



**Kwasu & 2 others v Kwasu & 2 others (Environment & Land Case 5 of 2021) [2023] KEELC 18123 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18123 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 5 OF 2021**

**AY KOROSS, J  
JUNE 20, 2023**

**BETWEEN**

**PHILIP OYIER KWASU ..... 1<sup>ST</sup> PLAINTIFF  
CORNEL MASIMBA KWASU ..... 2<sup>ND</sup> PLAINTIFF  
DANIEL OUMA KWASU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**HENRY NDUKWE KWASU ..... 1<sup>ST</sup> DEFENDANT  
THE LAND REGISTRAR, SIAYA ..... 2<sup>ND</sup> DEFENDANT  
THE PRINCIPAL MAGISTRATE, SIAYA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 18/04/2018 and amended on 13/09/2018, the plaintiffs instituted suit against the 1<sup>st</sup> defendant who is their brother. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were sued for actions and or omissions they allegedly committed in their official capacities.
2. The 2<sup>nd</sup> plaintiff died in the course of these proceedings and his suit abated against the defendants. After a referral for mediation by this court, the 3<sup>rd</sup> plaintiff and 1<sup>st</sup> defendant reached a settlement that was adopted as a Judgment of the court on 5/10/2022.

**1<sup>st</sup> plaintiff's case**

3. In his plaint, the plaintiff averred North Gem/Malanga/861 ('original parcel') which was family land was at adjudication fraudulently registered in the 1<sup>st</sup> defendant's name. The 1<sup>st</sup> defendant held it in trust for the 5 sons of their deceased parents; Ruben Kwasu ('Ruben') and Dorca Wajero ('Dorca').



4. On 11/03/1992, the original parcel was subdivided to create several parcels of land that were registered in the 5 sons names inter alia; North Gem/Malanga/1181 -1<sup>st</sup> defendant, North Gem/Malanga/1182- Paulo Otieno Kwasu ('Paulo') who was deceased at the time of registration, North Gem/Malanga/1183- 1<sup>st</sup> plaintiff, North Gem/Malanga/1184- 2<sup>nd</sup> plaintiff (now deceased) and North Gem/Malanga/1185- 3<sup>rd</sup> plaintiff. All these properties shall hereafter be referred as ('the suit properties').
5. According to the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> defendant had unfairly, illegally and unlawfully allocated himself a bigger chunk of the original parcel than the other siblings. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants had acquiesced the 1<sup>st</sup> defendant's conduct.
6. Despite findings in its report in Siaya PM Criminal case no. 43 of 2017, the 2<sup>nd</sup> defendant had failed to rectify the anomalies noted in the ground, map and mutation situation.
7. As for the 3<sup>rd</sup> defendant, he allowed the withdrawal of Siaya PM Criminal case no. 43 of 2017 by the DPP and proceeded ex parte in Siaya PM Misc.Appli. Case no. 10 of 2018 in a matter that had been filed by the 1<sup>st</sup> defendant.
8. It was the 1<sup>st</sup> plaintiff's position the 1<sup>st</sup> defendant was a vexatious litigant for filing several suits against him to wit a criminal complaint lodged against him by the 1<sup>st</sup> defendant's wife; Siaya SPM Succession Cause no. 65 of 2017 and Siaya PM Misc. Appli. Case no. 10 of 2018.
9. The 1<sup>st</sup> plaintiff's trees had been destroyed by the 1<sup>st</sup> defendant, his wife and son on diverse dates of December 2016 and 25/03/2018 thus occasioning him damages. He sought the following reliefs: -
  - a. A declaration the original parcel was held in trust by the 1<sup>st</sup> defendant.
  - b. A declaration the original parcel was fraudulently registered in the 1<sup>st</sup> defendant's name.
  - c. The court do issue an order of certiorari quashing the original parcel's title and replace it with a title deed in Ruben's name.
  - d. A declaration the suit properties were unlawfully subdivided and transferred and an order of certiorari do issue quashing the subdivisions.
  - e. An order do issue compelling the 2<sup>nd</sup> Defendant and County Surveyor to resurvey the original parcel, subdivide and transfer 4 equal parts thereof to the plaintiffs and 1<sup>st</sup> defendant.
  - f. That in the alternative, the court do compel the director of Survey to provide an independent surveyor to generate a mutation which tallied with the registry index map (RIM) and establish beacons.
  - g. That the court do compel the Director of Survey to issue a new RIM and or mutation over the boundaries of the suit properties.
  - h. A declaration the 1<sup>st</sup> defendant was a vexatious litigant.
  - i. That in the alternative, the court do make an order setting aside the orders dated 22/03/2018 and the application be heard de novo.
  - j. Costs of the suit and any other relief the court deemed fit.

### **1<sup>st</sup> defendants' case**



10. He was represented by the firm of Omondi, Abande & Company Advocates who filed a defence dated 21/05/2018. The 1<sup>st</sup> defendant denied the averments made in the plaint and put the plaintiffs to strict proof. He asserted his registration as the 1<sup>st</sup> registered owner of the original parcel was not objected to.
11. The subdivisions were created voluntarily by all the parties. The suit was time barred and the court was bereft of jurisdiction to entertain succession causes and resolve boundary disputes.

### **2<sup>nd</sup> and 3<sup>rd</sup> defendants' case**

12. The office of the attorney general entered appearance on 16/05/2018 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants but did not file a defence.

### **1<sup>st</sup> plaintiff's evidence**

13. The 1<sup>st</sup> plaintiff testified as PW1. His evidence was composed of his witness statement dated 18/04/2018 and oral testimony. It was his testimony Ruben was polygamous and in 1968, he divided land amongst households. The original parcel was for Dorca's household.
14. On 29/09/1975, he discovered the 1<sup>st</sup> defendant had fraudulently registered himself as the original parcel's proprietor. At his instigation and with the help of the 2<sup>nd</sup> plaintiff, the 1<sup>st</sup> defendant surrendered the original parcel's title to the 2<sup>nd</sup> defendant and subdivision was carried out which created the suit properties.
15. In December 2016, the 1<sup>st</sup> defendant's wife chopped off his trees that were on a boundary between his home and that of the 1<sup>st</sup> defendant. This culminated into Siaya PM Criminal case no. 43 of 2017. A site visit was conducted by the parties in which the 2<sup>nd</sup> respondent submitted a report to court. The report had aggrieved him since it showed the RIM, mutation and ground measurements did not tally.
16. On 25/10/2017, the 1<sup>st</sup> defendant's wife and son again chopped off his trees which were on the boundary. In Siaya PM Misc.Appli. case no. 10 of 2018, the 1<sup>st</sup> defendant was granted orders to restore his boundary and re-fence it. On 25/10/2018, the 1<sup>st</sup> defendant and his sons destroyed his properties.
17. On cross examination, he testified his main issue was the resolution of the long outstanding boundary dispute. He had lodged an appeal against the report which had never been implemented. He did not know the 3<sup>rd</sup> defendant was immune from these proceedings.

### **1<sup>st</sup> defendant's evidence**

18. The 1<sup>st</sup> defendant testified as DW1. His evidence was led by his step brother Samuel Ogutu Kwasu who testified as DW2. Apart from documents that were produced by the 1<sup>st</sup> defendant in accordance with his lists of documents, their evidence were composed of their witness statements both filed on 12/09/2019 and oral testimonies.
19. It was DW1's testimony he neither held the original parcel in trust for anyone nor did he commit fraud during adjudication. Apart from him, in Ruben's households, Elijah Owambla ('Elijah') and Ely Malawa ('Ely') who were Ruben's sons from the 1<sup>st</sup> household were respectively allocated North Gem/Malanga/1000 and 862. Ruben's wife Mama Leah Ocholla (DW2's mother and of the 4<sup>th</sup> household) was allocated North Gem/Malanga/222.
20. A public road traversed the suit properties. The 2<sup>nd</sup> defendant carried out its legal mandate and it was unfortunate all manner of public officers including the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had been dragged into



the dispute. Upon subdivision of the original parcel, the plaintiffs collected their respective title deeds and constructed houses on their respective portions.

21. On cross examination, he testified Paulo who was the eldest son from Dorca's household, was not around during adjudication. He was the only one who was registered in Dorca's household.
22. DW2 corroborated DW1's testimony. At adjudication, the original parcel could have been registered in Paulo's name, however, he unavailable. The 3<sup>rd</sup> household's parcel of land was registered in the names of Mariko Otieno and Charles Ohon but he did not recall the parcel no. He was from the 4<sup>th</sup> household which had 3 sons. He wanted the family to live in peace.

### **2<sup>nd</sup> and 3<sup>rd</sup> defendants' evidence**

23. Pursuant to witness summons, James Kamau Maina, a government surveyor testified as DW3. He prepared a report dated 04/07/2017 and issued a letter dated 05/07/2019 which corrected a typographical error in his report. From the report and corrections, the survey that took place in 1989 resulted into the suit properties. Physical boundaries were created by live hedges.
24. On cross examination, he testified the site visit he conducted on the suit properties was peaceful. Armed with the RIM and mutation form, he discovered there were slight discrepancies hence he adopted the boundaries established in 1989 and fixed the boundaries. The public road had been encroached onto thus the road between North Gem/Malanga/1181 and 1183 had been obliterated. This had led to North Gem/Malanga/1182 being denied access.
25. Kipng'etich Yegon, a land registrar, testified as DW4. He corroborated DW3's evidence. He testified pursuant to a court order, they established the boundaries between the subdivisions. The trees at the edge of North Gem/Malanga/1181 were on a public road. An appeal was not lodged against his report.
26. On cross examination, he testified his report resolved that the subsisting boundaries be maintained.

### **Plaintiffs' submissions**

27. Despite clear directions from court, the 1<sup>st</sup> plaintiff's counsel did not file his submissions. If at all they will be filed, this court will not consider them.

### **1<sup>st</sup> defendant's submissions**

28. Their counsel, Mr. Omondi, filed his written submissions dated 18/05/2023. He identified 4 issues for determination; (a) whether the 1<sup>st</sup> plaintiff had proved his claim to the required standards (b) whether the 1<sup>st</sup> defendant held the original parcel in trust for his family (c) whether the 1<sup>st</sup> defendant was a vexatious litigant and, (d) who bears the costs of the suit.
29. On the 1<sup>st</sup> issue, counsel submitted by Sections 107, 109 and 112 of the *Evidence Act*, the burden of proof lay with the 1<sup>st</sup> plaintiff. Fraud had not been proved to the required standards and the subdivision of the original parcel was carried out lawfully. Pursuant to Section 26 of the *Land Registration Act*, title could only be challenged on certain grounds.
30. Further, by Article 47 of *the Constitution*, Fair Administrative Actions Act and Order 53 of the *Civil Procedure Act*, this court was bereft of jurisdiction to entertain judicial review since it had been inappropriately moved. To buttress his position, counsel relied on R G Patel v Lalji Makanji [1957] E.A. 314 and Zechariah Wagunza & another v office of the registrar, academic Kenyatta University &



2 others [2013] eKLR that cited with approval a Ugandan decision of *Pastoli v Kabale District Local Government Council and other* [2008] 2 EA 300.

31. On the 2<sup>nd</sup> issue, counsel submitted the 1<sup>st</sup> plaintiff never produced documents to prove the subsistence of trust. Counsel relied on the well cited Supreme Court of Kenya decision of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
32. On the 3<sup>rd</sup> and 4<sup>th</sup> issues, counsel submitted the 1<sup>st</sup> plaintiff never produced evidence to demonstrate the 1<sup>st</sup> defendant had filed several suits over the same parties and subject matter and continued to do so despite dismissals. In other words, there was no proof the 1<sup>st</sup> defendant was a vexatious litigant. On the definition of a vexatious litigant, counsel cited the case of *Attorney General v Meshack Ochieng T/A Mecko Enterprises* [2019] which cited with approval *Camerado Insurance Agency v Superior Court of Sacramento County CV 52538 [STOLZ]* (1993). Costs of the suit were sought for.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions**

33. Despite being given leave, they did not file written submissions.

### **Analysis and determination**

34. I have considered the pleadings, evidence by parties including the documents that were relied upon and the 1<sup>st</sup> defendant's submissions. Being guided by the provisions of law and judicial precedents that have been well articulated by the 1<sup>st</sup> defendant's submissions, I shall now proceed to consider the merits or otherwise of the case. The issues falling for determination which will be addressed sequentially are: -
  - a. Whether the suit was competent against the 3<sup>rd</sup> defendant and the judicial officer's decision can be set aside.
  - b. Whether the 1<sup>st</sup> plaintiff proved his claim against the 2<sup>nd</sup> defendant.
  - c. Whether the claim of vexatious litigant was competent.
  - d. Whether prerogative orders can be issued.
  - e. Whether the claim of fraud was statutory barred.
  - f. Whether the 1<sup>st</sup> defendant unlawfully conducted the subdivisions.
  - g. Whether the 1<sup>st</sup> plaintiff proved customary trust subsisted over the original parcel and whether by its subdivision, trust ceased to exist.
  - h. Whether boundaries were fixed.
  - i. What orders should this court issue.
  - a. Whether the suit was competent against the 3<sup>rd</sup> defendant and the judicial officer's decision can be set aside
35. In exercise of judicial function, Article 160 (5) of *the Constitution* gives judicial officers immunity for acts done or omitted in good faith. This is in line with the doctrine of separation of powers and judicial independence. I adopt the position aptly held by Gikonyo J in *Moses Wamalwa Mukamari vs. John O. Makali & 3 others* [2012] and cited with approval by the Court of Appeal in *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR as follows: -

'I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that



kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of *the Constitution*.'

36. A judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction otherwise, public interest and confidence would be lost if a judge or a magistrate allowed fear of criminal or civil suit to affect his decisions. I find the suit against the 3<sup>rd</sup> defendant incompetently before me and hereby strike it out. The orders issued by the judicial officer cannot be set aside by an original suit. I similarly strike out this prayer.

b) Whether 1<sup>st</sup> plaintiff proved his claim against the 2<sup>nd</sup> defendant.

37. In preparing the report that was produced before court, the 3<sup>rd</sup> defendant complied with the orders of the court in Siaya PM Criminal case no. 43 of 2017. Their conduct was lawful. The order had not been purged by a review, appeal, judicial review or otherwise. In fact, had it not complied with the said order, it would have been guilty of contempt of court. I find the 1<sup>st</sup> plaintiff did not prove his claim on this issue.

c) Whether the claim of vexatious litigant was competent.

38. The law that governs the declaration of a litigant as vexatious is governed by the *Vexatious Proceedings Act* and by Section 2 thereof, the attorney general is the one who commences these proceedings. In this case, the applicant was the 1<sup>st</sup> plaintiff. I am bound by the law and I find this prayer was incompetent since the 1<sup>st</sup> plaintiff did not have capacity.

d) Whether prerogative orders can be issued.

39. Judicial review powers usually control the powers of state organs and other administrative bodies. As rightfully submitted by Mr. Omondi, it is founded on Article 47 of *the Constitution*, Fair Administrative Actions Act and Order 53 of the *Civil Procedure Act*.

40. Judicial review proceedings are special and the attorney general is usually the applicant. Because of its special nature, the ex parte applicant had to show the decision or act complained of was tainted with illegality, irrationality and procedural impropriety. See *Pastoli v Kabale District Local Government Council* (Supra). I find this court had been improperly moved and I find it cannot be cured by the oxygen principle.

41. Even if I am wrong, which am not, the 1<sup>st</sup> plaintiff had not met the conditions of prerogative orders as set down in *Shah vs. Attorney General* (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 which was cited with approval in *Republic v The Commissioner of Lands and Another Ex-Parte Kithinji Murugu M'agere*, Nairobi High Court Misc. Application No. 395 of 2012.

e) Whether the claim of fraud was statutory barred.

42. Fraud is a tortious action. The particulars of fraud were directed against the 1<sup>st</sup> defendant. By Section 4 (2) of the *Limitation of Actions Act*, the plaintiff ought to have instituted suit against the 1<sup>st</sup> defendant within a period of 3 years. However, by the provisions of Section 26 of the *Limitation of Actions Act*, the period started running from when the 1<sup>st</sup> plaintiff discovered fraud. From the 1<sup>st</sup> plaintiff's evidence,



he discovered fraud on 26/09/1975. This suit was filed on 18/04/2018 which was 43 years after he discovered fraud. I need not say more. I find the claim of fraud was statutory barred.

f) Whether the 1<sup>st</sup> defendant unlawfully conducted the subdivisions.

42. The particulars of illegalities were not disclosed. By his own testimony, the 1<sup>st</sup> plaintiff testified he and the 2<sup>nd</sup> plaintiff (deceased) with the aid of the 2<sup>nd</sup> defendant compelled the 1<sup>st</sup> defendant to subdivide the original parcel in order to create the suit properties.

43. From the evidence, the register of the original parcel was closed on 11/3/1992. The subdivisions which created the suit properties were transferred. The 1<sup>st</sup> plaintiff even constructed on the parcel that was transferred to him. He even collected the title document for North Gem/Malanga/1183. His claim and evidence on this issue were at variance. He was untruthful and did not prove this claim.

g) Whether the 1<sup>st</sup> plaintiff proved customary trust subsisted over the original parcel and whether by its subdivisions, trust ceased to exist.

43. Section 24 (a) of the *Land Registration Act* states the registration of a person as the proprietor of land shall vest in that person absolute ownership together with all such rights and privileges thereto. Within Section 25 of this Act a registered proprietor holds title subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights and interests including overriding interests which have been recognised by Section 28 (b) of the same Act to include customary trusts.

43. As rightfully submitted by Mr. Omondi, the apex court settled the principle of customary trust in *Isaack M’Inanga Kiebia v. Isaaya Theuri M’Lintari* (Supra). In the case of *Peter Gitonga v Francis Maingi M’Ikiara Meru HC.CC NO. 146 OF 2000* it was stated:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.”

43. The Court of Appeal in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR held: -

‘ “The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.’

43. These provisions of law and settled decisions affirm that customary trust is an encumbrance on land, it is not noted in the register of the subject land, possession and occupation is irrelevant, each case has to be determined based on the quality of evidence adduced, by Section 107 of the *Evidence Act*, the persons claiming trust had the onus of proving it. The court can never imply trust but give effect to the intention of the parties to create such a trust for the benefit of a group of other family members.

43. From the evidence adduced, the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant are siblings from the 2<sup>nd</sup> household of Dorca. At adjudication, Ruben was deceased and from evidence, his parcels were registered according to households. DW2 did not have an interest in the suit properties. He testified Paulo who was the 1<sup>st</sup>



son of Dorca could have been registered but because of his absence, the 1<sup>st</sup> defendant was registered as the proprietor.

43. From evidence, Dorca's sons always lived on the original parcel. None of Dorca's sons except the 1<sup>st</sup> defendant was registered as proprietor. I find it was the intention of Dorca's household the original parcel was to be held in trust for her entire household by the 1<sup>st</sup> defendant. It was on this basis the 1<sup>st</sup> defendant readily subdivided and allocated the suit properties to all of Dorca's sons including Paulo who was then deceased.

43. The question that suffices is, was the trust dissolved by the subdivisions? My answer is in the affirmative. The first registration affirmed the parties' customary rights over the original parcel. However, by the subdivisions, the trust was dissolved between the brothers. This was well explained in the book of Ramjohn Mohamed, *Beginning Equity and Trusts*, Taylor & Francis Group, 2013, page 31 as follows:-

'As the equitable owners of the trust property, the beneficiaries are entitled to assign the whole or part of such interest to others. They are also entitled to terminate the trust by directing the trustees to transfer the legal title to them, provided that they have attained the age of majority (18 years) are compos mentis (mentally sound) and absolutely entitled to the trust property. This is known as the rule in *Saunders v Vautier* (1841) 4 Beav 115.' Emphasis added.

I find none of Dorca's sons including the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant currently hold their respective subdivisions in trust for each other.

h) Whether boundaries were fixed.

45. DW3 and DW4 testified they fixed the boundaries of the disputed portions. However, I am uncertain if it was conducted since the site visit conducted on 4/07/2017 was pursuant to a court order issued in Siaya PM Criminal case no. 43 of 2017. The mandate of the the county land surveyor and land registrar was restricted by the said order. I have scrutinised the report and there is no evidence a boundary was fixed on the fateful date.

46. By Sections 18 and 19 of the [Land Registration Act](#), the county land surveyor and land registrar are vested with jurisdiction to fix boundaries for parcels of land that did not have fixed boundaries.

47. In the event this exercise was never conducted, any of the registered proprietors of the suit properties or their respective legal representatives are at liberty to make a formal application to the land registrar in accordance with the Sections 18 and 19 of the [Land Registration Act](#).

i) What orders should this court issue.

48. Ultimately, apart from my findings on the competence of the suit which I hereby strike out, I find the 1<sup>st</sup> plaintiff did not prove his claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the required standards. Considering the special relationship between the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant, each party shall bear their respective costs.

49. I hereby issue the following final disposal orders: -

- a. That the 1<sup>st</sup> plaintiff's suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants is hereby dismissed.
- b. That the suit against the 3<sup>rd</sup> defendant is hereby struck out.
- c. That each party shall bear their respective costs of this suit.

49. It is so ordered.



**Delivered and Dated at Siaya this 20<sup>th</sup> Day of June 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**20/6/2023**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

N/A for parties.

Court assistant: Ishmael Orwa

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