



Kingoina (Suing as the legal representative of Jeremiah Kingoina Obegi - Deceased) v Kingoina & 3 others (Environment & Land Case 457 of 2013) [2023] KEELC 18425 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 457 OF 2013**

**M SILA, J
JUNE 29, 2023**

BETWEEN

ARUSHA KINGOINA (SUING AS THE LEGAL REPRESENTATIVE OF JEREMIAH KINGOINA OBEGI - DECEASED) PLAINTIFF

AND

PETER OKARI KINGOINA 1ST DEFENDANT

HARON ONYIMBO KINGOINA 2ND DEFENDANT

GLADYS NYANSARORA ONUKOH 3RD DEFENDANT

KENNEDY ZACHARIA MAKORI 4TH DEFENDANT

JUDGMENT

A. Introduction And Pleadings

1. The plaintiff is step-brother of the 1st and 2nd defendants. Their late father, Jeremiah Kingoina Obegi (Jeremiah), had two wives, namely Kemunto Moraa (1st wife) now deceased, and Maria Kingoina (2nd wife). The plaintiff is of the first house whereas the 1st and 2nd defendants are from the second house.
2. Through a plaint filed on 15 November 2013 (which plaint was subsequently amended twice) the plaintiff filed this suit as the legal representative of the estate of his late father, Jeremiah. In the original plaint, the plaintiff sued his step-brothers, the 1st and 2nd defendants, and the Land Registrar Kisii. His claim was that they fraudulently caused themselves to be registered as proprietors of the land parcels Nyaribari Chache/B/B/Boburia/2901 and Nyaribari Chache/B/B/Boburia/5787 now subdivided to produce the parcel No. Nyaribari Chache/B/B/Boburia/10186. An amended plaint was filed on 10 June 2015 which removed as a party the Land Registrar, Kisii, leaving only the 1st and 2nd defendants as parties in the suit. The plaintiff in addition to the allegations that the 1st and 2nd defendants



obtained registration of the land parcels by fraud, also added a claim that they hold the two suit properties in trust for him as he is their step-brother. The plaint was further re-amended on 1 December 2016 vide which the plaintiff added other parties, being the 3rd, 4th defendants and a 5th defendant by name of The Registered Trustees, Ambassador For Christ Fellowship, Kiamabundu.

3. It is pleaded that Jeremiah was the registered proprietor of the land parcels Nyaribari Chache/B/B/Boburia/2901 and Nyaribari Chache/B/B/Boburia/5787 which parcels of land are separated by the Kisii-Kilgoris Road and lie on either side of the road. It is pleaded that during his lifetime, the deceased subdivided the above parcels of land to his two wives, each having a homestead and carrying out farming activities on distinct portions of the two parcels of land. The plaintiff pleads that in the year 2008, he went to the Lands Registry at Kisii to conduct a search and he discovered that the 1st defendant had obtained registration in his name of the land parcel Nyaribari Chache/B/B/Boburia/2901 and the 2nd defendant as proprietor of the land parcel Nyaribari Chache/B/B/Boburia/5787, the latter being subsequently subdivided into the land parcels Nyaribari Chache/B/B/Boburia/5069, 5070, 5778, 10186. He claims that their registration was through fraud, the particulars of fraud being :-

- i. gaining ownership before resorting to a succession court;
- ii. registering family land in their name while disregarding the interests of the plaintiff;
- iii. disregarding the plaintiff's customary rights over the land;
- iv. taking advantage of the illiteracy of the deceased, and;
- v. transferring the land without the requisite transfer instrument being executed and registered.

4. The plaintiff pleads that he resides and uses portions of both the land parcels Nyaribari Chache/B/B/Boburia/2901 and Nyaribari Chache/B/B/Boburia/10186, 5069, 5070, and 5778 albeit without ownership documents. He contends that the registration of the properties in the name of the 1st and 2nd defendants took place with the knowledge of the plaintiff's occupation, and consequently, the transfer and registration of the properties was in trust for and on behalf of the plaintiff. The following particulars of trust are pleaded :-

- i. The properties originally belonged to the late Jeremiah;
- ii. The plaintiff and defendants are sons of Jeremiah;
- iii. The plaintiff's mother and the mother of the defendants were co-wives;
- iv. The deceased settled and constructed homesteads for his wives on portions of the suit properties;
- v. The mother of the plaintiff was buried in the land parcel No. 2901;
- vi. The plaintiff resides in the parcel No. 2901;
- vii. The plaintiff cultivates and has tea in the parcel No. 10186, 5069, 5070 and 5778;
- viii. The occupation of the plaintiff has been open, continuous and uninterrupted;
- ix. The occupation, possession and activities of the plaintiff on the suit properties constitutes overriding interests;



- x. The plaintiff and defendants are blood relatives.
 - xi. The defendants were registered as owners of the suit properties in a fiduciary capacity;
 - xii. The defendants are therefore trustees of the plaintiff.
5. He contends that he is entitled to half of each of the two land parcels No. 2901 and the former parcel No. 5787. He has pleaded that the mother of the 1st and 2nd defendants had been settled by the deceased on a land parcel Nyaribari Chache/B/B/Boburia/3979 where she grows tea. He has added that on 25 August 2008, he placed a caution on the parcel No. 2901. In the re-amended plaint, the plaintiff has asked for the following orders :-
- a. A declaration that the defendants each hold in trust half of their respective properties to wit Nyaribari Chache/B/B/Boburia/2901 and 5787 (now subdivided and comprising of the parcels No. 10186, 5069, 5070 and 5778) for the plaintiff and the plaintiff is by reason of that trust relationship entitled to them.
 - b. An order for the resurvey of the properties Nyaribari Chache/B/B/Boburia/2901 and 5787 (now subdivided and comprising inter alia parcels No. 10186, 5069, 5070, and 5778) to carve and determine the plaintiff's interest therein and thereafter the title be cancelled and rectified to reflect each of the parties' respective interests in the properties.
 - c. An order of eviction against the defendants from portions of the land parcels Nyaribari Chache/B/B/Boburia/2901 and 10186, 5069, 5070, and 5778, decreed to belong to the plaintiff;
 - d. Permanent injunction restraining the defendants from dealing with the plaintiff's half share of the land parcels Nyaribari Chache/B/B/Boburia/2901 and 10186, 5069, 5070, and 5778.
 - e. Costs of the suit.
 - f. Interest at court rates.
6. The 1st and 2nd defendants had initially filed a joint statement of defence and counterclaim. It was later amended so as to incorporate the newly added 3rd and 4th defendants. The 1st and 2nd defendants averred that their late father voluntarily and willingly transferred the parcel No. 2901 to the 1st defendant on 4 December 2002. On the other hand, the 2nd defendant obtained title deed to the parcel No. 10186 (originally parcel No. 5787) on 5 December 2002. They pleaded that their father died on 15 November 2008, and before his demise, he had willingly and voluntarily passed on title to them and that he was of sound mind. It is pleaded that the 3rd and 4th defendants acquired their title deeds to parcels No. 5070 and 5069 on 3 June 2010 and 27 February 2003 respectively.
7. They pleaded that the plaintiff, and his brothers of the first house were allocated and registered as proprietors of their own parcels of land. They elaborated that the plaintiff's brother, one James Obegi Kingoina, got registered as proprietor of the land parcel Nyaribari Chache/B/B/Boburia/2625 which was subdivided and gave rise inter alia to the parcel No. Nyaribari Chache/B/B/5075; and another brother Mosoti Kingoina (now deceased) got registered as proprietor of the land parcel Nyaribari Chache/B/B/Boburia/2900 which was subdivided and gave rise inter alia to the land parcel Nyaribari



Cache/B/B/Boburia/6487. They added that the plaintiff's mother is buried in this land parcel No. 6487. They pleaded that the plaintiff ought to approach his brother James and the son of Mosoti, one Peter Lumumba Mosoti, to consider carving out some land for him, as it is them who are holding property in trust for him and not demand a share that belongs to his step-brothers. They added that it was incumbent upon the plaintiff to request his late father, before his demise, to apportion him some land as the rest of the sons did, but he slept on his rights by not doing so.

8. Conversely, they contended that the plaintiff should blame himself for exceedingly antagonizing their late father who in turn refused to allocate and register the plaintiff as owner of any landed property. They averred that the plaintiff's use and occupation of their land is illegal. They pleaded that when their father passed title to them, he made it clear that the plaintiff deserves a share of the land allocated to his late mother where she was laid to rest. They denied the particulars of fraud and particulars of trust pleaded. On the caution, they pleaded that the same was removed by a court order as recommended by the Kisii Land Registrar vide his ruling in a caution hearing of 19 July 2013. In the counterclaim, they have pleaded that after the burial of their late father in December 2008, the plaintiff invaded the land parcels No. 2901 and 10186 and started tilling on the former, and constructed a temporary structure on the latter, with intention to grab portions of the land. In their counterclaim, they seek orders of eviction of the plaintiff and a permanent injunction against him. The 3rd and 4th defendants pleaded that they are in possession and control of their land parcels No. 5070 and 5069 respectively.
9. On 26 January 2021, the plaintiff withdrew the case against the 5th defendant, the registered proprietor of the land parcel Nyaribari Cache/B/B/Boburia/5778. He also gave evidence on that day. I will mostly refer to the properties in dispute with their parcel numbers only (not adding the registration section for brevity) and the parcel numbers mentioned herein should be considered as referring to land within the registration section Nyaribari Cache/B/B/Boburia.

B. Evidence of the Parties

10. The plaintiff testified that Jeremiah is his father and that he has instituted this suit on behalf of his father's estate. He exhibited the limited grant ad litem. He also adopted two witness statements that he had earlier recorded. In it, he stated that until the year 2002, Jeremiah was still registered as proprietor of the land parcels No. 2901 and 5787 which parcels are separated from the Kisii-Kilgoris Road. He stated that during his lifetime, the deceased had demarcated the land into two, for his two wives, each having a homestead and carrying out farming activities on their distinct portions of the two parcels of land as delineated. He stated that in the year 2008, he did a search and discovered that the 1st defendant had through fraud been registered as proprietor of the land parcel No. 2901, and the 2nd defendant as proprietor of the parcel No. 5787, and that the 2nd defendant has subdivided this land into the parcels No. 5069, 5070, 5778 and 10186. He stated that the 2nd defendant is now registered as owner of the parcel No. 10186 while the 3rd, 4th and 5th defendants are registered as proprietors of the parcels No. 5069, 5070 and 5778 respectively. He stated that their registration was done through fraud.
11. On 25 August 2008, he lodged a caution against the parcel No. 2901. He stated that the transfer of the land was done in knowledge of his occupation and therefore it was on trust for himself. He stated that the mother of the 1st and 2nd defendants is settled in the land parcel No. 3979 where she grows tea bushes. In court, he testified that he filed the suit in respect of two parcels of land, that is parcel No. 2901 and No. 5787. He stated that the two parcels of land have been divided between his mother and step-mother. His mother predeceased his father. He testified that his father had built a home for his mother on the parcel No. 2901 and it is also on this parcel of land that his house is located. He claimed to have built his home 20 years back. He testified that this parcel No. 2901 is in name of the 1st defendant, Peter Okairo Kingoina (Peter). He claimed that Peter got registered as proprietor after



his father had died and after he had constructed his home. He stated that he has a permanent house and a mud house on this land parcel No. 2901 and that he has been cultivating on the land parcel No. 5787 where he has a coffee plantation. He added that he has constructed four permanent shops and a storeyed building on this land. He testified that the two parcels of land, i.e No. 2901 and No. 5787, were initially registered in the name of his late father. He stated that he and his brothers from the first house have no land registered in their names and therefore the 1st defendant is holding the land in trust for himself and his brothers from the first house. He however stated that his two brothers were given land elsewhere. He testified that it cannot be said that he has trespassed on the land since he has lived on it all his life.

12. Cross-examined, he mentioned that he was 70 years old at the time he testified whereas the defendants are in their 30s and 40s. He denied that his late father had transferred the land to the 1st and 2nd defendants before his death and he does not know from where the 1st defendant got his title. He however acknowledged that the title shows that it was issued in the year 2002 before the death of his father. He testified that his father died in the year 2008 at the age of 115 years. He claimed that his eyesight was failing. He testified that his father gave each of his two wives their respective parcels of land. He contended that his mother was given the parcel No. 2901 while his step-mother was given the land parcel No. 5787. His two blood brothers are James Kingoina and Mosoti Kingoina; he is the last born in that house. He stated that he does not know if any land was registered in name of James, but pressed, he conceded that his two brothers were given their own titles. He however does not know their parcel numbers and their sizes. He testified that before his death, his father divided his land among some of his children and wives. He stated that he remained on the parcel No. 2901 with his mother. He claimed that his father was buried in the land parcel No. 5787 while his mother was buried in the land parcel No. 2901. He testified that his sons have constructed a storeyed house on parcel No. 5787 which has been subdivided into the parcels No. 10186, 5069 and 5070. His stepmother stays in the parcel No. 10186 which is registered in the name of the 2nd defendant. He did not know why his father did not give him his own parcel of land though he stated that he had shown him where to build and cultivate on what he claimed to be his mother's portion. He stated that he has sued the 3rd defendant because he demolished his house. She had bought a portion of the land parcel No. 1086. He alleged that Kennedy (4th defendant) encroached on his land.
13. PW-2 was Samuel Omuya Mutachwa. His evidence was that he knew the late Jeremiah who was from his clan. He was aware that Jeremiah had two wives and he knew their children. He stated that Jeremiah gave each of his wives their own portion of land. He stated that the land parcel No. 2901 is divided into two portions; that the first wife Moraa was given the upper portion and that is where she is buried, and Maria (the second wife) was given the lower portion. He stated that the plaintiff is occupying his mother's portion in this parcel No. 2901. He continued that Jeremiah was also registered as owner of the parcel No. 10186. He was aware that Jeremiah owned the parcel No. 5787 which he subdivided into several parcels. He did not know how the defendants got their titles and was aware that the plaintiff has none. He refuted that Jeremiah had already given some of his sons their title deeds. He mentioned that Arusha (plaintiff) is the eldest son of Jeremiah and that he has always lived on his father's land and there is no way he can be evicted from it. He averred that the plaintiff has constructed on the portion given to him by his father. He did not know the 3rd, 4th and 5th defendants. He opined that it would be fair if each of Jeremiah's children were given their rightful share of their father's property.
14. Cross-examined, he now stated that Arusha is the youngest son of the late Jeremiah and Moraa, and that he has two brothers. He reiterated that Jeremiah was registered as owner of parcel No. 2901. He averred that Jeremiah gave land to his eldest sons, Obegi and Mosoti, during the adjudication process, and that the plaintiff inherited his mother's parcel of land and that is where he settled with his



family. He stated that Jeremiah sold some land to one Alex. He did not know who was constructing a storey building on the disputed land. He did not know Omboto Magesa, or Kennedy Zacharia Makori (4th defendant). He stated that the mother of the plaintiff is buried on the upper side, whereas his stepbrothers reside on the lower side and that they have no share on the upper side. Re-examined, he claimed that the land parcel No. 2901 was divided into two between the two wives.

15. With the above evidence, the plaintiff closed his case.
16. DW -1 was the 1st defendant, Peter Okari Kingoina. He is the first born in the second house. He affirmed that the plaintiff is his step-brother. He also relied on a pre-recorded witness statement. In it, he stated that his late father, during his lifetime, voluntarily passed the whole of the title to parcel No. 2901 to him. He added that his father was in good physical health and mental condition. His father made the application for consent of the Land Control Board and he appeared before the Board on 24 October 2002 and confirmed intention to transfer the title to him. He thereafter executed the transfer which he signed and thumb-printed. He stated that at that time he warned him that their step-brother, the plaintiff, is likely to give them problems if the title meant for them as the second house remains in his name. He also made it explicitly clear that the plaintiff deserves to get a share of the land allocated to his mother, where she was laid to rest, which is the parcel Nyaribari Chache/B/B/Boburia/2900. He stated that this land parcel No. 2900 was subdivided by an elder brother of the plaintiff to give rise to the parcel No. 6487 which is where the grave of the mother of the plaintiff is located. He added that if his father wished for him to hold the land in trust he would have stated so in the transfer document. He contended that the plaintiff is not only being malicious, ill-intentioned and oppressive when he imputes that their father's noble action amount to fraud. He testified that in the context of Gusii custom, it is an abomination for a son or daughter to discredit and disregard his/her late father's noble actions. In court, he added that he filed a counterclaim because the plaintiff is occupying a portion of about 30 by 100 feet and he has constructed a temporary structure on it which he wants him to vacate.
17. Cross-examined by counsel for the plaintiff, he reiterated that his father gave him the land parcel No. 2901 as a gift inter vivos. At that time, he was 99 years old. He was not illiterate. He signed and thumbprinted his documents. He acknowledged that his ID only had a thumbprint while the transfer form had a thumbprint and signature. The transfer form shows that he was identified by his mother Maria. He did not have the registration documents of the parcel No. 2900. He did not know if the first family was given another parcel of land. His father lived in the parcel No. 2901. He denied that the plaintiff was also living in this parcel No. 2901 and stated that he was staying on the land belonging to the first house. He did not know PW-2. His mother (Maria) lives on her own land though he does not know the parcel number. His father lived on the parcel No. 5887 which is where he was buried. He stated that the plaintiff's mother was buried in the land parcel No. 2901. He affirmed that the plaintiff has been cultivating on a portion of the land parcel No. 2901 and has constructed a temporary structure on it. He stated that it was constructed when he was away in Narok but could not remember the year. He does not know for how long he has been on the land. He denied forging his father's signature to transfer the parcel No. 2901 to himself.
18. . Re-examined, he stated that the plaintiff started bothering them after the death of their father. He added that the plaintiff started occupying the land after the death of their father.
19. DW-2 was the 2nd defendant. His evidence was that prior to his father's demise, his father had given him the land parcel No. 5787 which was a subdivision of the parcel No. 5068. He proceeded to subdivide the parcel No. 5787 into two portions. He is currently holding title to the parcel No. 1018. His evidence was that the first house was given the land parcels No. 2900 and 2625. He stated that each house was given two parcels of land and that the second house was given the parcels No. 2901 and 5787 which is where the share of the plaintiff is. He asserted that traditionally, the children of the first house are not



- allowed to occupy land belonging to the second house. He mentioned that two of his brothers, and his mother, live in this land parcel No. 5787. He testified that the plaintiff has constructed a permanent house on a portion of his land and that he built a brick house on a portion of his land after the demise of this father. He wants him out of his land.
20. Cross-examined, he averred that the parcel No. 2900 is registered in name of Mosoti Kingoina while parcel No. 2625 is registered in name of James Kingoina, who are the plaintiff's brothers from the same house. He claimed that parcel No. 2900 is bigger than the two parcels of land given to the second house. He however did not have copies of these title deeds. He denied forging his father's signature. He stated that the plaintiff encroached on his land in the year 2008. Before the year 2008 he had a house on the parcel No. 2625. He does not cultivate on his land.
 21. DW-3 was Kennedy Zakari Makori, the 3rd defendant. He is a high school teacher and is not related to the family of the plaintiff. He owns the parcel No. 5069. He testified that this land was sold to him by one Thomas Orina Oriosa (Oriosa) on 19 February 2003 and transfer to his name effected on 27 February 2003. He produced a copy of a mutation form showing that the parcel No. 5069 was a subdivision of the parcel No. 4738. This parcel No. 4738 was subdivided into the land parcels No. 5068, 5069 and 5070. Parcel No. 5068 remained with the owner Kingoina Obegi (Jeremiah). He produced the transfer form from Jeremiah to Oriosa and the requisite Land Control Board consent. He testified that on his land he has constructed a three storey building with tenants and he produced the building plans. He testified that it is not correct for the plaintiff to claim that he is holding this land in trust for him for the said land was sold to Oriosa in 1991 by Jeremiah. In turn, he purchased the land from Oriosa in 2003. He stated that as he was building, the plaintiff never came to claim the land. He testified that Gladys, the 4th defendant, lives between him and the plaintiff.
 22. Cross-examined, he testified that he does not know about the parcel No. 5787 as it does not appear in the mutation form. He testified that he produced documents related to the transaction between Jeremiah and Thomas from the Lands registry after asking for them. He did not have the consent from Jeremiah to Thomas as he had not asked for it. He did not have a written sale agreement with Thomas. He had no recollection of a boundary dispute between the parcels No. 5069 and 5070. He stated that prior to purchasing the land, he visited it and it was plain. He denied that the plaintiff was using this land prior to him purchasing it. He started developing the land in the year 2012.
 23. Re-examined, he testified that nobody has encroached on his land and that he is in full control of it.
 24. DW-4 was Daniel Ogwoka Gichana, a businessman. He holds a power of attorney from the 4th defendant (Gladys) who lives in the USA. His evidence was that Gladys owns the land parcel No. 5070. She got title on 3 June 2010 having purchased the land from one Johnson Ongoto Mogesa on 25 May 2009. Johnson Ongoto had earlier on purchased the land from Jeremiah on 14 September 1993. The land was vacant when it was bought but Gladys has embarked on construction of a building. Further construction was stopped by a court order. He testified that the plaintiff does not live on this land. Gladys had a previous suit where he sued Harun (2nd defendant) over a boundary dispute but this was sorted out. Cross-examined, he stated that the building being erected is a three storey building and two storeys are already done. This land is on the upper side of the Kisii-Kilgoris road which is where the second house resides. There was a time the plaintiff encroached on the plot belonging to Gladys from the parcel owned by Harun (2nd defendant). Gladys sued Harun. He stated that the plaintiff has brothers and sisters and none has questioned their ownership. He testified that the plaintiff trespassed into the property of Gladys in 2012 which forced them to come to court to resolve what was constituted as a boundary dispute between the parcels No. 5070 and 5068. It was found that the plaintiff had truly encroached into the plot No. 5070 and he later moved out. He had developed some temporary structures which were demolished.



25. With the above evidence the defendants closed their case.
26. I invited counsel to file their submissions which they did and I have taken the same into account before arriving at my disposition.

C. Analysis and Disposition

27. My starting point is to point out that this suit has not been filed by the plaintiff on his own behalf but on behalf of the estate of his late father. When one is filing suit on behalf of the estate of a person who is deceased, what he is agitating is not his own cause, but the cause of the estate of the deceased, so that the benefit of the judgment goes to the estate of the deceased. In other words, it is a suit which, if the deceased was alive, he would have had a cause of action to pursue. Thus, it needs to be appreciated that what the plaintiff is raising ought to be complaints that his father would have raised were he alive. Having made that clear, I now turn to discern what the cause of action, is as pleaded in the plaint.
28. It will be recalled that in his re-amended plaint, the plaintiff averred that until 2002, the late Jeremiah was the registered proprietor of the land parcels Nyaribari Chache/B/B/Boburia/2901 and 5787 now subdivided into the parcels No. 10186, 5069, 5070 and 5778. He pleaded that the 1st defendant had through fraud obtained registration in his name of the land parcel No. 2901 which registration was discovered in the year 2008. It was also pleaded that the 2nd defendant obtained registration of the land parcel No. 5787 which he (2nd defendant) proceeded to subdivide into the land parcels No. 10186, 5069, 5070 and 5778. I already laid down the particulars of fraud pleaded which inter alia are that the 1st and 2nd defendants gained ownership without resort to succession, that they registered their names disregarding the interest of the plaintiff, and that they took advantage of the illiteracy of their late father.
29. Certainly, if it is the case that the 1st and 2nd defendants obtained registration without first going through a succession cause, then the estate of the deceased would be entitled to complain, but the facts as they revealed themselves show otherwise as I demonstrate below:
30. Starting with the land parcel No. 2901, the evidence shows that this land was transferred to the 1st defendant on 5 December 2002. Jeremiah was at this time pretty much alive because he died on 15 November 2008. It cannot therefore be asserted that there was a transfer without first going through the process of succession, for this was a transfer effected while the registered proprietor was alive. It was of course pleaded that the 1st defendant took advantage of the illiteracy of his late father and there were insinuations in the evidence that the 1st defendant also took advantage of his father's advanced age and that he forged some signatures. In fact in her cross-examination, and even in her submissions, Ms. Ochwal, learned counsel for the plaintiff, did pursue the line that the documents were forged, because they have both a signature and a thumbprint, whereas the identity card of the deceased only had a thumbprint. It will be farfetched to argue that since one has only put a thumbprint on his identity card then he can never ever sign a document, and that for the rest of his/her life then he will have to put thumbprints on every document, and if ever there was a document bearing a thumbprint and a signature, then such document must be a forgery. I don't buy that argument. One is at liberty to thumbprint or sign documents as he may wish or even do both. And it is not hard to find out if a thumbprint on a document is not the impression of the person making it. All one needs to do is conduct a forensic document examination of the thumb impression on the identity card and that in the contested document. In our case, there was a thumbprint on the documents of transfer, and if at all the plaintiff was certain that this was not the thumbprint of his father, then he ought to have been bold enough to take the documents for forensic investigation. This would have revealed whether the thumbprint on the transfer is not the same as the thumbprint in the identity card. No such document examination was done, and I have said, I am not persuaded by the argument that because there is only



a thumb impression on the identity card of the late Jeremiah, then the transfer instrument which bears both signature and thumb impression is a forgery. That will be too low a standard of proof on forgery and fraud.

31. As far as I can see, the entire legal process of transferring the land was followed. There is an application for consent of the Land Control Board and consent was duly issued. If the plaintiff thought that this consent was fraudulent, he ought to have come with the minutes of the Land Control Board, but he did not. I have nothing before me to suggest that the deceased did not voluntarily and willingly proceed to the Board so as to have the Board issue consent to allow him to transfer the parcel No. 2901 to the 1st defendant. Jeremiah may have been advanced in age, but being advanced in age by itself if not an incapacity. One does not suffer legal incapacity because he is of advanced age. There was nothing presented before me to suggest that the deceased suffered any physical or mental infirmity when the land parcel No. 2901 was transferred to the 1st defendant. In essence, I have seen nothing before me which would lead me to the conclusion that the late Jeremiah never willingly transferred the parcel No. 2901 to the 1st defendant. My finding is that the late Jeremiah did voluntarily transfer the parcel No. 2901 to the 1st defendant.
32. Let me now turn to the parcel No. 5787. I reiterate that it was the pleading of the plaintiff that the 2nd defendant fraudulently obtained registration of this land parcel No. 5787 and then proceeded to subdivide it into the parcels No. 5069, 5070, 5778 and 10186. Is that really the position? I have again assessed the evidence and it does not point me to any such fact. At the outset, I must say that I have absolutely no evidence of any parcel of land registered as Nyaribari Chache/B/B/Boburia/5787 in these proceedings. I have no mutation form and no document whatsoever relating to the parcel No. 5787. I have no evidence whatsoever that the parcels No. 5069, 5070, 5778 and 10186 arose from subdivision of the parcel No. 5787. Parties are bound by their pleadings and they need to present evidence to support those pleadings. I have no such evidence in our case.
33. I do observe that in her submissions, learned counsel for the plaintiff did in fact backtrack on her own pleadings by submitting that it was erroneously captured that the parcels No. 5069 and 5070 were a subdivision of the parcel No. 5787. I repeat that parties are bound by their pleadings, and persons who have been sued bring evidence to answer to the pleadings that they have been served with. If at all the plaintiff or his counsel thought that there was an error in the pleadings, nothing stopped them from applying to make amendments thereto. Thus, what the plaintiff needed to provide evidence was to prove his pleadings, that the parcels No. 5069, 5070, 5778 and 10186, were as a result of subdivision of the land parcel No. 5787 which was initially owned by the late Jeremiah before it was transferred to the 2nd defendant. The plaintiff also needed to prove that it was actually the 2nd defendant who proceeded to subdivide the land upon obtaining registration. As I mentioned shortly before, there was absolutely no evidence of any land parcel No. 5787 and no evidence of this land having been subdivided to produce the parcels No. 5069, 5070, 5778 and 10186.
34. The irrebutable evidence which came from the defendants and which is supported by documentation, was that Jeremiah owned a parcel No. Nyaribari Chache/B/B/Boburia/4738. In the year 1992, Jeremiah subdivided this land to produce the land parcels No. 5068, 5069 and 5070. In 1993, Jeremiah sold the subdivision No. 5069 to Thomas Oriosa who then became registered as proprietor. He also sold the subdivision No. 5070 to Johnson Ongoto Mogesa in the same year 1993 and Johnson became the registered proprietor. Thomas in turn sold this parcel No. 5069 to the 4th defendant in the year 2003. For the parcel No. 5070, it was sold to the 3rd defendant (Gladys) on 25 May 2009, and she became registered as proprietor on 3 June 2010. There is absolutely nothing to suggest that these transactions were fraudulent. I am aware that in her submissions, counsel for the plaintiff ventured to submit that the plaintiff was in possession, but this is not a case for adverse possession and it should



- constantly be kept in mind that the plaintiff filed this suit on account of the estate of his late father. Surely, Jeremiah would not have had any complaint regarding the sales of the parcels No. 5069 and 5070 for they are completely above board.
35. . Apart from not getting it right on the genesis of these parcels No. 5069 and 5070, there is no evidence whatsoever that the titles of the 3rd and 4th defendants were illegally acquired. They purchased these parcels of land, took possession and proceeded to construct. In her submissions, Ms. Ochwal for the plaintiff, submitted that the 3rd and 4th defendants had a burden to prove that their predecessors in title had a good title. In the instance of this case, that was not their burden. It was the burden of the plaintiff to prove that their predecessors in title had no good title. The plaintiff never sued them and I see absolutely nothing to suggest any fraud. It is apparent that Jeremiah was subdividing and selling his land and he did sell two subdivisions to Thomas Oriosa and Johnson Ongoto. Jeremiah never raised any complaint from 1993 till he died in the year 2008. There is truly no case against the 3rd and 4th defendants and the plaintiff fails in his quest to claim the land parcels No. 5069 and 5070.
36. The other parcel that I am yet to talk about is the land parcel No. 10186 which is registered in the name of the 2nd defendant. Again, it will be recalled that it was the case of the plaintiff that the 2nd defendant fraudulently registered himself as owner of the parcel No. 5787 then he proceeded to subdivide it and that one of the resultant titles is this parcel No. 10186. I have assessed the documents provided. My analysis, as shown in the previous two or so paragraphs, was that Jeremiah owned the parcel No. 4738. He subdivided it into three, i.e parcels No. 5068, 5069 and 5070. He sold the latter two parcels and remained with the parcel No. 5068 in his name. I believe that he proceeded to subdivide this parcel No. 5068 into several land parcels, which I am unable to tell, for no evidence on this was led, but I can discern that one of the results of the subdivisions was the parcel No. 5787, for the green card, which was produced as an exhibit, shows this. This parcel No. 5787 was registered in the name of the 2nd defendant on 5 December 2002. Again, I have nil evidence to suggest that the transfer of this land from the name of the late Jeremiah to the name of the 2nd defendant was in any way fraudulent or not intended by Jeremiah. Having obtained title, the 2nd defendant subdivided this parcel No. 5787 into two parcels, being parcels No. 10186 and 10187. Nothing has been mentioned in this case about the land parcel No. 10187 and I have no evidence of its ownership. If the plaintiff thought that the subdivision of the parcel No. 5787 was fraudulent, then he needed to rope in the owner of the parcel No. 10187 for he stands to be affected but he did not do so. It will be recalled that one of the prayers in the plaint is for resurvey of the parcel No. 5787 and 10186 but this cannot be done without all owners of the survey of parcel No. 5787 being in the suit, which is not the case here, for the owner of the parcel No. 10187 remains undisclosed and is a stranger to these proceedings.
37. . But even if we take the parcel No. 10186 in isolation, is there any evidence of fraud in the manner of its acquisition? There is absolutely none. As I have mentioned, there is no evidence that the acquisition of the mother title, i.e parcel No. 5787 by the 2nd defendant in the year 2002 was fraudulent. I cannot therefore impute fraud in the subdivision that brought forth the parcel No. 10186. The plaintiff's suit in respect of fraudulent acquisition of this parcel No. 10186 cannot thus succeed.
38. The second angle to the plaintiff's case is trust. The plaintiff pleads that the parcels of land are held in trust for him. I will again go back to basics and point out that this is a case where the plaintiff sues on behalf of his late father, not himself. In other words, it is akin to his late father suing his two sons and telling them that he caused them to be registered as proprietors of the parcels they own in trust for the plaintiff. First, the documents of transfer show nothing of that sort. The documents of transfer that have been presented do not have any insinuation that Jeremiah was transferring the land parcel No. 2091 to the 1st defendant, and the parcel No. 5787 to the 2nd defendant, so that they may hold the same



- in trust for the plaintiff. There is in fact no plausible reason why the late Jeremiah would transfer the two parcels of land to the 1st and 2nd defendants so that they may hold the same in trust for the plaintiff.
39. For starters, the plaintiff was very much alive and not in any way incapacitated so that land ought to be held on his behalf. The plaintiff was also much older than the 1st and 2nd defendants; generally in African custom, you would expect that if it was a holding in trust, then it would be in the reverse, i.e the plaintiff registered as the older sibling to hold in trust for the younger ones. There is nothing before me to suggest why the burden of trust ought to have been imposed on them and not the plaintiff. Moreover, the plaintiff was from a different house, and I have no evidence that the step-siblings were so close that it would be them to hold the land in trust for the plaintiff, and not the plaintiff's own elder siblings. It is apparent that Jeremiah was distributing his land before his death, and if he had wanted to allocate some land directly to the plaintiff, he would have done so, just in the same way that he allocated land to the 1st and 2nd defendants. It is clear that there is no express trust and I am afraid that this is not one of those cases where trust can be implied. Trust cannot be implied for the simple reason that there is no evidence whatsoever that the late Jeremiah wished to have the 1st and 2nd defendants hold the land in trust for the plaintiff.
40. Part of the contention of the plaintiff is that Jeremiah could not have transferred the land to the 1st and 2nd defendants because he was in possession. That can't hold any water. At the outset, I am struggling to see any concrete evidence of possession by the plaintiff of the four land parcels that he has mentioned here. He never presented any report of a surveyor, or valuer, to demonstrate what sort of occupation he has. It was all by way of mouth that he testified that he has built various permanent structures. I am at a loss as to where those permanent structures are for they cannot be in the land parcel No. 5069 or 5070, owned by the 3rd and 4th defendants, who themselves have permanent structures. The 1st and 2nd defendants pleaded and testified that it was only after the demise of their late father that the plaintiff encroached into their parcels of land, made some temporary structures and started farming. If the plaintiff wished to hinge his case on long term possession, then he failed miserably. As I have mentioned, there was no expert report presented to show what sort of structures he has on the ground and for how long they have been there. 41. If occupation and possession are contested, to discharge the burden of proof, one must go the extra mile to adduce supporting evidence and I find none in this case. There is absolutely nothing before me to suggest that this is where the plaintiff has been living all along.
42. The plaintiff also appeared to suggest that this is where his mother was buried. Again there is no evidence to tell us the grave is on which land. The evidence of PW-2 doesn't help the plaintiff much. First, his relationship to the parties was never made clear, and if at all it is there, it is pretty much very loose. He merely said that he was a member of the clan of Jeremiah. Wasn't there anybody closer home who could have testified on behalf of the plaintiff, such as his brothers, uncles, or aunties, so they can give evidence of how they used to live? I have nothing to bring me to any concrete finding that the plaintiff possessed these parcels of land in any form of occupation prior to the year 2008 to entitle him to the suit properties. In any event, this is not a case where the plaintiff seeks judgment by way of adverse possession. If the plaintiff wanted to present a case of adverse possession or limitation, he ought to have pleaded it but he did not.
43. It will recalled that the plaintiff had at some point placed a caution which proceeded to hearing. Even the Land Registrar was not persuaded that the plaintiff had any reason to place the caution. He found,



on 19 July 2013, inter alia that the land was shared when the registered proprietor (Jeremiah) was alive. Significantly, one of his findings was finding No. 6 which is as follows :-

6. The cautioner lives in another land belonging to the second wife registered in the name of his step brother by the name Haron Onyimbo Kingoina though he has his share of the land in his mother's land (with his real brothers).
44. Harun does not own the land parcel No. 2901 and therefore the only land that the plaintiff could have been in possession of was Harun's land which was either parcel No. 10186 or 10187. I have no case over the land parcel No. 10187 here, and that only leaves the land parcel No. 10186. Even assuming that he did occupy this parcel No. 10186, the fact that he occupied the land does not mean that it was given out to his step-siblings for them to hold in trust for him. At some point in time, all children are in some sort of possession of the land of their parents. They can be born and raised there, and sometimes parents can accommodate them making some temporary shelters in loose arrangements. In my view, these constitute licences that may be revoked, unless the facts demonstrate a clear allocation for one to mount a case of trust. Parents do sometimes firm up these loose arrangements, or put them aside all together, by making a different sort of allocation. In our case, I am not in doubt that Jeremiah willingly allotted the disputed parcels of land to the 1st and 2nd defendants for them to hold absolutely and he transferred title to them. It was the wish of the late Jeremiah to transfer land to the 1st and 2nd defendants. It is not for this court to question his wisdom and his wishes. He dealt with his land in the manner he deemed best. He chose to have the land in dispute given to the 1st and 2nd defendants and not the plaintiff. I have already stated that there is nothing to suggest any trust. If the late Jeremiah wanted to allocate some land to the plaintiff, he would simply have proceeded to do so. Why would Jeremiah transfer the two parcels to the 1st and 2nd defendants to hold in trust for the plaintiff yet the plaintiff was their older sibling, alive, and not in any way incapacitated ?
45. My findings are that Jeremiah properly transferred his land to the 1st and 2nd defendants freely, and voluntarily. He wished to have them possess this land absolutely. He had his own reasons for not assigning this land to the plaintiff. Maybe his interest lies in the land allotted to his blood brothers, or maybe his father did not wish to allocate him any land. That I cannot state with finality within the context of these proceedings. What is clear to me is that Jeremiah gifted the parcels of land No. 2901 and No. 5787 to the 1st and 2nd defendants for them to hold absolutely, and he sold the land parcels No .5769 and 5770 for the purchasers to hold absolutely.
46. The plaintiff has not proved to me any right to be on these parcels of land. His case fails and is dismissed.
47. The 1st and 2nd defendants have a counterclaim. They are the rightful owners of the land parcels No. 2901 and 10186. I have no evidence that the plaintiff has any right to be in use or possession of these parcels of land given that his case has failed. I therefore proceed to allow the counterclaim. I order the plaintiff to give vacant possession within the next 30 days from the date hereof or he be forcibly evicted. Upon lapse of these 30 days, the plaintiff be permanently restrained from entering, being upon, utilizing, or in any other way interfering with possession of the use of the suit properties by the defendants.
48. The last issue is costs. They will follow the event. Though the plaintiff sued as administrator of the estate of his late father, the manner in which the case was pursued was as if the plaintiff was agitating a cause of his own and not that of his late father. Thus, the plaintiff, and not the estate of Jeremiah, to pay costs of both the main suit and of the counterclaim.
49. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 29 DAY OF JUNE 2023



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT

