is trite that fraud should not only be pleaded, but the same must be strictly proved on a standard that is higher than the standard of the balance of probabilities required in ordinary civil cases but slightly lower than the proof of beyond reasonable doubt required in criminal cases. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court stated as follows:-

...It is trite law that any allegations of fraud must be pleaded and strictly proved. We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

57. I have considered the amended defence and counterclaim and the same shows that the defendant listed the following particulars of fraud;

- a. Fraudulently preparing a transfer of shares in the name of the late Dominic Mutuku Kasyoka a result of which L.R. Mavoko Town Block 12/296 and Nairobi Block 118/457 was transferred from the estate of the deceased.
- b. Claiming that the transfer was done before Dominic Mutuku Kasyoki's wife called Anne Mutio I.D No. 6266632/69 while the deceased has never had such a wife.
- c. The deceased has never had an aunt called Monica Mwikali Ngambi.
- d. Preparing several false documents in support of fraud while the sole intention of depriving the estate of the deceased.
- e. Transfer of Mavoko Town Block 12/296 and Nairobi Block 118/457 using fraudulent documents after the death of the deceased.
- f. The defendants acted jointly in a fraudulent way.

58. The evidence tendered by the defendant with the support of alleged family members of the late Dominic Mutula Kasyoka was that he purchased the suit property in 1997 and took possession thereof immediately. He faults the agreement presented by the plaintiff on ground that the deceased only thumb printed his documents and did not sign them by pen and that the deceased had one wife called Lilita Mutio Wambua and not Anne Mutio as claimed by the plaintiff. Having considered the defendant's further witness statement dated 6<sup>th</sup> April 2017, the defendant stated that the deceased had one wife called Regina or Mutio Wambui. I am unable to believe the averments made by the defendant because the documents produced by the defendant being the identity card for Dominic Mutula Kasyoka, whom he claimed was the deceased, as well as that person's identification report from the Registrar, National Registration bureau, both have signatures in pen alleged to be for the said Dominic Mutula Kasyoka. In addition, and more critically, both the agreements dated 14<sup>th</sup> February 1997 and 4<sup>th</sup> September 1997 relied upon by the defendant, have the vendor's signature. This means that the allegations by the defendant that the vendor in regard to his agreements, who was allegedly the deceased never signed his documents but only thumb printed them are not true.



59. On the name of the deceased's wife, while the defendant produced the identity card of the alleged wife of the deceased with the name Litha Mutio Wambua, which card was issued on 11<sup>th</sup> March 2008, the defendant himself referred to her as Regina Mutio in his pleadings herein and in Kangundo PMCC No. 87 of 2010. The name Regina is not in the identity card of Litha Mutio.
60. Since the plaintiff's testimony was that the deceased's wife was Anne Mutio, as corroborated by the evidence of PW2, one Monicah Mwikali Ngumbi, who stated that she was married to Titus Ngumbi uncle of to the deceased, then the defendant being the one alleging fraud, was obligated by dint of section 107 of the Evidence Act, to show that Litha Mutio Wambua and not Anne Mutio, was the wife of the Dominic Mutuku Kasyoka. Having considered the defendant's evidence, there is no evidence to show that Litha Mutio Wambua was the wife of Dominic Mutuku Kasyoka. The evidence of Monica Mwikali Ngumbi, PW2 given in favour of the plaintiff, that Anne Mutio was the wife of Dominic Mutuku Kasyoka a fact she was aware of by virtue of being married to the deceased uncle was not rebutted in any manner. For the above reasons, I find and hold that the defendant failed to prove that the agreement produced by the plaintiff was obtained by fraud or that the wife of the deceased was Litha Mutio and not Ann Mutio. Consequently, I find and hold that the defendant has failed to demonstrate that the registration of the suit property in the plaintiff's name was by fraud.
61. Considering the agreement of the defendant, it is my view that that agreement cannot be authentic. The same is alleged to have been entered into on 14<sup>th</sup> February 1997. The subject property in the agreement is indicated as Title No. 12/296. The title for parcel Mavoko Town Block 12/296 which was produced by both the plaintiff and the defendant was issued on 5<sup>th</sup> January 2010. The plaintiff's by one Eliud Kababu, was that the registration of the suit property in the name of the plaintiff was a first registration, which evidence was not rebutted by the defendant. I believe this evidence because the defendant's evidence did not in any way suggest that the suit property was ever registered in the name of the deceased. It is therefore evident that the plaintiff's registration of the suit property was pursuant to the list from Drumvale forwarded to the Land Registrar Machakos and therefore the plaintiff was the first registered proprietor thereof. Therefore, if the suit property obtained its first registration in 2010 as demonstrated by the title thereof, then the defendant has not explained how he knew in 1997 at the time of his agreement that the same was Title 12/296, before that parcel was registered, when the deceased's land then was only identified as share number 418.
62. Although the defendant alleged that the deceased changed his name from Mutula to Mutuku, he did not produce an identification document in the name of Dominic Mutuku Kasyoka, yet the death certificate of the deceased and the grant of letters of administration in regard to the deceased referred to Dominic Mutuku Kasyoka. What he produced was an identity card of Dominic Mutula Kasyoka. In the premises, the argument that the deceased was initially called Mutula and changed his name to Mutuku has not been proved at all, and was only meant to convolute issues in this case and mislead the court. Even the agreements presented by the defendant have alterations on the name of the vendor and it is not clear whether it is Mutula or Mutuku. In addition, the agreements produced by the defendant in this suit are different from those produced in Kangundo SPMCC No. 87 of 2010. If the agreement were the same, they should not have been different in the two suits. In addition, if the defendant purchased the suit property at Kshs. 200, 000/= as alleged, then he did not explain to the court's satisfaction why his agreements show that he paid Kshs. 265, 000/= instead of Kshs 200, 000/= . In view of the above reasons therefore, I find and hold that the defendant did not prove that he purchased the suit property from Dominic Mutuku Kasyoka or that Dominic Mutula Kasyoka and Dominic Mutuku Kasyoka is one and the same person.



63. In addition, it is not disputed that the suit property was in regard to share No. 418 previously owned by the late Dominic Mutuku Kasyoka at Drumvale. Transfer of shares in a cooperative society is regulated under Rule 10 of the Cooperative Society Rules 2004 which provide as follows;

Transfer of shares

- (1) Subject to the provisions of section 20 of the Act and subrule (3) of this rule, and subject to the approval of the Committee, a member may transfer his share or shares in a co-operative society to any other member of the society or to any person whose membership of the society has been approved by the Committee.
  - (2) No transfer of a share in a co-operative society shall be valid and effective until such transfer has been recorded in the register of the society.
  - (3) No transfer of a share or shares in a co-operative society shall be valid and effective if made by a member indebted to a society whether such debt is due for payment or not.
  - (4) When for any reason other than death, a member of a co-operative society registered with limited liability holding deposit from non-members ceases to be a member, he may, subject to section 20 of the Act, transfer his share or shares in such society to another member, or to a proposed member approved by the Committee of such society, but he shall not be entitled to repayment from the society of any money paid by him in respect of such share or shares.
65. Therefore, sale and transfer of shares by a member of a cooperative society, can only take effect on being sanctioned and approved by the committee of such cooperative society.
66. As the suit property got its first registration in 2010 as demonstrated by the title presented by the parties and evidence of the officials of Drumvale, it is clear that before 2010 when both parties allege to have purchased the suit property from the deceased, the same was unregistered and was merely a share No. 418 belonging to the deceased at Drumvale and therefore the sale and transfer of the same required the sanction or approval of the committee of Drumvale. In that regard therefore, having considered the evidence presented by the plaintiff as against that of the defendant, it is clear as shown in the minutes of the committee of Drumvale dated 18<sup>th</sup> May 1994, that the sale of the deceased's share to the plaintiff was sanctioned by Drumvale and the register amended accordingly as demonstrated by the copy of the register of Drumvale's members as authenticated by the Land Registrar, Machakos, at page 5 thereof, indicating the owner of share No. 418 as Humphrey Mwaniki Ngibuini, who is the plaintiff herein. On the other hand, the defendant himself confirmed that he did not seek or obtain such approval from Drumvale for transfer of the deceased share to him. Therefore, the plaintiff has proved that the sale and transfer of share No. 418 to him by the deceased was sanctioned by Drumvale in accordance to Rule 10 of the Cooperative Societies Rules 2004 and therefore the acquisition of that share was lawful.
67. The plaintiff's purchase of the deceased shares in Drumvale, having been approved by Drumvale in 1994 and his name having been reflected and included in the register/list sent by Drumvale to the Land Registrar Machakos, it is clear that the plaintiff's acquisition of the suit property was lawful. Although the defendant argued that the the plaintiff's registration of the suit property having happened in 2010 after the death of Dominic, and that therefore it was fraudulent, I do not agree with this proposition. The process of registration of the suit property having been done after the death of the late Dominic Mutuku Kasyoka, does not of itself impute fraud on the part of the plaintiff as he did not need the deceased to sign any transfer documents to him at the point of registration of the suit property in his name at the lands registry. The transfer of shares from the deceased to the plaintiff done by the deceased in 1994 was sufficient, as the subsequent transfer of title was done by Drumvale as per the list forwarded it to the land registrar, where the deceased or his estate had no role to play.



68. For the reasons above, I find and hold that the defendant failed to prove fraud as against the plaintiff; and also failed to prove that he purchased the suit property from the late Dominic Mutuku Kasyoka. I also find and hold that the plaintiff has proved that he lawfully purchased the suit property from the late Dominic Mutuku Kasyoka.
69. The plaintiff having demonstrated that he lawfully purchased the suit property from the late Dominic Mutuku Kasyoka and having obtained registration thereof lawfully, I find and hold that the plaintiff is the bona fide proprietor of the suit property.
70. I now turn to the alternative claim by the defendant of adverse possession. Did the defendant prove adverse possession as against the plaintiff? Provisions in the Limitation of Actions Act provide the basis for a claim for land on the doctrine of adverse possession. Section 7 of the Limitation of Actions Act bars a person from bringing a suit for claim of land after twelve years, and provides as follows;

An action may not be brought by any person to recover land after the end of 12 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.

**Section 13 provides as follows;**

1. A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, whereunder Section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
3. For the purposes of this Section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 17 states as follows;

Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

Section 38 (1) and (2) provides as follows;

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

71. Therefore, where a registered owner of land fails to assert their rights, when they have been dispossessed of their land by a trespasser who came on the land without force, secrecy or the owner’s permission, who has occupied the same openly and without interruption for 12 years, the former’s rights in the land becomes extinguished under the doctrine of adverse possession. Therefore, in such circumstances, an adverse possessor may move this court for such land to be registered in their name under the doctrine of adverse possession.



72. The rationale for adverse possession was stated in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where the Court of Appeal cited with approval the case of *Adnam v Earl of Sandwich* (1877) 2 QB 485 where it was held as follows;

The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.

73. To prove adverse possession, an applicant must demonstrate having dispossessed the rightful registered owner of their land. In the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, the court held as follows;

Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession have been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.

74. In the instant case, the defendant alleged that he entered the suit property in 1997 upon entering into a land sale agreement with the late Dominic Mutula Kasyoka alias Dominic Mutuku Kasyoka, while the plaintiff denied this assertion and stated that the defendant entered thereon in September 2008. It was therefore incumbent upon the defendant to show that his entry on the suit property was in 1997 and that as at the time this suit was filed in 2011, he had been in occupation of the suit property openly, without force and without the plaintiff's consent for 12 years. While the defendant availed photographs showing some structures on the suit property, there is nothing to show that the same were constructed thereon in 1997. At any rate, since it is clear that the defendant did not enter into any land sale agreement over the suit property in 1997, or at all, as the documents mentioned in that agreement did not exist in 1997, it can only be concluded that his entry thereon could only have been in 2008 as stated by the plaintiff and not earlier. Since proof of adverse possession is continuous possession without permission for 12 years, the period between 2008 and 2011 when this suit was filed is merely three years and therefore does not meet that statutory period of 12 years. Both parties herein confirmed that in 2009, they appeared before the area chief for resolution of the dispute, and therefore, it is clear that the defendant's short occupation was not peaceful. In the premises, I find and hold that the defendant has failed to prove that he has been in open, exclusive, and uninterrupted occupation of the suit property for over 12 years and therefore his claim under adverse possession fails.

75. Having found that the plaintiff who is the registered proprietor of the suit property lawfully obtained the registration thereof, sections 24 and 25 of the Land Registration Act provides for the rights of a registered proprietor, which rights include quiet possession to the exclusion of everyone else, the plaintiff is therefore entitled to orders of delivery of vacant possession and permanent injunction as sought.

76. On mesne profits, the Black's law Dictionary 11<sup>th</sup> Edition defines mesne profits as the profits of an estate received by a tenant in wrongful possession between two dates. Therefore, to obtain mesne profits a plaintiff must demonstrate what they lost during the period of trespass. Mesne profits are special damages which must not only be pleaded but the same must also be strictly proved. Having considered the plaintiff's evidence, there is no evidence on the specific amount of profits lost during the period the defendant trespassed on his land. In the premises the plaintiff's claim for mesne profits is rejected.



77. In the end, I strike out the claim by Joseph Kasyoki Mutuku (suing as the legal representative of the estate of Dominic Mutuku Kasyoki) for being a stranger in this suit having, joined this suit without leave of court, and making a claim within a pleading filed by Oliver Ndungu Chege the defendant and therefore using the back door to get into this suit. In addition, I find and hold that the counterclaim of Oliver Ndung'u Chege the defendant herein is unmerited and the same is hereby dismissed with costs to Humprey Mwaniki Ngibuini the plaintiff herein; Receivers of Drumvale Farmers Co-operative Society; and the Attorney General. On the other hand, I find and hold that Humprey Mwaniki Ngibuini, the plaintiff herein has proved his claim on the required standard and I therefore enter judgment for him against Oliver Ndung'u Chege the defendant herein as follows;

- a. An order is hereby issued compelling Oliver Ndung'u Chege, the defendant herein, his servants and/or agents to forthwith deliver vacant possession of the property known as Mavoko Town Block 12/296 to the plaintiff within 90 days of the date of this judgment, and in default, eviction to issue.
- b. A permanent injunction is hereby issued restraining the Oliver Ndung'u Chege, the defendant herein by himself, his agents and or servants from interfering with the Plaintiffs quiet possession of the parcel of land known as Mavoko Town Block 12/296.
- c. The costs of the plaintiff's suit plus interest thereon are hereby awarded to the plaintiff to be borne by Oliver Ndung'u Chege, the defendant herein.

78. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL ,  
2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Mutugi holding brief for Mr. Kigata for plaintiff

Mr. Ngani for defendant

Court assistant- Abdisalam

