



Apwopa (As Administratrix of the Estate of Neri Ngoye) v Neri (As Administratrix of the Estate of Pascal Neri Neri) & another (Environment & Land Case E54 of 2021) [2023] KEELC 19860 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E54 OF 2021
BN OLAO, J
SEPTEMBER 21, 2023**

BETWEEN

ANJERLINA AGUTU APWOPA (AS ADMINISTRATRIX OF THE ESTATE OF NERI NGOYE) PLAINTIFF

AND

CAROLINE NAFULA NERI (AS ADMINISTRATRIX OF THE ESTATE OF PASCAL NERI NERI) 1ST DEFENDANT

IBRAHIM OGUTU NERI (AS ADMINISTRATOR OF THE ESTATE OF JOHN KHASARI NERI) 2ND DEFENDANT

JUDGMENT

1. The Bible verse in 2 Timothy 1:15 speaks specifically to grandmothers. It says:

“I am reminded of your sincere faith, a faith that dwelt first in your grandmother Lois and your mother Eunice and now, I am sure dwells in you.”

Grandparents help us discover ourselves because they connect us to the past. They are a reservoir of family traditions and history. They are true blessings to us because they brought up our parents who in turn toiled to take care of us. We all have found memories of them telling us stories by the fire place late into the night. When you are courting in the village and want information about your prospective spouse and their family, your best confident should be your grandparents. We must therefore be close to them, cherish them and treat them with respect.

2. Ibrahim Ogutu Neri (the 2nd Defendant herein) is a grandson to Anjelina Agutu Apwopa (the Plaintiff herein). Unfortunately, he does not appear to cherish those values. As will become clear in this judgment, he has treated his grandmother with contempt. I am surprised that he has not



- learnt anything from Carlyne Nafula Neri (the 2nd Defendant herein) and with whom they share grandparents. Perhaps he will pick some useful values after this judgment on how to treat grandparents and hopefully, pass them to his children.
3. The Plaintiff is the Administratrix to the Estate of Neri Ngoye who died in 1994 while the 1st Defendant is the daughter of Pascal Neri Neri (pascal) and is sued as the administratrix of his estate. The 2nd Defendant is the son of John Khasari Neri (John) and is sued as the administrator of his Estate. The Plaintiff pleads that she is the surviving widow of Neri Ngoye who was the father of Pascal And John.
 4. It is the Plaintiff's case that she got married to Neri Ngoye in 1968 as a second wife and they were blessed with three (3) children. Since her marriage, she has been living on the land parcel NO BUNYALA/MUDEMBI/2672 which has since been sub-divided to create land parcels NO BUNYALA/MUDEMBI/3279 and 3280.
 5. Unknown to her, Pascal And John who are children of her co-wife had secretly and fraudulently registered the said land in their names in October 1985.
 6. The particulars of fraud are pleaded in paragraph 6 of the plaint as follows:
 1. Taking advantage of their late father's illiteracy and old age to have their father's land registered in their names.
 2. Omitting to disclose the existence of the other children of their father during the registration with the intention to disinherit them.
 3. Secretly sharing their father's land between themselves to the exclusion of their step-mother, the Plaintiff herein, their step brothers and sisters and by sub-dividing it into land parcels NO BUNYALA/MUDEMBI/3279 and 3280.
 4. Exposing the Plaintiff to eviction by purchasers of her husband's land.
 7. The Plaintiff claims that her husband Neri Ngoye died in 1994 without knowing what her sons Pascal And John had done. And it was only recently that the Plaintiff discovered the fraud when some purchasers came to the land.
 8. The Plaintiff therefore seeks judgment against the Defendants jointly and severally in the following terms:
 1. An order restraining the Defendants and those who claim through them from selling, charging, disposing or in any other way interfering with the land parcel NO BUNYALA/MUDEMBI/2672 now sub-divided into BUNYALA/MUDEMBI/3279 and 3280.
 2. Land parcels NO BUNYALA/MUDEMBI/3279 and 3280 and any other subsequent sub-divisions be cancelled and the said parcels do revert to the original number BUNYALA/MUDEMBI/2672 and be registered in the name of Neri Ngoye.
 3. Costs.
 9. The Plaintiff recorded and filed a statement dated 14th December 2021 in which she basically rehashed the pleadings in her plaint. She reiterated that she was married to Neri Ngoye as a second wife in 1968 and they were blessed with 3 children. That they live on the original land parcel NO BUNYALA/MUDEMBI/2676 which has since been sub-divided into land parcels NO BUNYALA/



MUDEMBI/3279 and 3280 (the suit land). That unknown to her late husband who died in 1994, Pascal And John sub-divided the said land and the parcel NO BUNYALA/MUDEMBI/3279 is registered in the name of John and BUNYALA/MUDEMBI/3280 in the name of Pascal. Another third portion whose particulars she did not give but which is clearly BUNYALA/MUDEMBI/3281 from the Green Card has already been sold to a third party. That the sub-division was done without her knowledge yet she continues to reside on the said land. This has rendered both her and her children landless and stand the risk of being evicted. That the portion which her late husband Neri Ngoye gave her when she was married measures about 1½ acres. And although Pascal And John are now deceased, their children have obtained grants of Letters of Administration in respect of their Estates and she has information that they intend to sell all the portion which they inherited from their fathers. She therefore prays that she be given 1½ acres as her share.

10. The Plaintiff filed a list of documents dated 14th December 2021 to which were annexed the following documents.
 1. Limited Grant issued to her in Busia CM'S Court P&A No E10 of 2020 for purposes of filing this suit in Estate of Neri Ngoye.
 2. Limited Grant issued to the 1st Defendant in Busia CM'S Court Succession Cause No E118 of 2021 for purposes of filing suit in Estate of Pascal Neri.
 3. Grant issued to the 2nd Defendant in Busia CM'S Court Succession Cause No 141 of 2020 in the Estate of John Khasali Neri Alias John Khasali.
 4. Green Card for the land parcel NO BUNYALA/MUDEMBI/2672.
 5. Green Card for the land parcel NO BUNYALA/MUDEMBI/3279.
 6. Green Card for the land parcel NO BUNYALA/MUDEMBI/3280.
11. By a further list of documents dated 29th July 2022, the Plaintiff filed a Power of Attorney registered on 6th June 2022 appointing Ruth Nelimo Majoni as her Attorney.
12. The 1st Defendant did not file any defence. When the case came up for hearing on 2nd November 2022, she told the Court that she admits the Plaintiffs claims. She also filed a statement dated 16th August 2022 and in paragraph 5 thereof, she stated thus:
 - 5 "The land in question belonged to my grandfather Neri Ngoye and it is only fair that my grandmother, as his wife, also gets her share."
13. On his part, the 2nd Defendant filed a defence dated 9th February 2022 in which he stated that the Plaintiff has no legal right to challenge the registration of the land parcel NO BUNYALA/MUDEMBI/2672 since it was a first registration. Further, that if the Plaintiff's husband set up a home on the said land, which is denied, then he did so as a licensee. The 2nd Defendant also denied the particulars of fraud levelled against him and put the Plaintiff to strict proof thereof. He added that there have been succession proceedings between him and the Plaintiff and urged the Court to dismiss the Plaintiff's case with costs.
14. The 2nd Defendant filed his statement also dated 9th February 2022 in which he confirmed that he is the son of John who together with Pascal were the proprietors of the land parcel NO BUNYALA/MUDEMBI/2672. That nobody challenged their registration as proprietors of the said land. That the Plaintiff cannot wait for the demise of John And Pascal to file this suit. The Plaintiff is therefore



estopped from claiming the land belonging to her stepson, grandson and son. That this case has been filed with dirty hands and being a first registration, his title cannot be challenged by way of fraud.

15. The 2nd Defendant filed two lists of documents.
16. In the first list dated 9th February 2022, he annexed the following documents:
 1. Copy of register for land parcel NO BUNYALA/MUDEMBI/2672.
 2. Adjudication register.
 3. Application for revocation of Grant in Busia CM'S Court Succession No 141 of 2020.

In the second list of documents dated 25th November 2022, he annexed the following:

1. Application for revocation of Grant in Busia CM'S Court Succession Cause No 141 of 2020.
 2. Copy of register for the land parcel NO BUNYALA/MUDEMBI/11358.
 3. Adjudication register for the Mudembi Section dated 21st April 1975.
17. The hearing commenced on 2nd November 2022 when Ruth Welimo Majoni (PW1) to whom the Plaintiff had donated a Power of Attorney testified on her behalf. She adopted the Plaintiff's statement adding that she is familiar with the facts of the case and that the Plaintiff lives on the suit land. She added that the 2nd Defendant is her nephew being the son to her brother John. She also produced as the Plaintiff's documentary evidence the documents filed herein as well as the Power of Attorney donated to her.
18. The 1st Defendant did not testify having earlier admitted the Plaintiff's claim as per his statement of admission dated 16th August 2022 and filed on 24th August 2027 and which I have already quoted in extenso above.
19. The 2nd Defendant adopted his statement dated 9th February 2022 as his evidence. He also produced as his documentary evidence the documents filed herein.
20. Submissions were thereafter filed both by Mr. J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Plaintiff while the 2nd Defendant filed his submissions in person.
21. I have considered the evidence by the parties as well as the submissions filed.
22. It is common ground that the Plaintiff is the step-mother to both Pascal And John who are the registered proprietors of the suit land. The register shows that they were the first registered proprietors of the original land parcel NO BUNYALA/MUDEMBI/2672 on 2nd October 1985 with each entitled to ½ share. That title was subsequently closed on 5th November 2015 to create the suit land as well as another parcel of land NO BUNYALA/MUDEMBE/3281 whose ownership has not been disclosed. It is the Plaintiff's case that Pascal And John fraudulently registered themselves as proprietors of the land parcel NO BUNYALA/MUDEMBI/2672 which belonged to her late husband. That they took advantage of their late father's old age and illiteracy to do so and did not disclose the existence of their other siblings in particular the children of the Plaintiff. Although the Plaintiff did not disclose the names of her children, it is clear from her application for revocation of grant filed in Busia CM'S Court Succession Cause No 141 of 2020 that apart from Pascal And John, her deceased husband Neri Ngyo had two (2) other sons namely Clement Neri And Christina Majoni (deceased) as well as a



daughter called Elizabeth Ngalo with his first wife Marsela Nafula (deceased). And with the Plaintiff, the deceased Neri Ngoye had five (5) daughters namely Mugeni Neri (deceased), Ruth Werimo, Wilkister Awino (deceased), Cecilia Taaka (deceased) and Lillian Neri as well as two (2) sons namely Emmanuel Paul and Stephen Neri (deceased). I did not hear the 2nd Defendant question the contents of the affidavit filed by the Plaintiff in support of her application for the revocation of the grant issued to the 2nd Defendant in Busia CM'S Court Succession Cause No 141 of 2020 and in which the names of the above children of the deceased Neri Ngoye are listed. It is not known what became of that application and this Court is of course not in a position to question the grant. What is clear, however, is that Pascal And John are not the only children of Neri Ngoye.

23. While the said PASCAL and JOHN were the first registered proprietors of the original land parcel NO BUNYALA/MUDEMBI/2672, the Plaintiff's case is that in fact the said land belonged to Neri Ngoye but that Pascal And John fraudulently took advantage of their late father's age and illiteracy to register themselves as the proprietors thereof. The Plaintiff's claim that she has always lived on the said land from the time of her marriage to Neri Ngoye in 1968 has not been rebutted. Indeed when he was cross-examined by Mr. J. V. Juma, the 2nd Defendant confirmed as much and said:

“My grandfather had another parcel of land but nobody lives there. From the time I was born, I found the Plaintiff living on that land.”

He also confirmed that the Plaintiff is a wife to Neri Ngoye. That can only mean that prior to its registration in the names of Pascal And John, the original land parcel NO BUNYALA/MUDEMBI/2672 was family land held by Neri Ngoye for the benefit of his family which includes the Plaintiff and her children. I did not hear the 2nd Defendant claim that the land parcel NO BUNYALA/MUDEMBI/2672 was private property acquired by his father John And Pascal through a purchase. The fact that the Plaintiff has always and still lives on the suit land is clear evidence that it was also meant for her and her children. In his submissions, the 2nd Defendant has stated in paragraph five (5) thus:

“My Lord, the Plaintiff from the time she lived on this earth she never used any part of L.R BUNYALA/MUDEMBI/2672 which now became BUNYALA/MUDEMBI/3279”.

He however forgot that earlier on during cross-examination, he had admitted that when he was born which was in 1990, he found the Plaintiff living on the suit land.

24. He also submitted in paragraph thirteen (13) of the submission that:

“My Lord, the Plaintiff has not cited (sic) any law to give room to accommodate the Plaintiff to own any part of L.R BUNYALA/MUDEMBI/3279”.

Among the principles which guide this Court, and a party need not cite them because the Court is presumed to know the law, are those set out in Section 18(iv) of the *Environment and Land Court Act* which are:

“The principles of intergenerational and intragenerational equity.”

Prior to its registration in the names of Pascal And John, the land parcel NO BUNYALA/MUDEMBI/2672 could only have been ancestral land on which Neri Ngoye intended to bring up his family including the Plaintiff and her children. It is a concept of intergenerational equity that such land is held by one generation for the benefit of succeeding generations – Mbui Mukangu -v- Gerald Mutwiri Mbui C.A. Civil Appeal No 281 of 2000. That must have been the intention of Neri Ngoye when he settled the Plaintiff on the suit land. Otherwise, he would have settled her elsewhere. It



was therefore not only fraudulent but also inequitable for Pascal And John to register the entire land parcel NO BUNYALA/MUDEMBI/2672 in their names in equal shares and thereafter sub-divided it into land parcels NO BUNYALA/MUDEMBI/3279, 3280 and 3281 without even considering the Plaintiff and her children. I am satisfied that the Plaintiff has established the allegation of fraud on the part of Pascal And John as pleaded in paragraph 6(1) to (iv) of her plaint and in accordance with decided precedents including R.G. Peter -v- Lalji Makanji 1957 E.A. 314. It cannot be correct for the 2nd Defendant to plead, as he has done in paragraph 4 of his defence, that the registration of Pascal And John, being a first registration cannot be challenged. Section 26(1) of the *Land Registration Act* provides no bar against challenging a first registration. In any event, what is being challenged now is the registration of the land parcels NO BUNYALA/MUDEMBI/3279 and 3280 which happened on 5th November 2015 long after the commencement of the *Land Registration Act* 2012. I am not, in the least, persuaded, as the 2nd Defendant would like me to be, that Neri Ngoye would have wanted that his other half of the family led by the Plaintiff to remain destitute while all the family land is taken by the other half of his family led by Pascal and John. And to make matters worse, Pascal and John are not even holding the suit land in trust on behalf of their half of the family of Neri and Ngoye. That is why at the commencement of this judgement I implored the 2nd Defendant to re-think his relationship with his grandmother the Plaintiff.

25. Having considered all the evidence herein, I am satisfied that the Plaintiff has established her case against the Defendants and is entitled to the orders sought in her plaint. Indeed as against the 1st Defendant, the Plaintiff's claim was admitted on 2nd November 2022. Judgment is therefore entered against her on admission.
26. I am however of the view that merely granting the Plaintiff the orders sought in her plaint will not resolve conclusively this dispute. I must make orders which will finally bring this matter to rest and that will not be achieved by merely registering the title to the land parcel NO BUNYALA/MUDEMBI/2672 in the names of Neri Ngoye or issuing injunctive orders.
27. Although the Plaintiff did not in her plaint, specifically plead to be registered as proprietor of the 1½ acre of land which she occupies, she said as follows in paragraphs 10, 11, 12, 13 and 14 of the statement dated 14th December 2021.

10 “That with the sub-division of 2015, I have been rendered landless as I and my children have not been given any portion of land which belonged to my husband though we are physically on land.”

11 “That I am at risk of being thrown out of my home.”

12 “That the area my husband gave me where my house stands and the area I have been cultivating since 1968 when I was married is about 1½ acres.”

13 “That my husband's children Pascal and John are now dead but their children have now obtained Grant of Letters of Administration and are capable of evicting me.”

14 “That it has come to my knowledge that they intend to sell of portion of the land they inherited from their father.”



On the other hand in paragraph 3 of his statement, the 2nd Defendant has made the following very assertive claim.

- 3: “The Plaintiff cannot wait for the deaths of original owners and she starts claiming ownership thereof, it is an impunity of the highest order. That my grandfather had his own land separate from the suit land. In any case, the land was registered in the names of our grandfather, sons not his wives therefore, the Plaintiff is estopped from claiming land when she can enjoy life interests in the land belonging to her stepson, grandsons and her son. The Plaintiff has brought this case with dirty hands to challenge first registered on fraud. The 2nd Defendant prays that the suit be dismissed and he be given enjoyment of occupation.”

On her part, the 1st Defendant stated as follows in her statement dated 16th August 2022 at paragraphs 3 and 5:

- 3 “That the Plaintiff Anjelina Agutu Apwopa is my grandmother.”
- 5 “That the land in question belonged to my grandfather Neri Ngoye and it is only fair that my grandmother, as his wife, also gets her share.”

It is clear from the above excerpts of the statements of the parties herein that this Court is being urged, other than cancelling the fraudulent registrations by Pascal and John, to declare what the parties are entitled to. The Plaintiff claim 1½ acres. The 2nd Defendant thinks it would be an act of “impunity of the highest order,” to grant her that prayer.

28. It is well established that the issues for determination by a Court flow from the parties pleadings – *Galaxy Paints Ltd -v- Falcon Guards LTD* 2000 2 E. A 385. However, there is an exception to that rule in that where the parties raise and address unpleaded issues and leave them to the Court to decide, then the Court must do so. In the case of *Odd Jobs -v- Mubia* 1970 E.A. 476, it was held (per Duffus P), as follows:

“Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the Court. In this respect a trial Court may frame issues on a point not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary to determine the dispute between the parties.” Emphasis mine.

The Court went on to add that:

“A Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

29. In *Mutiso -v- Mutiso* 1988 KLR 864, the Court of Appeal similarly held that whereas the issue of a trust had not been pleaded on the plaint, it was nevertheless a live issue throughout the trial and it therefore became an issue which the trial Court could properly make a finding on. Guided by the above, I am satisfied that I must make further orders as to whether the Plaintiff is entitled to the 1½ acres which she claims. And going by the evidence herein including the submissions by the parties, that is a live issue for this Court to determine. I am persuaded that the Plaintiff is indeed entitled to that portion of the suit land to hold in trust for her children whom Pascal and John decided to over-look even as they shared the suit land among themselves.



30. As I drafted this judgement, I was reminded of the lyrics of this song Mganga No 1 by the Tanzanian Group Jamhuri Jazz Band and which was popular in the 1980s. They sang:

“Wanyama wabaya maana yake.

Sio Simba wala si tembo.

Ni wanadamu wenye choyo.”

The 2nd defendant is a clear epitome of greed.

31. Ultimately and having considered all the evidence, there shall be judgement for the Plaintiff against the Defendants jointly and severally as follows:

1. The titles to the land parcels NO BUNYALA/MUDEMBI/3279 registered in the name of John Khasali Neri and land parcel NO BUNYALA/MUDEMBI/3280 registered in the name of Pascal Neri Neri and any other subsequent sub-divisions are hereby cancelled. They shall forthwith revert to the original land parcel NO BUNYALA/MUDEMBI/2672.
2. The land parcel NO BUNYALA/MUDEMBI/2672 shall be sub-divided into two (2) portions.
3. One (1) portion measuring 1½ acres shall be registered in the names of Anjelina Agutu Apwopa to hold in trust for her children.
4. The balance shall be registered in the names of Caroline Nafula Neri and Ibrahim Ogutu Neri to hold in trust for the children of Marsela Nafula.
5. Thereafter, the Defendants, their agents, assigns and all those claiming through them shall be restrained from selling, charging disposing or in any other way interfering with the portion measuring 1½ acres registered in the name of the Plaintiff.
6. The Land Registrar and Surveyor Busia will ensure that as much as possible the Plaintiff is registered as proprietor of the 1½ acres which she and her family currently occupy.
7. As the parties are family, each shall meet their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 21ST DAY OF SEPTEMBER 2023.

BOAZ N. OLAO

JUDGE

