Oganga & another v Orangi & 3 others (Environment & Land Case 466 of 2015) [2023] KEELC 16348 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 466 OF 2015

M SILA, J

MARCH 22, 2023

BETWEEN

EDWARD MAKORI OGANGA ..... 1ST PLAINTIFF

STEPHEN AMWOLMA MAGOGO ..... 2ND PLAINTIFF

AND

JOHN AYIENDA ORANGI ..... 1ST DEFENDANT

JACQUES ORANGI AYIENDA ..... 2ND DEFENDANT

DONALD BOSIRE AYIENDA ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

JUDGMENT

(1st defendant being registered proprietor of disputed land; 1st defendant subdividing the land and selling it to the plaintiffs; plaintiffs obtaining title to the subdivisions; 2nd and 3rd defendant filing suit at the Land Disputes Tribunal to contest the subdivision and sale of the properties; the plaintiffs not being parties at the tribunal despite 2nd plaintiff being already registered as proprietor of one subdivision at the time the complaint before the tribunal was lodged; tribunal holding in favour of the 2nd and 3rd defendants and ordering that the land to revert back to the ownership of the 1st defendant and be subdivided between his two homes; plaintiffs now filing suit to contend that the tribunal's decision is an illegality and null and void and seeking to have their titles restored; 2nd and 3rd defendants filing counterclaim to assert that the 1st defendant held the title in their trust as the land was ancestral land; court no persuaded from the evidence that the 2nd and 3rd defendants have proved that the land was ancestral land; court persuaded that the 1st defendant freely owned the land and was entitled to deal with it as he pleased; no law cited supporting contention that children have a

right to compel their parents to consult them when dealing with their land; plaintiffs' suit succeeds; counterclaim of the 2nd and 3rd defendants dismissed)

Introduction and Pleadings

1. The land registration number West Kitutu/Mwakibagendi/1395 was registered in the name of the 1st defendant pursuant to a registration done on 29 December 1969. Through a subdivision registered on 9 November 2010, the 1st defendant subdivided this parcel of land to create the titles West Kitutu/Mwakibagendi/2858, 2859, 2860 and 2861 (herein after simply described as parcels No. 2858, 2859, 2860 and 2861). He sold the parcel No. 2858 to the 2nd defendant and the other subdivisions to the 1st defendant. The 2nd defendant obtained title to the parcel No. 2858 on 15 November 2010, whereas the 1st defendant became registered as proprietor of the parcels No. 2859, and 2861 on 2 July 2012, and as proprietor of the parcel No. 2860, on 17 August 2012.

2. The plaintiffs aver that unbeknown to them, the 2nd and 3rd defendants filed proceedings against the 1st defendant before the Marani Land Disputes Tribunal, which proceeded to order that the 1st defendant's title to the land parcel No. 1395 be cancelled. The order of the tribunal was registered on 18 August 2015, thus reverting ownership of the land back to the parcel No. 1395 in name of the 1st defendant effectively nullifying the titles of the plaintiffs. The plaintiffs contend that this has far reaching consequences to them as they were never heard at the tribunal. In this suit, they seek the following orders :-

    a) A Declaration that the Plaintiffs are innocent purchasers for value of the properties West Kitutu/Mwakibagendi/2858, 2859, 2860 and 2861 and the Tribunal decision seeking to cancel their title without hearing them is illegal, unlawful, improper and unconstitutional.

    b) A Declaration that the decision of the Marani Land Disputes Tribunal Case No. 115 of 2011 revoking and or cancelling the title known as West Kitutu/Mwakibagendi/1395 is illegal, unlawful, improper and unconstitutional and that the same is a nullity.

    c) An order of permanent injunction restraining the Defendants by themselves their agents, servants and or any person acting on their behalf from in anyway interfering with the Plaintiff's titles occupation and/or possession of the suit properties.

    d) Such further and/or other relief as the Honourable Court may deem fit and expedient to grant.

    e) Costs of the suit to be borne by the Defendants.

3. The 2nd and 3rd defendants filed defence and counterclaim. They contended that the original parcel of land, that is parcel No. 1395, was at all material times ancestral land, and that the 1st defendant held the title thereof in trust for himself and his two families and succeeding generations. They claimed that the 1st defendant's title was subject to a trust which was an overriding interest pursuant to Section 28 (3) of the *Land Registration Act*, 2012. They pleaded that the purported sale to the plaintiffs was a nullity. They averred that the titles of the plaintiffs were cancelled by an order issued in Kisii Miscellaneous Civil Application No. 115 of 2011. They pleaded that the plaintiffs were always aware of the dispute between the 1st defendant and themselves, the pendency of proceedings before the

Marani Land Disputes Tribunal, Case No. 38 of 2011, and the reasonable possibility of existence of an overriding interests. In the counterclaim, they ask for the following orders :-

a) A Declaration that the 1st Defendant held the title to Land Parcel No. West Kitutu/Mwakibagendi/1395 (the original parcel of land) as a trustee for himself and for the benefit of his two (2) families (including the 1st and 2nd defendants) and succeeding generations and that the said trust is an overriding interest pursuant to Section 28 (3) of the *Land Registration Act* No. 3 of 2012, Land parcel No. West Kitutu/Mwakibagendi/1395 being ancestral Land.

b) A Declaration that the purported purchase of portions of Land Parcel No. West Kitutu/Mwakibagendi/1395 by the plaintiffs is illegal, null and void and incapable of vesting any proprietary benefits, rights or interests, upon them.

c) Costs of and incidental to the suit and of the counterclaim.

4. The 4th defendant made a general pleading of denial but pleaded in the alternative that if the suit properties were registered in the plaintiffs' names then the same was illegally done and should be cancelled. It pleaded that the tribunal properly and legally dealt with the issues pertaining the suit land and its decision should be upheld.

5. The 1st defendant did not file any pleadings, and it was mentioned on 5 October 2017 that he died. He died on 20 October 2016. No substitution was done and the case against him abated.

Evidence of the Parties

6. The evidence of the 1st plaintiff was that on 19 June 2012, he entered into a sale agreement with the 1st defendant vide which he purchased the parcels No. 2859, 2860 and 2861. The 1st defendant executed the transfer instruments and he became registered as proprietor. He stated that he was not aware of the tribunal proceedings between the 1st , and 2nd and 3rd defendants, being Marani Land Disputes Tribunal Case No. 115 of 2011. He stated that the decision of the tribunal was adopted in Kisii CMCC Miscellaneous Application No. 115 of 2010 and a decree issued. On 5 October 2015, he went to charge his properties and the Land Registrar informed him of the cancellation of his titles pursuant to the decision of the tribunal and subsequent decree. He was also shown a Gazette Notice dated 17 December 2014 advertising their titles for cancellation as the original title deeds had not been surrendered. He averred to be an innocent purchaser for value and not aware of the intrigues between the 1st defendant, and 2nd and 3rd defendants. He stated that he conducted an official search which showed the 1st defendant as proprietor and there was no indication that he was holding the land parcel No. 1395 in trust for anyone. He stated that one side of the land was bushy and the other side had a maize crop and there was no structure on the land. When he bought the land there was nobody living on it and the 1st defendant did not inform him that he had any dispute over it. He testified that the sale agreement was witnessed by the 1st defendant's wife, one Teresa Kemuma Ayienda, who accompanied the 1st defendant during execution of the sale agreement.

7. Cross-examined, he stated that the 1st defendant lived about 5km away from the disputed land and he visited him here. He was informed that he had two wives but one had died. Teresa was the 2nd wife. He did not inform him how many children he had and he did not ask him about the children of the 1st deceased wife. He did not find it necessary to ask as the 1st defendant told him that what he was selling was not ancestral land. He did not ask the 1st defendant how he acquired the land. He did not know the 2nd and 3rd defendants but he later discovered that they were sons of the deceased 1st wife. The 1st defendant did not inform him that he had divided his land amongst his children. He paid in full

and took possession in the year 2013 after some people who had leased the land were asked to vacate. He took possession without any resistance. There were some indigenous trees on the land which the 1st defendant informed him he had planted. What he purchased was 3.2 Ha whereas the 2nd plaintiff purchased a slightly bigger portion, 3.3 Ha. The 2nd plaintiff bought his land in the year 2010 whereas he bought his in the year 2012 at Kshs. 1.65 million. He discovered that his titles had been cancelled when he tried to take a loan.

8. The 2nd plaintiff testified that he lives in Lamu where he works as a driver. He testified that he purchased 3.3 Ha of the parcel No. 1395 for Kshs. 3 million. The sale agreement was witnessed by Teresa, the seller's wife, two of his sons being John Nyakundi Ayienda and Eric Mayaka Ayienda, and one John Ogwaro Mokaya who acted as a witness of the 2nd plaintiff. When he paid the purchase price, a photograph of those present was taken. The land was not occupied and there was no residence. He obtained title to what he purchased (parcel No. 2858) and took possession of the land which he continues to be in occupation. He later came to know about the tribunal proceedings but he was never a party. By the time the case was lodged in the tribunal in the year 2011, he had already acquired title to the parcel No. 2858 and the mother title, parcel No. 1395, was not in existence. He was not sued at the tribunal despite holding title and was not given notice of the case. Neither was he party before the Magistrates' Court in the cause that adopted the tribunal proceedings which led to the cancellation of his title. He stated that he was not aware of any issues between the seller and his children.

9. Cross-examined, he testified that he did due diligence before the sale agreement. He did a search for the plot No. 2858. He paid Kshs. 3 million which he said was reflected in the sale agreement. He did not know the seller's first wife. No child of the first house participated in the sale agreement. He testified that nobody of the family of the 1st defendant is on the land. His title was prepared on 15 November 2010, the same day that the title to parcel No. 1395 was closed. He was not very clear when he went to the Land Control Board; he mentioned July 2010 but also mentioned November 2010. It was the 1st defendant who undertook the transfer process and later handed over title to him. He stated that he purchased the land in July 2010 though the sale agreement was done on 11 November 2010. He explained that the photograph was not taken when they did the sale agreement, but later when he went to pay the money, and that is why it has one person less than what is noted in the sale agreement.

10. With the above evidence, the plaintiffs closed their case.

11. DW-1 was Jacques Orangi Ayienda, the 2nd defendant. He gave evidence on his own behalf and on behalf of the 3rd defendant. He is a teacher and was aged 53 years when he first testified on 13 October 2022. He affirmed that the 1st defendant is his father. He testified that the whole of the parcel No. 1395 was 15.5 acres. He stated that his father did not buy this land but got the land from his grandfather during adjudication, and that this is where his grandfather was farming before his death. His father got title in the year 1969. DW-1 testified that he grew up on this land, and that there were two huts, one for his mother, and the other for his step-mother. He claimed that the land was subdivided almost equally among three people; his mother, his step-mother, and the bottom side for his father. He elaborated that following Gusii custom, when a father is apportioning land, he usually leaves one portion for himself, referred to as "emonga" which he keeps until his death. Upon his death, this portion is subdivided among his wife/wives or the last born son/s of the wife/wives. He (DW-1) and his mother (Mary Ayienda) were the complainants before the tribunal and his father did testify. He claimed that at the tribunal, his father testified that he had subdivided the land amongst his two wives and presented three witnesses who all agreed that the land should be subdivided equally among his two wives. He referred to parts of the evidence at the tribunal where his uncle, Joseph Atuki, an elder brother to his father, testified that the land should be subdivided equally between the two wives and coffee left for his father.

He stated that this coffee constituted the "emonga." He also referred to the evidence of Robins Okari, a clan elder, who said that he has gone to the land and subdivided it.

12. He explained that the genesis of the dispute was that his step-brother, Donald Bosire (3rd defendant), wanted to construct a house on the land and he was told that he should not construct there. His brother thought that his father did not have any good reason to stop him constructing and he went to see the Assistant Chief. The Assistant Chief called a meeting of clan elders who proceeded to demarcate the boundaries for the two wives so that they can bequeath the land to their children. He testified that his mother, Mary Ayienda, is the first wife (now deceased, having died in the year 2001) whereas his father's second wife was Teresa. He produced a letter written by the Chief identifying the spouses and their children. He continued to state that his father had done a traditional demarcation vertically, leaving the "emonga" to be at the bottom, and that he did this by planting trees. He said that they found these boundaries when they were born. He testified that the two spouses of his father were using the land. After the death of his mother, his sisters, his wife and himself, continued using the land. His step mother, his step-brother Donald, and his father also used the land. He stated that he did not participate in the sale of the land in the year 2010 and that the buyers never engaged them in the sale. He testified that if one did a search in the year 2010, they would have found a caution by Osoro Achiki, a first cousin of his father, who was claiming that his father had taken a portion of his land. He elaborated that the disputed land neighbours land owned by his uncles. He testified that the parcel No. 1395 was also subject to a case filed by one Dominic Ogiti, a son of Osoro Achiki, which is ongoing before the Magistrates' Court. The complaint was the same as that lodged by Osoro Achiki, that part of their land is within the parcel No. 1395, and he stated that if anyone cared to find out, they would have discovered this dispute. He produced as an exhibit the plaint in the suit between Dominic and his father. He stated that the first house was not involved in the sale of the land, and also Donald, of the second house, was not involved, and they have never given consent to the sale. He produced an adjudication register to demonstrate that the land was acquired through adjudication. He asserted that his father could not sell the land without first consulting the family as this was ancestral land. He claimed that they were farming the land when it was sold in the year 2010 and 2012 though they did not have residences on the land. He wondered how the 1st plaintiff bought 3.5 Ha for Kshs. 3 million in the year 2012, and the 2nd plaintiff bought, 3.3 Ha of the land in 2012 for Kshs. 1.65 million, yet land appreciates in value. He wondered why the 1st plaintiff would be given preferential treatment yet they are not related. He stated that title to the parcel No. 1395 should be restored so that it is subjected to succession.

13. Cross-examined, by counsel for the 4th defendant, he stated that he has never seen surveyors on the land coming to subdivide it. He did not know if his father visited the Land Control Board (LCB). He stated that they live on an adjacent parcel separated by a 10m wide road. He identified those named as witnesses in the first sale agreement. They are Teresa (his stepmother), John Nyakundi and Eric Mayaka, both being his stepbrothers. In the second agreement, the witnesses were Teresa (his stepmother) and Cosmas Matara and Peterson Kenani, the latter two being unknown to him. Other than the sale agreement he had not seen any other supporting documents. He denied that Stephen (2nd plaintiff) took possession in the year 2010. He claimed that he came into the land in the year 2012. The tribunal proceedings were in the year 2011. He stated that he and Donald are the ones who proceeded to the tribunal, and the dispute was because Donald wished to built on the land. It emerged at the tribunal that their father had subdivided the land. He stated that the tribunal decided that the subdivisions be cancelled and the land land be subdivided equally amongst the two wives of his father.

14. Cross-examined by counsel for the plaintiff, he testified that he was born in the year 1968. He was one-year-old when his father came to be registered as proprietor of the land. His grandfather died in the year 1952. He said that he heard from his grandmother that his grandfather was using the land as he could not have witnessed that. He stated that his father had five parcels of land. One is a commercial

plot in Sieka market measuring 50 X 100; the other is a parcel No. 1483 measuring 1.5 acres which his father sold in the year 2000/2001; the third a parcel number West Kitutu/Mwakibagendi/876 which is where they are currently residing measuring 2.8 acres and which he said was also ancestral land separated from the disputed land by the 10m wide road; the fourth parcel of land is West Kitutu/Mwakibagendi/1611 measuring 0.3 acres which he stated his father purchased and is not ancestral land; and finally, a commercial plot No. 16A, in Ruga market. When his mother died in the year 2001 she was buried in the parcel No. 876. His father was also buried on this same parcel of land. He said that this is their traditional home and this is where their residences are located. He stated that the parcel No. 1395 was used for farming though he claimed that long time ago some people lived here and that this is where he was born. He claimed that there used to be two huts, one for his mother and one for his father, one family living in one hut and the other in the second hut. The first house has 9 children and the second house 8 children and they all lived in the two huts but the mothers lived in the parcel No. 876. He stated that it was around the year 2000 that his parents relocated to reside in the parcel No. 876. He reiterated that his father had demarcated the parcel No. 1395 into three portions around the year 1970 and showed each house their share. He conceded that at the tribunal, he had stated that it was in the year 2007 that his father demarcated the land. He repeated the push and pull between his father and his stepbrother (Donald) which led to a dispute before the Chief. It was in 2007 when the Chief went to the land and subdivided it into three portions. The land had not yet been sold at this time. They proceeded to the tribunal when they heard that the land had been subdivided and sold. It was only Donald and himself who complained at the tribunal.

15. I need to mention that owing to time, we adjourned the hearing at this point and resumed on 17 October 2022.

16. Cross-examination resumed with DW-1 being asked to describe yet again the location of the parcels No. 876 and 1395. This time, he stated that they two parcels of land do not abut one another. He stated that they are about one kilometer apart and that there are about seven different parcels of land separating the two which he said are owned by his uncles. He testified that the immediate neighbouring parcel was parcel No. 1396, of one Omosa Otwenyo, and parcel No. 1394, of one Omosa Kengere, whom he claimed are related to them. He was cross-examined on the Adjudication Register. He pointed out that the same indicates that the land was previously owned by Augustine Saisi and Nyagaka Nyakeyo, who he said are first cousins of his father. Their names were cancelled and his father's name inserted. This was in accordance with the decision of the Committee following an objection lodged by his father. He claimed that it was because the two persons wanted to extend their land but his father objected saying that this was his father's land. He however conceded that he was yet to be born at that time and could not tell of the particulars of the dispute. He nevertheless asserted that this was ancestral land. He acknowledged that his grandfather was never registered as proprietor of the land though he claimed that people were being allocated the land of their parents. He recalled the case filed by Osoro Achiki against his father in the year 2001 in the High Court at Kisii, being Kisii HCCC No. 87 of 2001. He was not aware that the case was dismissed in the year 2005. He confirmed that it was the same Osoro Achiki who registered a caution in the year 2003. His father did apply to have the caution removed on 9 November 2010 following an order issued on 7 December 2006 in the suit No. 87 of 2001. The son of Osoro Achiki filed another case being Kisii ELC No. 394 of 2014 against his father and the two plaintiffs herein. He stated that the suit is still pending awaiting the outcome of this case. He affirmed that when they lodged the case at the tribunal in the year 2011 the land had already been subdivided by their father. He acknowledged that the sale agreements were signed by his stepmother. By that time, his mother was already deceased. He has not been on the land since the year 2015 as the court issued an order of status quo. He claimed that as at 2010 there was only one hut on the land as the other hut had fallen. He stated that at the tribunal, his father explained that he sold the land to have money

for himself and that what he sold was his "emonga." He also stated that he had educated his children. He was not aware that he was being pursued to pay litigation costs or advocate fees of Mr. Momanyi Aunga Advocate. He was aware that his father changed counsel to Mr. GJM Masese. Of the parcels of land which he said were owned by his father, his father sold three of them. He sold the parcel No. 1483 in the year 2001; the plot No. 43 in Siaka market in the year 2009; and the plot No. 16A in Ruga market though he could not tell the year. They were sold without him consulting his children but he did not know if he consulted his stepmother. He testified that his father did not sell the parcel No. 876. He elaborated that the parcel No. 876 is now subdivided into two. One portion, parcel No. 3302 is still in the name of his late father, whereas the other, parcel No. 3303 is in his (DW-1's) name. He said that this is the portion of his mother. He added that the parcel No. 1611 is also subdivided into two, giving forth the parcel numbers 3300 for Teresa, and 3301 for his mother, which latter portion was transferred to him. He stated that in Kisii custom, if a father has five parcels of land, it would not be wrong for him to settle his family in different parcels of land as he pleases.

17. Re-examined, he stated that in settling his family in different parcels of land, a father must do so fairly and not whimsically and that he needs to call his brothers, uncles and neighbours to assist him in sharing his property. He asserted that his father did not purchase the parcel No. 1395 and his interpretation of the adjudication award was that his father was being restored back to the land. He reiterated that he grew up together with his siblings in the disputed land, and that they lived here with their father and grandmother, until the year 2001, when his mother died and was buried in the parcel No. 876 after which they moved there. He stated that the parcel No. 876 is divided into two unlike the parcel No. 1395 yet it is ancestral land. He stated that the plots sold were purchased by his father and he did not have to consult them. They have no issue over these sales.

18. With the above evidence, the 2nd and 3rd defendants closed their case.

19. The 4th defendant closed her case without offering any evidence.

Analysis and Disposition

20. I invited counsel to file written submissions which they did and I have taken these into account before arriving at my decision. I have seen the submissions filed by Mr. Marita, learned counsel for the plaintiffs, and Mr. Nyamurongi, learned counsel for the 2nd and 3rd defendants. The following issues in my opinion are open for determination:-

    i. Whether the decision of the Land Disputes Tribunal should be declared illegal and null and void.

    ii. Whether it should be declared that the 1st defendant held title on his own behalf and as trustee for his two families.

    iii. Whether the 1st defendant's sale of the land ought to be declared null and void.

    iv. Whether the titles of the plaintiffs should be upheld or whether the land should be allowed to revert back to the original parcel No. 1395 and be subjected to a succession process.

21. On whether the decision of the Land Disputes Tribunal should be declared illegal and null and void, it is of course the case of the plaintiffs that the decision of the Marani Land Disputes Tribunal in the case No. 38 of 2011 should be declared illegal and null and void. I have carefully gone through the submissions of Mr. Nyamurongi and I have not seen any significant address on this point. Mr. Marita, for the plaintiffs, referred me to various authorities including the Court of Appeal majority decision in the case of Lemita Ole Lemein vs Attorney General & 2 Others (2020) eKLR to press the point that the tribunal erred in hearing the case for want of jurisdiction and for proceeding in absence of the

plaintiffs yet they had interest in the land. On the issue of jurisdiction, the jurisdiction of the Land Disputes Tribunal was set out in Section 3 (3) of the Land Disputes Tribunal Act, Cap 303 A (repealed in 2011 by the *Environment and Land Court Act*) which provided as follows:-

> 3.
>
> (1) Subject to this Act, all cases of a civil nature involving a dispute as to—
>
> (a) the division of, or the determination of boundaries to land, including land held in common;
>
> (b) a claim to occupy or work land; or
>
> (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

22. It will be seen from the above that the tribunal was only empowered to hear disputes over division and determination of boundaries, claims to occupy or work land or trespass to land. What was presented before the tribunal by the 2nd and 3rd defendants did not constitute any of the above categories of disputes. In his address to the tribunal, the 2nd defendant was categorical that he filed the dispute because his father was selling the land parcel No. 1395 without involving them. What was in issue was therefore a sale of land for which the tribunal did not have jurisdiction. Moreover, I can see that the dispute was presented on 3 March 2011. What the 2nd and 3rd defendants presented was a claim over the parcel No. 1395 and two other parcels being No. 876 and 1611. However, by that time, the parcel No. 1395 was not in existence as it had been subdivided on 15 November 2010 to produce the titles No. 2858 to 2861. Even the 2nd defendant himself, who presented the case, was aware of this subdivision, for in his evidence, he did affirm that the land has been duly subdivided and he was aware that the 2nd plaintiff was proprietor of the parcel No. 2858. Why he would proceed, without the presence of the 2nd plaintiff, yet he knew that he held title to one of the subdivisions of the land in dispute, smacks of bad faith and intention to steal a march on the 2nd plaintiff. Whatever the case, the tribunal could not purport to hear a case over a subject matter that did not exist. To make it worse, by that time, the parcel No. 2858 had already been transferred to the 2nd defendant, the transfer having been effected on 15 November 2010. The tribunal could not purport to hear a dispute without the registered owner of the land being present.

23. It is clear to me that the tribunal proceeded to venture into a dispute that they had no jurisdiction to hear and also flouted procedures related to fair hearing by proceeding to hear subject matter that was not in existence and which had partly been sold without the purchaser being party to the suit. I have no hesitation to declare null and void the award of the Marani Land Disputes Tribunal in the case No. 38 of 2011 and the decree subsequently issued through the case Kisii CMCC Miscellaneous Application No. 115 of 2011. Being null and void, that decree cannot purport to reverse any entries in the land register of the parcels West Kitutu/Mwakibagendi/1395 or West Kitutu/Mwakibagendi/2858, 2859, 2860 and 2861. I will proceed to order that the registration of this decree in the above parcel registers be cancelled by the Land Registrar, Kisii.

24. I will address the other three issues collectively in the following discourse.

25. It is the contention of the 2nd and 3rd defendants that the suit land is ancestral land held in their trust. The 2nd defendant in his evidence did assert that this was ancestral land. At the time that the land was registered in the name of his father, he was only a year or so old, and alone, his evidence that this is ancestral land cannot be borne out of facts within his knowledge given his tender age at the time. He

did claim that his grandmother told him that the land was of his grandfather, but again, this cannot be taken too seriously as it is hearsay evidence. The 2nd and 3rd defendants, to support their position, brought an extract of the adjudication register. It actually doesn't say too much. What I can see is that the 1st defendant had a dispute over who should be registered as proprietor. It seems the land had been adjudicated to some other people (probably Abustino Saisi and Nyabaka Nyakeyo whose names are crossed out in the register) and the 1st defendant raised an objection. He succeeded and the land reverted back to him. I do not think that there is sufficient evidence from the adjudication register to demonstrate what sort of dispute the 1st defendant had with the other two claimants. We cannot tell whether what he said before the Adjudication Committee was that he inherited the land or he bought it. Going beyond what is noted in the adjudication register would be to venture into the arena of speculation. It is not possible to tell, merely by looking at the adjudication register, that this was land bequeathed to the 1st defendant by his father. Probably it would have assisted the 2nd and 3rd defendants to call witnesses who had actual knowledge of the dispute during adjudication, or bring proceedings related to the dispute, which should be within the adjudication records, but the 2nd and 3rd defendants brought none. Since it was their assertion that the land was ancestral land bequeathed by their grandfather, the onus was on them to prove that allegation. This was affirmed in the case of *Jackson Mwiti M'Rinyiru vs Silas M'Rinyiru Mbui* (2020) eKLR, cited by Mr. Marita, where the court stated as follows :

> " 17. Thus, it was not sufficient for the appellant to state that the suit land belonged to his grandfather. He was duty bound to adduce evidence to support his claim, which evidence did not meet the threshold of a customary trust on a balance of probabilities."

26. I am afraid that it is the same in this case. The 2nd and 3rd defendants have failed to provide sufficient evidence to lead this court to the conclusion that this was land that was donated to the 1st defendant from his father with the expectation that he would continuously donate it to his descendants. It follows that we cannot impute any ancestral or customary trust over the land. What the register shows is that this was land that was held exclusively by the 1st defendant meaning that he could deal with it as he wished.

27. In fact from the evidence, it is apparent that he dealt with this land differently from how he dealt with the parcel No. 867. There was no challenge to the fact that the 1st defendant had two wives and two families. The first wife is Mary Ayienda, who died in the year 2001, whereas the second wife is Teresa Kemunto who is still alive. They both had children. Although the 2nd defendant in his evidence alleged that they lived in the parcel No. 1395, that cannot be believed. He claimed that there were two huts and that the land had been demarcated to the two families, and that they moved out of this land to the parcel No. 867 around the year 2000. I don't believe him. I really do not see how a family of nine people, some of whom are adults of over 30 years, could be sharing one hut. The 2nd defendant himself is a professional teacher and he cannot be said to be a man of straw, who, at 33 years, would be squeezing himself in a hut with eight other siblings, and similarly the other home, with eight adult siblings, would also squeeze into the other hut. It simply doesn't add up and that is not how families live. In any event, if it is on the disputed land that the family resided up to the time of death of the first wife, you would expect her to be buried here, not in some place where nobody lives, and which is a kilometer away. Even before the tribunal, the evidence presented was that the family lived in the parcel No. 876 and not on the parcel No. 1395.

28. The 2nd defendant may have been trying to curry favour with the court by his evidence but what he has ended up doing is to destroy his credibility as an honest witness. He even tried to state that the

parcel No. 876 was separated from the disputed land by a 10m road which he eventually recanted on intense cross-examination and now stated that it was a kilometer away. I am not persuaded that the 2nd defendant was saying the truth in claiming that the two families resided on the suit land.

29. In my view, the totality of the evidence presented suggests to me that the families lived in the parcel No. 876 and not in the parcel No. 1395. In fact, it would appear that the 1st defendant did not have much issue with division of the parcel No. 876 to his two wives. He proceeded to subdivide the land without serious complaint. He was however quite protective of the parcel No. 1395 which he did not wish his sons to touch. If we are to believe the 2nd defendant, his father declined to have the 3rd defendant build a house on this land. He also refused to subdivide it to his wives or children. That is precisely why the 2nd and 3rd defendants reported him to the Chief in the year 2007.

30. I have seen, in the evidence presented at the tribunal, that the Chief went with clan members, and in their wisdom, decided that this land should be subdivided amongst the two wives with a portion being left to the 1st defendant. The 1st defendant appears to have initially succumbed to this pressure but subsequently asserted himself as owner and that is why the matter was escalated to the tribunal. The behavior of the 1st defendant in the manner in which he related with the parcel No. 1395 does not suggest in any way that he thought that this was ancestral land which he had an obligation to pass over to his children. To the contrary he appears to have wanted to deal with it as he wished and that is why he never settled any of his families on the land. The mere fact that the land neighbours some owned by the uncles of the 2nd and 3rd defendants does not make the land ancestral land and subject to customary tenure. In any event, it was not explained how he could have ended up having two ancestral parcels of land, that is, parcel No. 876 and the parcel No. 1395, which were not side by side.

31. From the above, I am not persuaded that the 2nd and 3rd defendants have sufficiently demonstrated that this is ancestral land which must be bequeathed to them, as children of the 1st defendant, pursuant to custom.

32. My holding is that this was the free property of the 1st defendant which was not beholden to any trust or any ancestral rights. It cannot be alleged that the 2nd and 3rd defendants held any overriding interest in the land. In his submissions Mr. Nyamurongi referred me to the case of *Patrick Mbasa vs Meshack Odhiambo Mbasa & Another* (2020) eKLR and the Supreme Court decision in the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'lintari* (2018) eKLR on customary trusts, but my view is that the land herein was not held under any customary trust. It means that the 1st defendant could freely deal with the land as he wished and his wish was to sell it.

33. The 2nd and 3rd defendants of course complain that they were not involved in the sale. Was the 1st defendant under any legal obligation to involve them in such a sale? I do not think so, and Mr. Nyamurongi did not refer me to any law or any authority which asserts that a parent must consult and obtain consent of his children before disposing of his/her free land. In fact it is despicable, if not outrageous, for a child to assert that his father or mother, must subdivide his land in a particular way, and proceed to sue his parent because he/she does not wish to deal with the land in the way proposed by the child. I can do no better than echo the words of Mugo J, delivered in the case of *Teresisa Kwamboka Mauti (suing as the Administratix of the estate of David Mauti Nyarango (deceased) & Another vs Ezekiel Nyarango Mauti & 5 Others* (2022) eKLR. In that case, the plaintiff sued his father in law (father to her deceased husband) to compel him to subdivide his land and give her what she

thought would be the share of her late husband in the property of his father. In dismissing the suit, the Honourable Judge, without mincing his words, rendered himself as follows:-

> "It is very shameful, sickening, disgusting, dishonourable and disgraceful that the First Plaintiff has the audacity to urge this Court to grant orders:
>
> "restraining the 1st Defendant from entering or interfering in any manner with the 14 Acres comprised in L.R. NO. North Mugirango/Nyankono Settlement Scheme/17"
>
> on the misguided and misinformed basis that she has acquired "equitable interest" over the same.
>
> Section 24(a) of the *Land Registration Act* states as follows: -
>
> "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".
>
> No one can deny any proprietor of land such rights and privileges. I find it as spiting a parent when one goes to court to have him ordered not to enter his legally acquired land, from his hard earned labour and that he be ordered to distribute it among some of his children and more so when such children are living and earning a living out of the said land... It is a sign of insensitivity, selfishness, thoughtlessness, heedlessness and ungratefulness."

34. I am in full agreement with the above dictum. It is time that children stopped having a notion, that what belongs to their parents also belongs to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner. In this case, the 2nd and 3rd defendants, children of the registered proprietor, attempted to bully and cajole their father to distribute his land in a way that they themselves wanted. I have mentioned that it does appear that their father was overwhelmed by this pressure, and also pressure from his relatives, that he did go to the land and make proposals on subdivision. He had proposed to subdivide the land to his two wives and leave a portion for himself but this was rejected by the 2nd and 3rd defendants who thought that the old man was keeping too much land for himself and subdividing to his wives too little (from the tribunal proceedings, it appears the 1st defendant wanted to keep 8 'mirabas' and share 5 'mirabas' to his wives, but this was rejected, with the 2nd and 3rd defendants, supported by some clan members, insisting that he should share it in the reverse, that is 5 'mirabas' for himself and 8 'mirabas' for his two wives). The 2nd and 3rd defendants brought in the Chief and clan elders who had the audacity to go to the land and subdivide it as they thought best, as if this land did not have an owner who could make independent decisions. I think it is this which made the 1st defendant decide to sell the land and have it out his hands. The fact that he had at some point conceded to subdividing his land, in some proportion, does not mean that he had no right to change his mind and not decide not to share the land at all. It was his land and he could do whatever he wanted with it; he could as well change his mind from distributing the land to selling it, which is precisely what he ended up doing.

35. This case is not too dissimilar to the case of *Muriuki Marigi vs Richard Marigi Muriuki & 2 Others* (1997) eKLR. The appellant had five wives and several children. The respondents' claim in the suit was for a designated share of the above parcel of land which claim was based on customary law rights. Their case, as pleaded, was that the appellant intended to sub-divide and distribute the property in such shares that they will be disadvantaged, that such sub-division and distribution was contrary to Kikuyu Customary law, that it did not cater for the second and third respondents, and in general that it was inequitable. They therefore, wanted the court to compel the appellant to share the land amongst his wives and children in an equitable manner. In his defence, the appellant averred, among other things,

that as registered proprietor of the suit land, he had an absolute and indefeasible right over the property, and no one had the right to urge, direct or compel him to share it in any particular manner. The High Court referred the case to arbitration and an award made in favour of the respondents. On appeal, the Court of Appeal held that given that the appellant was still alive, his property was not yet available for subdivision and distribution among his wives and children. They stated that :-

> " He may not be urged, directed or ordered to do it against his own will. In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the Court would aid them to enforce. The dispute between the parties was, therefore, improperly referred to arbitration as on the face of the respondents' amended plaint there was no dispute capable of being referred. The award which was rendered was therefore, a nullity. We accordingly set it aside and in its place substitute an order striking out the original suit with costs".

36. It will be observed that I do not find the 2nd and 3rd defendants to have any right. From the foregoing, the 2nd and 3rd defendants had no right to compel the 1st defendant to subdivide his land in a certain way. Neither can they purport to attempt to reverse a sale that was freely entered into by their late father. The property was never held in their trust. I regret to tell the defendants that they have to live with the fact that their father changed his mind and decided to sell the land. He was the owner of the land and nothing barred him from selling the land.

37. In his submissions, Mr. Nyamurongi went to great lengths to contend that the plaintiffs are not innocent purchasers for value. He tried to poke holes into the agreements of the plaintiffs by submitting that they did not provide evidence of payment and questioning the subdivision and time of transfer of the land. The 2nd and 3rd defendants have no capacity to question the manner in which the parcels of land were sold as I have demonstrated that they have no interest in it. The plaintiffs have no duty to prove to them that they are innocent purchasers for value.

38. The conduct of the 2nd and 3rd defendant was, and remains, shameful. It is abominable. They relentlessly hounded their father; they demanded that he distributes the land in the form that they themselves wanted; even when their father gave them some land, they complained that it was too little; they sued their father before the Chief, the clan, and before the tribunal; they failed to give their father peace. This is despite the fact that it was their father who took them to school and educated them up to University level and made them to be what they are today. They are thankless. They have forgotten that their father took care of them when they were wobbly and helpless tots and raised them to be responsible adults. The 2nd defendant is a teacher. He can fend for himself. So too the 3rd defendant. I wonder why they were harassing their father over his own property. Why couldn't they use their knowledge, wisdom and economic empowerment to go and find their own property? Maybe if the 2nd and 3rd defendants had left the old man in peace, and endeavoured to cultivate and nurture a good relationship with him instead of harassing him, he would have opted not to sell the land and leave it for them to inherit upon his demise. They have to live with the fact that they led their father to sell the land so that he can have peace. They cannot be heard to complain.

39. I am persuaded that the plaintiffs have demonstrated to this court that they deserve to be declared the rightful proprietors of the suit properties. The 2nd and 3rd defendants have failed to prove their counterclaim and it is hereby dismissed. Having dismissed their counterclaim, the 2nd and 3rd defendants have no right to try to enter, use, or interfere with the quiet possession of the 2nd and 3rd defendants of the suit properties and I do issue an order of permanent injunction against them in

relation to the suit properties. The plaintiffs have succeeded and the 2nd and 3rd defendants have failed. Costs will follow the event.

40. For the above reasons, I am persuaded to make the following final orders:-

i. That a declaration is hereby issued that the Marani Land Disputes Tribunal proceedings and award in Marani Land Disputes Tribunal Case No. 38 of 2011 and the subsequent adoption of the award as the decree of the court in the suit Kisii CMCC Miscellaneous Suit No. 115 of 2011 is null and void.

ii. That an order is hereby issued to the Land Registrar, Kisii, to proceed and cancel any entry registering the above award and decree and maintain the registers of the land parcels West Kitutu/Mwakibagendi/1395 and West Kitutu/Mwakibagendi/ 2858, 2859, 2860 and 2861, as they were before the registration of the award of the tribunal and the subsequent decree.

iii. That it is hereby declared that the 1st plaintiff is the rightful proprietor of the land parcels West Kitutu/Mwakibagendi/2859, 2860 and 2861, whereas the 2nd plaintiff is the rightful proprietor of the land parcel West Kitutu/ Mwakibagendi/2858.

iv. That there is hereby issued an order of permanent injunction restraining the defendants by themselves or any person acting on their behalf from interfering with the quiet possession of the plaintiffs of the properties West Kitutu/ Mwakibagendi/2858, 2859, 2860 and 2861.

v. The 2nd and 3rd defendants to pay the costs of the main suit and of the counterclaim to the plaintiffs in the main suit. There will be no orders as to costs for or against the 4th defendant in the main suit.

41. Judgment accordingly.

DATED AND DELIVERED THIS 22 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII.