



**Barasa v Kwoba (Environment & Land Case E023 of 2021)
[2023] KEELC 20093 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E023 OF 2021
BN OLAO, J
SEPTEMBER 27, 2023**

BETWEEN

CRESENT WANDERA BARASA PLAINTIFF

AND

PAUL ODHIAMBO KWOPA DEFENDANT

JUDGMENT

1. This is yet another of those cases involving land which, originally did not even belong to any of the parties. Such disputes are usually propelled by greed, the root of all evil, and founded on an insatiable desire for wealth. The Bible says in LUKE 12:15:

“And he said to them, ‘take heed and beware of all covetousness; for a men’s life does not consist in the abundance of his possessions.”
2. Crescent Wandera Barasa (the Plaintiff herein) and Paul Odhiambo Kwoba (the Defendant herein) are cousins. The Plaintiff’s father Barasa Anyango and the Defendant’s father Kwoba Anyango Masiga (both deceased) were sons of the late Anyango Masiga who, as admitted by both parties in their pleadings, was the original proprietor of the land parcel No Bukhayo/ebusibwabo/149 (the suit land).
3. By his plaint dated 2nd May 2021 and filed on 4th May 2021, the Plaintiff sought judgment against the Defendant in the following terms with respect to the suit land:
 1. A declaration that the Defendant holds a portion measuring approximately 11.16 acres or 4.52 Hectares out of the land parcel No Bukhayo/ebusibwao/149 in trust for the Plaintiff.
 2. An order that the Defendant executes all the relevant documents for the sub-division and transfer of a portion measuring approximately 11.16 acres or 4.52 Hectares out of the land parcel No Bukhayo/ebusibwabo/149 to the Plaintiff and in default thereof, the Executive Officer of this Honourable Court do execute the said documents on behalf of the Defendant.



3. Costs of this suit.
4. Any other relief this Honourable Court deems fit to grant.
4. The crux of the Plaintiff's case is that his late father Barasa Anyango and the Defendant's late father Kwoba Anyango Masiga were brother's and sons of Anyango Masiga who was the original proprietor of the suit land. The Plaintiff's father died before the land adjudication process and so the suit land was registered in the names of the Defendant's father to hold in trust for himself and for the Plaintiff. The particulars of trust are pleaded in paragraph 5(i) to (iv) of the plaint as follows:
 - i. "That land parcel No Bukhayo/ebusibwabo/149 is ancestral land belonging to the Plaintiff's and the Defendant's grandfather."
 - ii. "That the Defendant's father took over the Plaintiff as his own son inheriting his mother after the death of his father and took care of the Plaintiff until his death."
 - iii. "That after the death of the Defendant's father, the clan elders demarcated a portion of the land measuring approximately 11.16 acres or 4.52 Hectares in the Plaintiff's occupation out of the land parcel No Bukhayo/ebusibwabo/149 with a distinct boundary in the year 2004."
 - iv. "That the suit land was registered in the Defendant's names during adjudication as the Plaintiff's father had passed on and the Plaintiff was young."

There must be an error in paragraph 5(iv) and I believe the proper pleading should be that the suit land was registered in the names of the Defendant's father during adjudication as the Plaintiff's father had passed on and the Plaintiff was still young.

5. Together with the plaint, the Plaintiff filed his statement and that of his witness Joseck Nelson Juma both dated 7th April 2021.
6. In his statement, the Plaintiff basically rehashed the contents of his plaint which is that his late father Barasa Anyango and the Defendant's late father Kwoba Anyango Masiga were brothers both being the sons of Anyango Masiga the original owner of the suit land. That the Plaintiff's father having died before the land Adjudication process in Bukhayo, the suit land was registered in the names of the Plaintiff's father (this must be an error in paragraph 5 of the statement and the Plaintiff must have meant that the land was registered in the names of the Defendant's father) to hold in trust for his brother and his children.
7. That following the death of the Plaintiff's father, the Defendant's father inherited the Plaintiff's mother with whom he sired three daughters and took care of them as his own children until his death. The Plaintiff occupies a portion of the suit land measuring 11.16 acres or 4.51 hectares with a distinct boundary which was re-established by the elders of Matayos Land Disputes Tribunal. The Defendant however took out Letters of Administration in respect of his father's Estate vide Busia High Court Succession Cause No 149 of 2014 but did not recognize his interest in the suit land thus necessitating this suit. The Defendant therefore holds the suit land in trust and should be ordered to execute subdivisions and transfer documents in favour of the Plaintiff.
8. The Plaintiff's witness Joseck Nelson Juma (PW2) also recorded his statement dated 7th April 2021 in which he confirmed that the parties are his cousins and neighbours and both are grandsons of the late Anyango Masiga and that their fathers were brothers.
9. He added that the suit land was registered in the names of the Defendant's father to hold in trust for himself and the Plaintiff who was young and whose father had passed away. That following the death of the Plaintiff's father, the Defendant's father inherited the Plaintiff's mother Phance Nekesa



with whom they got three daughters. They all lived together and the Plaintiff even took care of the Defendant's father until his demise as his (Defendant's father's) wife had run away. The suit land was therefore sub-divided into two portions by the elders in 2007 giving the Plaintiff a parcel measuring 11.16 acres.

10. The Plaintiff filed a list of documents dated 7th April 2021 containing the following in support of his case:
 1. Copy of register for the land parcel No Bukhayo/ebusibwabo/149.
 2. Copy of Busia Land Disputes Tribunal.
 3. Copy of Grant of Letters of Administration issued to the Defendant on 14th April 2021 in Busia High Court Succession Cause No 149 of 2014 in respect to the Estate of Kwoba Anyango Masiga.
11. In response to the Plaintiff's claim, the Defendant filed a statement of defence and counter-claim dated 21st October 2021. He admitted that the Plaintiff's deceased father Barasa Anyango and his late father Kwoba Anyango Masiga were brothers and sons of Anyango Masiga. He added that other than the suit land, the said Anyango Masiga was also the owner of another land parcel No Bukhayo/ebusibwabo/143 as well as another parcel of land whose registration number has not been disclosed. He denied that the Plaintiff's father died before the Land Adjudication process or that his late father held the suit land for himself and the Plaintiff's late father. He also denied all the Plaintiff's averments of trust adding that there was infact a long standing dispute between him and the Plaintiff over the suit land in Busia High Court Succession Cause No 149 of 2014. He pleaded further that the suit is incurably defective as the Plaintiff cannot purport to file a suit on behalf of his late father without a Grant of Letters of Administration and therefore lacks the locus standi. Further, the Plaintiff's suit is res judicata as he had filed a similar suit at the Matayos Land Disputes Tribunal in which these same issues were determined. Tribunal's award was adopted as a judgment of the Court in Busia Chief Magistrate's Court Land Case No 11 of 2004. Similarly, the dispute between the parties was determined vide Busia High Court Succession Cause No 149 of 2014 in favour of the Defendant. The Plaintiff's suit is therefore time-barred by operation of the law.
12. In his counter-claim, the Defendant pleaded that his late father was the absolute and sole registered proprietor of the suit land measuring 21.725 acres (8.69 hectares) to the exclusion of anybody else. That the Plaintiff was invited to live on the suit land by the Defendant's father and therefore lives thereon with the consent of the Defendant which consent has now expired. Further, that the Plaintiff has abused the Defendant's Courtesy by bringing strangers who have erected structures on the suit land without the Defendant's consent and knowledge.
13. The Defendant therefore seeks the following orders against the Plaintiff by way of counter-claim:
 1. Eviction of the Plaintiff and his agents from the land parcel No Bukhayo/ebusibwabo/149.
 2. An order of permanent injunction restraining the Plaintiff, his agents, servants and family members from constructing on, using, occupying and/or re-entering the land parcel No Bukhayo/ebusibwabo/149.
 3. Costs.
 4. Interest.
 5. Any other relief as this Court may deem fit to grant.



14. The defendant filed his statement dated 21st October 2022 and those of his witnesses Ouma Bramwel (dw2) and Justine Akinyi Ouma (dw3) both dated 14th February 2022.
15. In his statement, the defendant confirmed that apart from the Plaintiff's father and his father, their grandfather Anyango Masiga had one other son and a daughter. That before his demise, the said Anyango Masiga had given all his sons their parcels of land. That the Plaintiff's father had been given the land parcel NO Bukhayo/ebusibwabo/143 while his father had been given the suit land. That the Plaintiff's father was living on the land parcel NO Bukhayo/ebusibwabo/143 where he was buried and not on the suit land. That after the demise of his father, the Plaintiff and his mother vacated the land parcel NO Bukhayo/ebusibwabo/143 and moved onto the suit land. That the land parcel No Bukhayo/ebusibwabo/143 was then grabbed by one Absalom Wabwire now deceased and was registered in his names during the Land Adjudication process. The suit land was registered in his late father's land. Since the Plaintiff was older than him during the Land Adjudication process, he (the Plaintiff) should have been registered as the proprietor of the land if indeed his late father owned part of it.
16. That in 2007, the Plaintiff mobilized an unruly mob which descended onto the suit land and forcefully planted a boundary thereon. It is therefore not true that the elders demarcated the boundary in 2004 as alleged by the Plaintiff.
17. He denied having been a party in the Matayos Land Disputes Tribunal case adding that in any case, those proceedings show that this case is res judicata. He added that the Plaintiff had unsuccessfully challenged the proceedings in Busia High Court Succession Cause No 149 of 2014. He denied the claim by the Plaintiff's witness Joseck Juma (pw2) who alleged to be a cousin to the parties. Instead, he accused the Plaintiff of selling part of the suit land to third parties and denied that his late father held the suit land in trust for the Plaintiff or his father.
18. Ouma Bramwel (dw2) recorded in his statement that he is a cousin to the parties and the suit land was given to the Defendant's father while the Plaintiff's father was given another parcel of land. The Plaintiff should therefore claim his land from one Absalom. He added that the Defendant was not present when the elders purportedly demarcated the boundary. That the illegal boundary was forcefully planted by the Plaintiff, Pius Ouma and Jonaya Ouma in the Defendant's absence. He too denied having participated in the Tribunal's proceedings adding that the Plaintiff is a busy body who is disposing off the suit land to third parties.
19. In her statement Justine Akinyi Ouma (dw3) states that she is the widow of Albert Ouma Kwoba a brother to the Defendant. That in 2003, there was a dispute between her late husband and the Plaintiff over the suit land. The same was reported to the chief who advised them to call the elders for reconciliation. However, by the time the elders came, her husband was too sick to attend and the Defendant was away. The Plaintiff took advantage of her husband's illness and the Defendant's absence and forcefully put a boundary.
20. When the Defendant came back, he decided to do succession in order to resolve the dispute once and for all. The Plaintiff unsuccessfully filed an objection to the proceedings and later filed this case after placing a caution on the suit land. She denied that the Defendant attended the proceedings at the Matayos Land Disputes Tribunal stating that he was away in Mombasa while her late husband was bed-ridden. Those proceedings are therefore doctored.
21. The Defendant did not file any list of documents but in his replying affidavit dated 26th July 2022 in response to the Plaintiff's application for inhibition he annexed a copy of the confirmed Grant issued



on 8th July 2022 to the Defendant in respect to the Estate of Kwoba Anyango Masiga. It shows that the suit land was the only property of the said Kwoba Anyango Masiga and was distributed as follows:

1. Defendant - 12.325 acres
 2. Justice Akinyi Ouma
 3. Charles Abwire Ouma - 9.4 acres jointly
 4. Barasa Ouma
22. The Plaintiff filed a reply to the defence and a defence to the counter-claim. He joined issues with the Defendant and reiterated the contents of his plaint. He denied statement of defence in particular paragraphs 16, 17, 18, 19, 20, 21, 22 and 23 thereof and averred that he is in occupation of a clearly demarcated portion of the suit land measuring 4.52 hectares registered in the names of Kwoba Anyango Masiga now deceased.
23. The plenary hearing commenced before Omollo J who heard the Plaintiff's evidence and that of his witness on 13th July 2022. They adopted as their evidence the contents of their statements which I have already summarised above. The Plaintiff also produced the documents filed herein as his documentary evidence.
24. The Defendant and his witnesses testified before me on 9th March 2023 following the transfer of Omollo J. They too adopted their respective statements as their evidence.
25. Submissions were thereafter filed both by Mr Otanga instructed by the firm of Bogonko, Otanga & Company Advocates for the Plaintiff (the submissions wrongly indicate that they are advocates for the Defendant) and by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the Defendant.
26. I have considered the evidence by the parties as well as the submissions by counsel.
27. Before I delve into the gist of the dispute, the Defendant has in his defence raised issues which not only touch on the jurisdiction of this Court to determine this dispute but also touch on the locus standi of the Plaintiff to file this suit. Those are important issues which this Court must determine as a first point of call because, as was held in the case of Owners Of The Motor Vessel 'lilian S' -v- Caltex Oil Kenya Ltd 1989 Klr 1 (as Per Nyarangi Ja):

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Defendant made a fleeting reference to this Court's want of jurisdiction when at paragraph 14 of his statement, he stated that the Plaintiff's suit is res judicata as the issues herein were canvassed in Matayo's Land Disputes Tribunal. And in the submissions by his counsel Mr Onsongo, the following submission is made at page 14:

“Lastly, we humbly submit that jurisdiction is everything. The High Court has made a decision in the Succession Cause. This Honourable Court being of equal status is not clothed with jurisdiction to deal with a matter already determined by a competent Court of equal jurisdiction. That would be tantamount to sitting on it's own appeal”.

The Defendant also pleaded in paragraph 14 of his defence as follows:



14: “The Defendant avers that the suit is time-barred by operation of the law.”

Earlier, in paragraph 12 of his defence, the Defendant pleaded that:

12: “The Defendant avers that the Plaintiff’s claim is incurably defective as he cannot purport to bring a suit on behalf of his deceased father without Letters of Administration. He therefore lacks locus standi.”

It is important to note, however, that in paragraph 11 of his defence, the Defendant pleaded that:

11: “Jurisdiction is admitted.”

A party cannot approbate and reprobate at the same time.

28. Having said so, and since the issues touching on jurisdiction, res judicata, limitation and the Plaintiff’s locus standi have been raised by the Defendant, it is imperative that I address them at this point.

JURISDICTION

29. As I have already stated above, the Defendant did approbate and reprobate on the issue of jurisdiction but finally conceded that this Court is indeed clothed with the requisite jurisdiction to handle this dispute.
30. That notwithstanding, it is common ground that the Plaintiff’s case is that the Defendant holds a portion of the suit land in trust for him. On the other hand, the Defendant’s counter-claim is that he is the sole and absolute proprietor of the said land on which the Plaintiff has only been living with his consent. That the said consent has now expired and the Plaintiff should be evicted therefrom. The dispute is clearly therefore one relating to the ownership of land and falls within Section 13 of the [Environment and Land Court Act](#) which sets out this Court’s jurisdiction.
31. Secondly, counsel for the Defendant has submitted that the suit land having been the subject of succession proceedings, this Court has no jurisdiction to deal with a matter already handled by another Court of competent jurisdiction. It is true that the suit land was the subject of proceedings in Busia High Court Succession Cause No 149 of 2014. However, the primary duty of the Court in succession proceedings was to distribute the Estate of Kwoba Anyango Masiga. That Court had no jurisdiction to determine a dispute over ownership of land such as trusts or order for the eviction of any person which is what the parties herein seek. That jurisdiction is solely vested in this Court, or a subordinate Court determining a civil dispute within its pecuniary jurisdiction by dint of Section 13 of the [Environment and Land Court Act](#), Section 150 of the [Land Act](#), Section 7 of the [Magistrates’ Courts Act](#) and Article 165(5) of [the Constitution](#).
32. In any event, once the Succession Court has confirmed the Grant, it becomes functus officio.
33. The challenge to this Court’s jurisdiction is not well taken. It is hollow and I dismiss it.

Res Judicata

34. This is provided for in Section 7 of the [Civil Procedure Act](#) as follows:
- 7: “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”



In support of his claim that the Plaintiff's suit is res judicata, the Defendant has pleaded as follows in paragraph 13 of his defence:

13: "The Defendant avers that the suit is res judicata as the Plaintiff brought the same suit against the Defendant and his late brother vide Matayos Land Disputes Tribunal and though the Defendant did not participate. It determined the issues herein and which award was adopted as judgment of this Court vide Busia Cm L.d No 11 of 2004 and there was a long standing dispute between the parties herein vide Busia H.c. P & A No 149 of 2014 which was resolved in favour of the Plaintiff."

For res-judicata to be applied, the following must be proved;

1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit in which the plea of res judicata is being raised.
2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.
3. The former suit must have been heard and finally determined.
4. The Court or Tribunal which determined the former suit must have been competent.

The basis upon which the Defendant is pleading that this suit is res judicata is therefore two fold; the first is that the issues herein were determined by the Matayos Land Disputes Tribunal and second, that the same issues were resolved by the High Court In Succession Cause No 149 of 2014.

35. Unfortunately, however, the plea of res judicata cannot be sustained because, with respect to the proceedings in the Matayos Land Disputes Tribunal, the issue which was considered was only relating to a boundary dispute. Indeed in it's ruling, the said TRIBUNAL made the following order:

"From the evidences (sic) by both partners (sic) and observation made during the site visit, the panel rules out that; the first boundary made by the clan elders shall be adapted and established from the upper side to the stream."

The Tribunal did not, and could not, determine the issue of trust which is now being raised by the Plaintiff in this suit. It's jurisdiction was circumscribed under Section 3(1) of the now repealed Land Disputes Tribunal Act which provided that:

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."

It is clear from the above provisions that a claim based on trust was not within the jurisdiction of the Tribunal under the repealed law. That was made clear by the Court of Appeal in the case of Joseph Malakwen Lelei And Another -v- Rift Valley Land Disputes Appeal Committee And Others C.a. Civil Appeal No 82 Of 2006 (eldoret) where the Court citing the above provisions stated thus:

"Evidently, the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land or the determination of a trust in favour of a party which in essence was the basis of the 3rd respondent's claim."



It follows from the order in the Tribunal and the applicable law and precedents that the Matayos Land Disputes Tribunal did not make any determination on the issue of trust and would not have had any jurisdiction to do so.

36. Similarly, the High Court in the Succession Cause No 149 of 2014 did not determine the issue of trust and would not have been seized of the jurisdiction to do so. Its jurisdiction being limited to distributing the Estate of a deceased.
37. The plea of res judicata is not well taken. It is dismissed.

Limitation

38. The Defendant has pleaded in paragraph 14 of his defence that the Plaintiff's suit "is time-barred by operation of the law." No reasons have been advanced as to why the Plaintiff's suit is "time-barred by operation of the law." Indeed no law was cited for that proposition.
39. The Plaintiff's claim is founded on a customary trust as he claims the suit land was ancestral land. The position in law is that the law on Limitation does not apply in such cases. In *Macharia Kihari -v- Ngigi Kiahri C.a. Civil Appeal No 170 of 1993 [1994 eKLR]* the Court of Appeal said:

"Limitation period prescribed in Section 20(2) of the Limitation of Action Act will not apply to a trust coming into existence under Customary Law. Under Customary Law, the land even after the right of action has occurred is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in Customary Law."

40. Similarly, the case of *Stephens & 6 Others -v- Stephen & Another C.a. Civil Appeal No. 18 of 1987 [1987 eKLR]*, the Court of Appeal held that:

"The philosophy underlying the English Limitation Act seems to be that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case (see Section 19(1) of the Limitation Act 1939). The Parliament of Kenya clearly shares that policy and in the *Limitation of Actions Act* (cap 22) enacted a similar provision in almost identical language."

The Court then went on to cite the provisions of Section 20(1) (b) of our *Limitation of Actions Act* (cap 22) which states that:

"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action -

- (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

The claim that the Plaintiff's suit is time barred was therefore not raised with any serious conviction. The Defendant was simply whistling in the dark. That objection is similarly rejected.



Locus Standi

41. Finally, the Defendant asserts that the Plaintiff lacks the locus standi; to file this suit on behalf of his deceased father as he has not obtained any Grant of Letters of Administration.

42. Again, that is a vain assertion. The Plaintiff has not in his pleadings stated that he has approached this Court in his capacity as the Administrator to the Estate of his late father or on behalf of any Estate. Rather, he has file this suit in his own names seeking orders that a portion of the suit land be registered in his name. If there was any doubt as to the nature of his claim, that has been clarified in paragraphs 6 and 7 of his plaint. They are worth repeating and read as follows:

6: “The Plaintiff claim against the Defendant for declaration that he holds a portion measuring approximately 11.16 acres or 4.52 hectares out of L.r No. Bukhayo/ebusibwabo of 149 in trust for the Plaintiff.”

7: “The Plaintiff further claims against the Defendant for the Defendant to execute all the relevant documents of sub-division and transfer of a portion measuring approximately 11.16 acres or 4.52 hectares out of the suit property to the Plaintiff and in default thereof, the executive officer of this Honourable Court do execute the same documents on behalf of the Defendant.”
Emphasis mine.

43. The term locus standi is defined in Black’s Law Dictionary 10th Edition as:

“The right to bring an action or to be heard in a given forum.”

In Alfred Njau & Others -v- City Council Of Nairobi 1982 Kar 229, it was held that:

“... The term locus standi means a right to appear in Court and conversely, to say that a person has no locus standi means hat he has no right to appear or be heard in such and such proceedings.”

Basically, therefore, a party who has an identifiable interest in a subject of litigation and which is under threat, or has been violated has a right to approach the Court seeking relief. In this case, it is the Plaintiff’s case that the Defendant holds the suit land in trust for him. He has approached this Court in his personal capacity alleging that the Defendant, as a trustee, has violated his interest in the suit land. He has not approached this Court as an Administrator of his late father’s Estate. The orders which he seeks are for his own personal benefit. It cannot therefore, by any stretch of imagination, be argued that the Plaintiff has no locus standi to file this case. He certainly has. Whether or not his claim will be up-held is a matter to be determined by the evidence and which I am about to do.

44. The objection as to the Plaintiff’s lack of locus standi to prosecute this suit is fallow. I dismiss it.

45. Having dispensed with those jurisdictional issues, I shall now consider the merits or otherwise of the Plaintiff’s claim and the Defendant’s counter-claim.

46. The salient issues in this case are not even in dispute. It is common ground that:

1. The parties are cousins.
2. The Plaintiff’s late father Barasa Anyango and the Defendant’s late father Kwoba Anyango Masiga were brothers.
3. The parties are grandsons of Anyango Masiga the original owner of the suit land.



4. The suit land was first registered in the names of the said Kwoba Anyango the Defendant's father on 15th January 1971.
 5. The Defendant applied for and obtained a Confirmed Grant in respect of the Estate of Kwoba Anyango Masiga on 8th July 2022 in Busia High Court Succession Cause No 149 of 2014 in which the suit land was the only property shared between the beneficiaries to the Estate.
 6. The only beneficiaries were the Plaintiff whose share is 12.325 acres while Justine Akinyi Ouma, Charles Abwire Ouma and Barasa Ouma jointly shared 9.4 acres.
 7. The Defendant placed a restriction on the suit land on 22nd February 2016 and which was still in place as at 8th April 2021 as per the Green Card.
 8. The Plaintiff lives on the suit land.
47. I consider the following two issues to be germane in the determination of this dispute:
1. Whether the Defendant's father held the suit land in trust for the Plaintiff who is entitled to 11.16 acres (4.52 Hectares)
 2. Whether the suit land was the sole property of the Defendant's father and the Plaintiff is a trespasser thereon and ought to be evicted therefrom.

I shall consider the two issues simultaneously.

48. Although the succession proceedings were finalised in Busia High Court Succession Cause No 149 of 2014, there is nothing to show that the suit land has since been distributed to the heirs including the Defendant. From his own defence in paragraph 22, it would seem that the suit land is yet to be transmitted to the beneficiaries and that is why the Defendant seeks the main orders that the Plaintiff and his agents and family members be evicted and injuncted from re-entering "the land parcel No Bukhayo/ebusibwabo/149." That shows that the restriction placed on the suit land is yet to be removed, at least as at the time of drafting this judgment.
49. As the registered proprietor of the suit land, Kwoba Anyango, and whose Estate the defendant is the Administrator, enjoined the rights set out in Section 26(1) of the [Land Registration Act](#) which provides that:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -"

A similar provision was found in Section 27 of the repealed Registered [Land Act](#) which was the law when the suit land was registered in the names of the Defendant's father in 1971. Therefore, as the registered proprietor of the suit land, the Defendant's father and, following his demise, his son the Defendant as Administrator of his Estate, had the right to evict the Plaintiff and his family from the said land and injunct them from re-entering. Those are the remedies which the Defendant seeks in his counter-claim.



50. However, Section 25 of the *Land Registration Act*, while affirming the rights and privileges to which a registered proprietor of land is entitled to, it goes on to provide under sub-paragraph (2) that:

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

A similar provision was found in Section 28 of the repealed Registered *Land Act*.

51. Section 28(b) of the *Land Registration Act* provides that among the overriding interests to which registered land is subject are:

“trusts including customary trusts”

It is now well established that the registration of a person as proprietor of land does not extinguish the customary land rights of those in occupation and possession thereof including those claiming under a trust. See *Mbui Mukangu -v- Gerald Mutwiri Mbui C.a. Civil Appeal No 281 Of 2000 [2004 Eklr]* And *Gathiba -v- Gathiba 2001 2 E.A 342* among other cases.

52. I shall now consider whether infact the Plaintiff has proved that he is entitled to a portion of the suit land by way of a trust.

53. The Plaintiff claims that the suit land was infact ancestral land belonging to the parties grandfather Anyango Masiga. While the Defendant concedes that the suit land was indeed the property of the parties grandfather prior to registration, he adds that it was registered in the names of his father as his sole property while another parcel of land being parcel No Bukhayo/ebusibwabo/143 was given to the Plaintiff's father but was abandoned and grabbed by one Absalom Bwire although there was no proof of that. However, the fact that the Plaintiff and his family occupy a portion of the suit land is not disputed.

54. In the case of *Isack M'inanga Kiebia -v- Isaaya Theuri M'lintari & Another Supreme Court Petition No 10 [2018 eKLR]*, the Supreme Court recognised that not every claim of a right to land will qualify as a customary trust and each case has to be determined on it's own merits and quality of the evidence. Nonetheless, the Court identified the following as some of the elements that can prove a trust:

1. The land in question was before registration family, clan or group land.
2. The claimant belongs to such family, clan or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

The Plaintiff confirmed, and it is not in dispute, that he lives on the suit land. During the plenary hearing, he added that his late father was buried on the suit land which belonged to their grandfather. The suit land is therefore family land and the Plaintiff's relationship to the family cannot be described as “so remote or tenuous as to make his claim idle or adventurous” – *Isack M'inanga Kebia -v- Isaaya Theuri M'lintari (supra)*.



55. It is also instructive to note that at no time did the Defendant's late father, during his lifetime, attempt to evict the Plaintiff from the suit land. That can only be an affirmation of the fact that he recognised the Plaintiff's interest in the suit land. The Matayos Land Disputes Tribunal further affirmed the Plaintiff's interest in the suit land and that is why it went ahead to demarcate the boundary. It would not have done so if it was of the opinion that the Plaintiff was a stranger with no such interest.
56. When he was cross-examined by Mr Otanga on 9th March 2023, the Defendant said the following which is further proof that the suit land is family land occupied by the Plaintiff and his family:

“The Plaintiff live on the land in dispute. It's Bukhayo/ebusibwabo/149. I am the Administrator to the Estate of Kwoba Anyango the registered proprietor of the said land. He did not buy it. He inherited it from his father.”

He went on to confirm that the Plaintiff, his mother and sisters were all living on the suit land under the care of his (defendant's) father. He then went by to add that the land parcel No Bukhayo/ebusibwabo/143 was registered in the name of Absalom Wabwire and is utilized by his children following his demise. It is hollow, therefore, for the Defendant to plead that his late father was the sole proprietor of the suit land and that the Plaintiff and his family only occupy it with his consent which “has now expired”. The true position is that the Plaintiff and his family are on the suit land as of right and not with the “consent” of the Defendant. The Defendant cannot therefore delude himself that he has any powers to purport to terminate any “consent”. His deceased father was a trustee holding the title to the suit land on behalf of himself and the Plaintiff's father. The Defendant, as the Administrator to the Estate of his deceased father, is therefore under an obligation to ensure that his co-beneficiaries are given their entitlement of the suit land. In paragraph 19 of his counter-claim, he has alleged without giving names or sizes of the land, that “the Plaintiff has abused the Courtesy and brought in strangers whom he has purported to sell part of the parcel of land.” It would have been useful to name those strangers and indicate what portions of the suit land have been sold to them. He did not bother to do so thus making it a mere un-substantiated allegation.

57. In his submissions, counsel for the Defendant has stated that the suit land is not solely owned by the Defendant but by other third parties who have not been sued and therefore have not been heard. They may therefore be affected by this Court's judgement against the rules of Natural Justice. The only document produced before this Court is the copy of the register which shows the Defendant's father as the registered proprietor of the suit land. Although the Grant in Busia High Court Succession Cause No 149 of 2014 was confirmed by Karanjah J on 7th July 2022 with the Defendant getting 12.325 acres and three other beneficiaries benefiting with 9.4 acres jointly, there is no evidence to suggest that any transmission has so far been done in favour of the beneficiaries as required under Section 61 of the *Land Registration Act* or Section 50 (1) of the *Land Act*. It is only after transmission has been done as provided in the above provisions that the beneficiaries named in the Confirmed Grant can acquire their title deeds out of the property the subject of the transmission. Only then can they be regarded as the registered owners of any property. Section 61(2) of the *Land Registration Act* is very clear. It reads:

“Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission -

- (a) any transfer by the personal representative; and
- (b) any surrender of a lease or discharge of a charge by the personal representative.”



Section 50(2) of the *Land Act* reads:

“Upon production of grant, the Registrar may without requiring the personal representative to be registered, register by transmission –

- a. any transfer by the personal representative; and
- b. any surrender of a lease or discharge of a charge by the personal representative.”

For purposes of this judgment therefore, the only evidence by way of register shows that the proprietor of the suit land is Kwoba Anyango whose Estate is being Administered by the Defendant. I do not think, therefore, that there is much merit in the submission by counsel for the Defendant when he says at page 3 that:

“As it stands, the land in dispute is not solely owned by the Defendant but by other third parties. Those third parties are not parties to this suit. They have not been heard before the claims over their land is determined. In the very unlikely event that they are adversely affected by the determination of this suit, they shall have been punished unheard. That goes against the rules of Natural Justice. After confirmation and distribution of part of the land in dispute to them, the Plaintiff should have moved the Court to have them joined in the suit.”

58. My take on that is that a confirmed grant does not confer any title to land to the beneficiaries until the provisions of Section 60(1) of the *Land Registration Act* or Section 50(2) of the *Land Act* are complied with. A claim for land by way of a trust can only be directed against the registered proprietor of the land or, as is the case here, the personal representative who is the Defendant. It was not necessary to implead the other three beneficiaries named in the Confirmed Grant namely Justine Akinyi Ouma, Charles Abwire Ouma and Barasa Ouma who between them jointly shared 9.4 acres out of the suit land because, they are not yet the registered proprietors of their respective portions of the suit land as per the record.
59. Having said so, however, and since the Defendant himself distributed part of the suit land to the three other beneficiaries, and to further pre-empt the issues that counsel for the Defendant has raised in the above submissions, this Court while making it's final orders will craft them in such manner that the three other beneficiaries are not prejudiced.
60. All the above considered, it is clear that the Defendant's father held the title to the suit land in trust for the Plaintiff. It is by virtue of that trust that the Plaintiff and his family still continue to occupy the suit land. The Defendant cannot therefore be granted the orders to evict or injunct the Plaintiff and his family from utilising the suit land. His counter-claim is for dismissal.
61. On the other hand, the Plaintiff has been able to prove, to the satisfaction of this Court, that the Defendant's father held the title to the suit land in trust for him following the demise of his father. The Defendant's father was always aware of his obligation as a trustee and that is why, during his lifetime, he did not evict the Plaintiff and his family therefrom. The suit land was never the private property of the Defendant's father. It has always been family land and by virtue of the principles of intergenerational and intragenerational equity, human dignity and social justice espoused in Section 18 of the *Environment and Land Court Act* and Article 10 of *the Constitution*, I am satisfied that the Plaintiff has proved his claim against the Defendant as prayed in the plaint and is entitled to the orders sought.



62. As to what amount of land the Plaintiff is entitled to, the size of the suit land is 8.69 Hectares (21.473 acres). The Plaintiff claims 11.16 acres which is half of the suit land. Although the Plaintiff produced as part of his documentary evidence a sketch map of the suit land, it does not show exactly how much land he and his family occupy. A surveyor's report ought to have been prepared and produced to prove exactly what amount of land the Plaintiff and his family occupy. The sketch map appears to have been produced basically to show the boundaries of the land as occupied by the Plaintiff and the Defendant as well as the original portions occupied by their fathers. It is not clear if the three other beneficiaries have taken possession of the 9.4 acres following the succession proceedings. And in view of the fact that the Plaintiff did not produce a surveyor's report which would have been the best evidence to confirm if indeed he occupies 11.16 acres or indeed what size of the suit land he occupies, this Court doing it's best in the circumstances will award him 6.1625 acres.

63. Ultimately therefore and having considered the evidence by all the parties, there shall be judgement for the Plaintiff against the Defendant in the following terms:

PARA 1.

The Defendant's counter-claim is dismissed.

2. A declaration is hereby issued that the Defendant holds a portion of land measuring 6.1625 acres out of the land parcel No Bukhayo/ebusibwabo/149 in trust for the Plaintiff.
3. The trust is hereby determined.
4. The Land Registrar and County Surveyor Busia shall forthwith demarcate a portion of the land parcel No Bukhayo/ebusibwabo/149 and register a portion measuring 6.1625 acres in the name of the Plaintiff.
5. The Defendant shall within 30 days of the delivery of this judgment surrender the original title deed to the land parcel No Bukhayo/ebusibwabo/149 to the Land Registrar Busia for cancellation and to execute all the necessary documents to facilitate the registration of that portion in the names of the Plaintiff.
6. In default of (5) above, the Deputy Registrar of this Court shall execute all the necessary documents on behalf of the Defendant to facilitate that registration
7. As the parties are relatives, each shall meet their own costs.

BOAZ N. OLAO - JUDGE

27TH SEPTEMBER 2023

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
27TH DAY OF SEPTEMBER 2023.**

BOAZ N. OLAO - JUDGE

27TH SEPTEMBER 2023

