



**Wanyonyi v Simiyu (Land Case 49 of 2018)
[2023] KEELC 21805 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE 49 OF 2018
FO NYAGAKA, J
NOVEMBER 20, 2023**

BETWEEN

HELLEN NASAMBU WANYONYI PLAINTIFF

AND

JANE NALIAKA SIMIYU DEFENDANT

JUDGMENT

Background

1. Through an Amended Complaint dated 11/11/2019, Hellen Nasamabu Wanyonyi, the Plaintiff herein, claimed that she was the duly registered owner of parcel of Land Number Kwanza/Namanjalala Block 5/175, measuring 0.971 Hectares (hereinafter referred to as ‘The Suit Land’).
2. It was her case that she was in peaceful possession of the suit land until sometimes in January 2018 when Jane Naliaka Simiyu, the Defendant herein, lodged a complaint through the Deputy Commissioner Kwanza Sub County, claiming ownership thereof. She pleaded that while the dispute was pending before the Deputy Commissioner, the Defendant without any colour of right, forcefully entered and or trespassed on the suit land and erected a structure thereon.
3. The Plaintiff further averred that in or about November 2018, the Defendant without her consent, and in contempt of the Court Order which restrained anyone from dealing with the suit land, buried the remains of her son, one Rodgers Simiyu on thereon.
4. It was her case that pursuant to the illegal entry she reported to Kwanza Police Station. Further, that the Defendant’s actions were not only illegal but also infringed on her right of the use and enjoyment of the suit property.
5. On the foregoing, the Plaintiff sought the following reliefs;



- a. A declaration that the Plaintiff is entitled to the exclusive and unimpeded right of use and possession and enjoyment of the suit property.
- b. An order of eviction and a permanent injunction restraining the Defendant or any other person claiming through her from trespassing upon, claiming, accessing or dealing with the suit property.
- c. An order directing the Public Health Officer Trans-Nzoia County to exhume the remains of the Defendant's son one Rogers Simiyu from the suit property.
- d. Costs of the suit.

The Plaintiff's Evidence

6. On 03/06/2021, the Plaintiff testified as PW1. In her oral testimony, after adopting her written witness statement dated 07/05/2018, she testified that she was a member of the Trans-Nzoia Investment Company Limited, (hereinafter 'The Company') that allegedly sold her the suit land. That it was from the year 1990.
7. To that end, she produced as PExh1(a), (b), (c) and (d) receipts for the payments to the Company and PExh 2 a Share Certificate No. 7845 dated 30/06/1992 issued to her upon purchasing the shares from the Company. Her further evidence was that later the Company 'gave' her a Title Deed, issued on 10/10/2011, which she produced as PExh 3.
8. During cross-examination, it was her case that she did not build on the land after the death of John Pilipili Simiyu (hereinafter referred to as 'The deceased'). She denied the fact of there being graves of the Defendant's kin on the land. She denied the land being the deceased's.
9. She testified that she was given land by the Company and did not find anyone in occupation when that happened. She sought to fortify that position by reference to the Share Certificate that had no plot number on it.
10. It was her evidence that in the year 1992 the office of Survey carried out a survey of the land. She was given a Plot. Further, she testified that her name was entered in the Area List and upon allocation new numbers were issued. She stated that she did not know to whom the deceased sold the parcel of land which was to the western side of hers.
11. PW2, Ronald Sawenja Walubengo, the Secretary of the Trans-Nzoia Investment Company adopted his statement and stated that he became a director of the company in 1987. He testified that according to his records, the suit land belonged to the Plaintiff.
12. On cross-examination, he stated that the Company was incorporated in 1969, it owned three farms, among them Namanjalala farm, which belonged to its shareholders.
13. He stated that the Company had an initial register of members of Namanjalala Farm whose total was 1704 and the Plaintiff was registered as the 8th person from the bottom on page 2 of the register. He produced as PExh 4 a certified copy of The Register of the Namanjalala Farm after the original was compared with the certified copy. He testified further that the register showed only the names of the members not the year when they were registered and that it did not bear the Plaintiff's number and of all other members. He denied her name having been sneaked into the register.
14. During re-examination, he stated that in the Register, plot numbers were not indicated. He stated that when Survey was done and completed, their names and numbers appeared in Namanjalala Farm Area



List. He reiterated that the members' register was only to identify the members who would show their receipts for purposes of Survey and registration.

The Defendant's Case

15. Jane Naliaka Simiyu challenged the Plaintiff's case through an undated Amended Statement of Defence and Counter Claim. It was filed in Court on 25/11/ 2019.
16. In her defence, she denied that the Plaintiff registered and got ownership of the suit land lawfully. She averred that the Plaintiff entered the suit land in 2017 after the death of John Pilipili and that prior to that, she could not have entered the land because the John Pilipili was insane and violent.
17. The defendant averred further that she was justified to enter the suit land because it was her late husband's. She claimed that it had no boundaries or beacons marking the part of land to which the Plaintiff held title and the remainder which belonged to the Estate of the deceased to which the Defendant had a right of entry as a widow of the deceased.
18. She pleaded further that she buried her son, Rogers Simiyu, on the suit land out of necessity since she had no other place except the family cemetery where several other members of the family were buried. She averred that the Plaintiff was not entitled to the Orders of exhumation as pleaded.
19. In setting out the particulars of the Plaintiff's title illegality, the Defendant averred that she (the Plaintiff) was not a shareholder in Trans-Nzoia Investment Company Limited. She stated that the deceased did not personally sell part of share of his land, Plot No. 327 on Namanjalala Farm, to the Plaintiff and there was no sale Agreement between the Plaintiff and the deceased.
20. She averred further that there was no valid agreement of sale of land in respect of the suit land since the deceased was perennially insane.
21. She asserted further that no Survey was ever carried out on the ground to fix the boundary between the Plaintiff's land and the remaining portion. It was her case that the Plaintiff only surfaced in the year 2017 and built a house on the suit land when she (the Defendant) returned to her husband and started building.
22. In the Counterclaim, the Defendant averred that she was the administratrix of the personal estate of John Pilipili who died intestate on 24/10/2015. She pleaded that Letters of Administration Ad Litem were granted to her in the Kitale Chief Magistrate's Registry on 03/07/2018.
23. She pleaded that in his lifetime the deceased was a member and shareholder of a land buying company known as Trans-Nzoia Investment Company. That in 1974 the deceased purchased five shares being five acres of land in Namanjalala Farm being plot No. 327 and was issued with a Share Certificate by the Company.
24. She averred that the deceased lived in the farm with his family since that period and at some point, sold some portion but remained living on the remainder thereon until his death in 2015. She pleaded that in 1992, the deceased became mentally ill and progressively became violent which forced her and the children to escape from the suit land.
25. She claimed further that after the death of the husband, they returned to the farm. In 2017 she begun to construct a structure on the farm where their home, which was previously set ablaze by the decease, stood. It was then that the Plaintiff showed up and started constructing her workman's structure, claiming that she had title to the land.



26. To demonstrate illegality of the Plaintiff's action, the Defendant claimed that the deceased did not sell any part of his interests in Namanjalala Farm plot No. 327 to the Plaintiff. Further, that the Plaintiff was not a shareholder in the Company and had failed to produce any document to prove any valid agreement of sale of land.
27. In the end, the Defendant prayed for the following reliefs;
 - a. A declaration that the registration of the Plaintiff as proprietor of Land Title No. Kwnaza/namajalala Block.5/175 which is part of plot no. 327 on Namanjalala Farm was unlawful.
 - b. An order for cancellation of the registration of the Plaintiff as the proprietor of land parcel No. Kwanza/Namanjalala Block/5/175 measuring 0.97 Ha. which was excised from Namanjalala plot 327 and the same be registered in the name of the Defendant Jane Naliaka Simiyu as trustee for the Estate of John Pilipili- Deceased.

The Defendant's evidence

28. The Defendant testified as DW1. In her oral evidence, after adopting her written witness statement dated 30/07/2018, the defendant stated that the suit land belonged to her husband, John Simiyu, who had since died. She produced as DExh 1 Letters of Administration for his Estate and copy of The Agreement, DExh 2, dated 14th June 1977.
29. The Defendant also produced as DExh 3 a Letter dated 17th June 2016 from the Trans-Nzoia Investment Company, DExh 4 a Letter from the District Assistant County Commissioner, and DExh 5 and DExh 7 two letters from the Trans-Nzoia Investment Company, dated 31st January 2018 respectively, and DExh 8, DExh9, DExh 10 and DExh 12 Four Letters from the area Chief of Namanjalala Location, dated 16th May 2017, 19th May 2018 and 22nd May 2018, 22nd July 2018 respectively.
30. The defendant further testified that she had the Share Certificate of one Wilson Saikalo who was her neighbour. She produced it as DExh 13. It was her case that she had lined Mr. Siakalo's wife as a witness but she passed on. The Court adopted the witness statement of the deceased Mrs. Imelda Siakalo, under Section 33(e) of the Evidence Act, only for proof of a relationship of a neighbour.
31. The said Imelda Nakhumicha Siakalo, now deceased, had stated in her statement dated 30/07/2018 that the Defendant was her neighbour and that her deceased husband, John Pilipili Simiyu owned the 5 acres which shared a boundary with her parcel of land. Further, that her late husband and the said John Pilipili were shareholders of Trans Nzoia Investment Company Limited but somewhere along the way Mr. Pilipili became mentally ill and he died in 2015. She invited the court to visit the land and hear from neighbours who the owner of the suit land was.
32. DW1 testified further that she had lived on the suit land since 10/02/1974 and had been planting maize and beans thereon. She stated that her husband bought 5 acres from the Company and had not been given title deed.
33. Further, she stated that she did not know who sold the land to the Plaintiff. That when the Plaintiff entered the land, she occupied four acres. Again, that before her husband died, he sold one acre to one Boaz Wafula. She said, her village elder Gabriel Mukhinde Wekesa was her witness too.
34. It was her evidence that apart from burying his son, Rogers Simiyu, in the suit land, she had also buried 9 of her children thereon and other relatives.



35. On cross-examination, the Defendant could not account for the disparity in reference to the plot numbers on two letters said to have been issued by Trans-Nzoia Investment Company Limited. These were DEXh 5, a letter dated 31/01/2018 and DEXh 7, a letter dated 22/03/2018 which referred to the suit land as parcel No. 3272 and 327 respectively. Her witness statement and Defence and Counterclaim all referred to the plot as No. 327.
36. It was her case that her land was four acres, not two and a half and she needed it back from the Plaintiff. She stated that her husband used to have ownership documents but when he became insane, he burnt all them. She testified that later she went to the Trans-Nzoia Investment Company and was given a document written by one John Wangulo.
37. On re-examination, she stated that when the Plaintiff took part of her land, it was subdivided into two. She stated that the Plaintiff took 2½ acres thereby leaving 1½, resulting in two different numbers on as shown on DEXh 5 and DEXh7.
38. Gabriel Muhinde Wekesa, DW2, a village elder of Bunyanji village, adopted his witness statement dated 30/07/2018. He stated that he was a village elder of the area. That his land approximately 21 acres in size was about 300 meters from the suit land and the parcels in Namanjalala were since already surveyed but title deeds were yet to issue to shareholders. He stated he knew the late John Pilipili as the then husband of the Defendant and the suit land belonged to him. That he had a long mental illness since 1992 and started burning houses on the land and in 2015 he died. He said the Plaintiff's ownership of the suit land was suspect. She never was on land but only showed up in 2016.
39. On cross examination, it was his evidence that he was a village elder from the year 1992. To that end, he stated that he was issued with a village elder card on 1st November 2016. He testified that that was the period when village elder cards were issued.
40. It was his evidence that his parcel of land in Namanjalala was Parcel No. 119 approximately 21 acres in size and that the Defendant's husband, John Pilipili, occupied the suit land since 1974. He testified further that he started residing in the farm in the year 1970. Further, that after the death of the Defendant's husband, no one occupied the suit land since he had chased away his wife and children. It was his evidence that he never saw the Plaintiff all along.
41. As regards issuance of title deeds to the land Mr. Wekesa stated that land in Namanjalala Farm did not have titles. It was his case that no original member of Namanjalala had titles and that those who bought land much later from the Directors had title deeds.
42. At the end of the oral testimony, the parties submitted on their respective cases.

The Plaintiff's Submissions

43. In her written submissions dated 16/05/2023, the Plaintiff asserted that she came to ownership of the suit land in the year 1990 when she purchased shares from the Trans-Nzoia Investment Company Ltd after which she was issued with a share certificate.
44. She reiterated that since Survey had not been done on the entire farm no plot number was indicated on the share certificate. She submitted that she paid Survey fee and after survey was done, her plot was identified both on the ground and on the Farm Area List.
45. Further, she argued that the Company Directors showed her the suit land and she took vacant possession in 1992 and cultivated it.



46. She submitted that in the year 1997 she fenced the suit land but, while she was attending a course of study in Thogoto Teachers Training College, the fence was removed by unknown people.
47. The Plaintiff submitted further that in the year 2011, she processed the Title Deed of the suit land. She summed it that her name appeared both in the Company members Register and on the Area List.
48. Based on the foregoing, the Plaintiff submitted that she acquired the suit property lawfully and procedurally upon paying 150 shares to The Company whereupon she was issued with receipts and a Share Certificate.
49. She submitted that unlike Defendant who did not produce any evidence to prove ownership, she had, and on a balance of probability, proved that she was entitled to the reliefs sought as per Article 40 of [*the Constitution*](#) as read with Section 26 of the [*Land Registration Act*](#).
50. It was her case that the Certificate of Title issued to a purchaser of land by the Registrar upon registration or upon a transfer or transmission by the proprietor ought to be taken by courts as prima facie evidence that the person named thereon as a proprietor was the absolute and indefeasible owner.

The Defendant's Submissions

51. The defendant urged her case further through written submissions dated 30/05/2023. She argued that that despite the Plaintiff obtaining the title to the property on 10/10/2011, registration of the same remained clandestine.
52. She submitted further that if the Plaintiff was the owner she ought to have taken possession of the land and occupied it pending issuance of title deed alongside thousands of other shareholders. She argued that since all original owners of the suit land knew each other and had not received transfers for title deeds from the Company themselves, the transfer to the Plaintiff was dubious.
53. Her submission was that the Plaintiff could be protected under Section 26 of the [*Land Registration Act*](#) since the title was acquired by a corrupt scheme involving rogue directors of the Company.
54. In asserting her right for being in the possession of the suit land, the Defendant relied on the decision in HIGH COURT CIVIL CASE NO. 2306 OF 1980, SAMUEL KARIUKI MWANGI & ANOTHER -VS-NJURU MWANGI where the court observed that the rights of a person in occupation are equitable rights which are binding on the land which are binding on the land and the land is subject to those rights. She also relied on the case of JANDU V. KIRPAL [1975] EA, 226.

Issues for Determination

55. From the foregoing comprehensive appreciation of the parties' respective cases, the only pertinent issue herein is the determination of who, between the Plaintiff and the Defendant, lawfully, regularly and procedurally obtained ownership of Land Parcel No. Kwanza/Namanjalala Block 5/175. Costs shall follow the event, as Section 27 of the [*Civil Procedure Act*](#) provides.

Analysis and Determination

56. It was common ground that the suit land, said to be measuring approximately 0.971 hectares, herein was originally owned by the Trans-Nzoia Investment Company. The point of departure was how the disputants came into ownership subsequently.



57. Whereas the Plaintiff asserted that she directly bought the land from The Company, the Defendant claimed that it devolved to her upon the death of her husband, John Pilipili Simiyu. The Defendant's case, therefore, rests on the claim that her husband acquired the suit land from The Company.
58. Based on the foregoing, the resolution of the issue of ownership resides in validity of the process through which the Plaintiff, as compared to the Defendant's husband, acquired the suit land.
59. I will sequentially interrogate the two scenarios, starting with the Plaintiff's case.
60. On 01/11/1990, the Trans-Nzoia Investment Company issued to the Plaintiff receipt No. 415, produced as PExh 1(b), being an acknowledgment for the payment of Kshs. 2,500/- for five (5) acres of land. On the same date the Plaintiff further paid the Company Kshs.175/- being payment of Survey Fee. Receipt No. 447 was issued to that end.
61. The Plaintiff further paid Survey Fees of Kshs. 660/- on 24/09/1991 and was issued with the receipt No. 1053.
62. According to the receipt dated 28/03/1992, the Plaintiff made payment of Kshs. 1660/-. The Company acknowledged the sum to be the final payment of Survey fee.
63. It is important to point out that the foregoing receipts produced by the Plaintiff are originals as issued by the Trans-Nzoia Investment Company. Subsequently, on 30/06/1992, the Plaintiff was issued with the Share Certificate by the Company.
64. I have carefully analyzed the other original exhibit produced as Plaintiff Exhibit 2. It was a share certificate. It was issued in the name and the Identification card Number of the Plaintiff. It indicated that the Plaintiff, of Namajalala Farm, was a registered proprietor of Trans-Nzoia Investment Company Ltd, although it did not indicate the plot number.
65. The Share Certificate further indicated that the Plaintiff purchased 150 shares of Kshs. 20/= each and was accordingly signed by the Director and the Secretary and embossed by the Company seal. It means from the share certificate that the Plaintiff was given shares worth KShs. 3,000/= in total. When the document is compared with PExh 1(b), being the receipt dated 01/11/1990 for KShs. 2,500/=, there is a discrepancy of KShs. 500/=. No evidence was led to show whether the Plaintiff paid any further sum for the five acres, other than that for survey fees which totalled to KShs. 2,495/=. It means that the two documents do not add up, that is to say, there is doubt whether the Plaintiff paid for the full purchase price of the five (5) acres or not. If the total sum on the share certificate is anything to go by when compared with the sum shown on PExh 1(b) it means the Plaintiff paid for 4.167 acres.
66. On 10/10/2011, the Plaintiff was issued with the Title Deed, produced as Plaintiff Exhibit 3. She henceforth became the absolute proprietor of the land comprised Kwanza/ Namanjalala/ Bock5/175, the suit land herein.
67. The question that remains unanswered then is, how is it that the Plaintiff who paid for five (5) acres was finally given 0.971 hectares (which translates to 2.4 acres) and processed title for it in her favour. When and how did the shares amounting to KShs 3,000/= reduce to the said acreage above?
68. This Court shall come back to this observation later in this decision.
69. The statement of Ronald Sawenja Walubengo, the Secretary of the Trans-Nzoia Investment Company, further shed light on the ownership of the suit land. He produced as PExh. 4 a certified copy handwritten register of the company after it was compared with the original. He stated on the one hand



that the Defendant's late husband's name did not feature in the register. On the other, he testified that the Plaintiff's name was on page 2 of the register as the 8th from the bottom thereof.

70. Indeed, the Court scrutinized page 2 of PExh 4 and found the Plaintiff's name there. The peculiar feature or issue with the indication of the Plaintiff's on the page was that whereas the rest of the names on the page were written sequentially on the lines of the page, hers was not in a line of its own as others. The register did not also indicate the Plot number for the Plaintiff's allocation yet elsewhere the witness stated that her plot number was 175. The name was inserted in a line below the name of Beatrice Masaba but on top of the one of Alice Mululu whose land acreage was indicated as 3 acres. The register did not bear the Plaintiff's acreage. Clearly this was an anomaly which was not explained.
71. Moreover, stated in the adopted witness statement that according to the records of the Company the Plot No. 327 belonged to the Catholic Diocese of Kitale for which a title deed was already issued while Hellen Nasambu's was 175 and there was no record of John Pilipili Wekesa. Thus, he refuted the Defendant's counterclaim over the parcel of land.
72. But this Court has carefully scrutinized the entire register (PExh. 4). On line 1 of page 17 of the register is the name of Mark M'mbaya against whom on the column of Plot No. is indicated 327 whose size is 4.6 acres. There are other names on the same page that have plot numbers with various acreages while others do not have plot numbers but have acreages indicated against them. The Catholic Church Namanjalala name is in line 16 of page 40 and its plot No. 798 with an acreage of 0.2.
73. If the evidence of PW2 is anything to go by then it means that the Company had records which were different from the handwritten register (PExh 4) which contained details of who or which body owns which parcel of land. In any event that explains why the register was incomplete in many respects. Some members' names were just a single one, in the columns of "Plots" and "acreage", there were very many blanks against names of many owners. Moreover, the register was neither serialized nor fully filled (in all lines) on many pages such as 1-7, 10, 14, 21, 22, 24, 27, among many others. This gives the possibility of the record keeper or other person filling in names at will.
74. To demonstrate further errors in the register, at page 2 line 5 is the name of a person named "PETER" whose parcel of land measures 2 acres. The same name and acreage appears at page 2 line 21. At page 19 lines 9 and 19 the name of David Adega is repeated and the acreage he owns of 0.6 is indicated against him.
75. PW2 testified further that the name of Hellen Nasambu's name was not a late addition but the Court is of the view that clearly this was a late addition after the other names on the other lines had been entered in the register. The reason why that was the case was that there was a blank space only two lines above that of Alice Mululu. It is a mystery that can only be resolved by a finding that it was a deliberate addition to include the Plaintiff in the register. No wonder, or in any event, whereas against the names on the page were entries of the plot sizes, the Plaintiff's was blank.
76. Furthermore, the PW2 testified that when he became secretary, most of the company records were not there. That they were not available hence he could not have the original register of the members since 1970. He then stated that the members for Namanjalala Farm were 1704.
77. He fell short of stating that the total of 1704 members on PExh. 4 was a reconstruction of the register. This Court finds that indeed that was the case. He, however, did not explain to the Court how the register was reconstructed and if it was verified by any independent people. Is Pilipili's in the original?
78. Elsewhere PW2 contradicted his evidence that the original members of the Namanjalala Farm had not been issued with titles yet Hellen Nasambu had acquired hers. The contradiction was that the evidence of PW1 and PW2 pointed to the fact that she



79. In his statement on cross-examination he stated that neither the Defendant's name nor her late husband's name appeared anywhere in the Company's records and to that extent, was not a shareholder. He denied the company altering the register by including or removing others' names. It was his case that the document that the Defendant purported to be a share Certificate was in fact an application by Wilson Siakalo to be registered as a shareholder not the Defendant's husband.
80. He stated further that there was nothing to show that the Defendant's husband ever bought Wilson Saikalo's shares and that in absence of a Share Certificate issued by the Trans-Nzoia Investment Company, the Defendant could not claim that her husband was a shareholder in the farm. But given the analysis of the evidence of this witness in the previous paragraphs his claim that the Defendant (through her late husband) was not a shareholder in the Farm is wholly untrue. It is inconceivable that some who was not a shareholder would occupy a whole five acres (of which he sold one) of the farm since 1974 to date, without any officials or shareholders detecting and complaining of it.
81. I will now interrogate the Defendant's evidence.
82. From the onset, this Court's attention was drawn to the fact that the Defendant's claim is in respect to plot No. 327 as opposed to the suit land herein. As can be discerned from the Counter claim, the Defendant claimed that the suit land herein was unlawfully hived off from Plot No. 327 by the Plaintiff.
83. The entirety of Plaintiff's pleadings and evidence clearly demonstrate that she does not lay any proprietary interest in Plot No. 327. Hers is a claim to parcel no. 175 which, according to PW1 and PW2 yielded land title Kwanza/Namanjalala Block 5/175. The Plaintiff did not show the root number or parcel number, according to the records held by the Trans Nzoia Investment Company Limited. This is because in the PExh 4 against Hellen Nasambu's name at page 2 thereof there is no parcel number indicated. As found elsewhere, the register is incomplete in many respects and cannot assist the Court in ascertaining the fact of the root or parcel number. Worse is that neither the Plaintiff nor PW2 attempted to produce the Area List in evidence.
84. The reason for this serious omission is as good as anyone's guess. The document they filed together with the List of Documents and which purported to be the Area List of Namanjala Farm differed in many material particulars with the register, PExh 4. It is this Court's inference that the Plaintiff knew that if she produced the Area List in evidence it would be detrimental to her already flawed case. So, she was careful to leave it out from the evidence.
85. The decision in Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others [2012] eKLR is relevant in this instance. The Court, in reference to Section 112 of the *Evidence Act*, observed as follows;
- Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:-
- In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving of disproving that fact is upon him.....where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party'.
86. It was also noteworthy that according to the evidence of the PW2, the Secretary of the Company, Plot No. 327, according to their records, is the property of The Catholic Church Diocese of Kitale for which they have a title to. But as I have pointed out in paragraph 70 above, plot no 327 was allocated to Mark M'mbaya while the Catholic Church Plot was 798. But in the area List, it is purported, by indication that the Catholic Church was allocated plot no. 327 while Mr. Mark M'mbaya is allocated plot No. 400 of the size of 2.225 acres as against the 4.6 acres in the register.



87. Having said that, I now turn to the Defendant's evidence.
88. The Defendant relied on and adopted as part of her evidence the witness statement of one of her witnesses, Mrs. Imelda Siakalo who died before she could testify. The Court admitted the statement under Section 33(e) of the *Evidence Act*. It was admitted in evidence only to the extent that it went to show that there was a relationship between the maker and the husband of and Defendant herein, the relationship being that the maker and the Defendant and her deceased husband were neighbours for all the while from the time her later husband and the deceased husband of the Defendant bought shares in the Trans Nzoia Investment Company Limited.
89. Upon testifying, the Defendant produced a total of 19 documents all of which were copies of the originals. They were all not objected to by the Plaintiff hence the Court takes their content to be a true reflection of what they spoke to. Among them are various letters from administrative offices regarding complaints and some from the Trans Nzoia Investment Company Limited on loss of ownership documents.
90. Even PW2 who was the secretary of the Company did not raise any questions on whether the documents did or did not originate from the Company or the authenticity thereof.
91. This Court takes keen interest in the letter authored by The Deputy Commissioner dated 12th March 2018 addressed to the Registrar High Court.
92. The Defendant had prior to the suit escalated the dispute to the Deputy Commissioner but upon appreciating her case, the Commissioner was of the view that she had no evidence to demonstrate that she was indeed the owner of the suit land. The Commissioner referred the matter to Court for resolution. While that was his observation, this Court now has to interrogate deeper the documentary evidence over this matter since the Commissioner was not a legal expert or an officer duly authorized to determinate the ownership of the land.
93. It is also noted that other than the limited grant of letters of Administration ad Litem, issued on 3rd July 2018, there is no other piece of evidence from the Company or other source corroborating the Defendant's husband ownership of the suit property. DW1 testified that during his mental illness her late husband burnt all ownership documents. This was not reported to the police or investigated.
94. Be that as it may, the Defendant the Defendant produced as DExh 3, DExh 5 and DExh 7 letters issued by the Trans Nzoia Investment Company Limited through one John Wambulwa who wrote them on behalf of the secretary. They referred to the ownership of 5 acres by John Pilipili in Buyanji village of Namanjalala Farm. While DExh 5 referred to the plot as No. 3272 the next one (DExh 7) referred to the suit land number, being No. 327.
95. Having regard to the law and precedents set by Court of Superior Jurisdiction on land ownership, while the contents of the three documents seem to refer to the suit land, the totality of the documentary evidence relied upon by the Defendant are of very little evidential value in proving ownership of the suit land since they are copies which were not certified as true copies of the original.
96. In Environment & Land Case 79 of 2010, Lwangu v Ndoté (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) this Court discussed the significance of best evidence rule in the following manner;
- i. The meaning of a document being understood as discussed above, the relevant section of the *Evidence Act*, 65(1), then stipulates that primary evidence is the document itself produced for inspection by the court. This is the best type of evidence. It is called the best evidence rule. Therefore, a party in any proceedings should endeavor, at all times, to rely on primary evidence.



But in cases where it is not possible to avail primary evidence in court, for example, where the evidence is of immovable nature then the Court is permitted to admit secondary evidence, as discussed below.

- ii. 13. Section 67 of the Act is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof it falls among the exceptions provided in the Act. It states “Documents must be produced by primary evidence except in the cases hereinafter mentioned.” This forms the basis of the best evidence rule. Thus, by virtue of the provision, a party has no option but to either avail the document itself or bring himself within the exceptions given in the law.
97. Section 26 of the [Land Registration Act](#) is definite that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land. However, such proprietorship can be challenged where the certificate of title was acquired fraudulently, unprocedurally or through corrupt practice.
 98. The Court of Appeal spoke to the foregoing provision in the case of Embakasi Properties Limited & another v Commissioner of Lands & Anor [2019] eKLR when it observed as follows:

“Although it has been held time without end that the certificate of title is: “. conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.
 99. Having regard to the foregoing, it is my considered view that the chain of ownership documents produced by the Plaintiff do not prove on a balance of probabilities that the Plaintiff was the owner of the suit land. If anything, particularly, PExh 1 (a) points to the fact that there is a possibility that the Plaintiff may have been allocated a plot in Naluringo Farm and that is why she paid the initial fee of KShs 175/= for survey in that farm as shown by PExh 1(a). Moreover, PExh 1(b) when compared to PExh 2 do not match. The sums paid as per PExh 1(b) for the shares do not add to the Kshs 3,000/= total of the share certificate which PExh 2 purported to evidence.
 100. Again, when that is compared with PExh 4 (the register) the acreage referred to in PExh 1(b) differs sharply with that given to the Plaintiff in PExh 4 and finally on the title – PExh 3. This big discrepancy while also being worsened by the fact that the name of the Plaintiff was inserted in a line where someone’s details had been captured and it is not countersigned or any explanation for such anomaly given makes this Court to find that there was fraud in the acquisition of the title the Plaintiff holds as hers. Thus, in terms of Sections 107 and 108 of the [Evidence Act](#), she did not discharge her burden of proof to the satisfaction of this Court, rather the Defendant proved the particulars of fraud in paragraph 18(d) and (i) and that is enough to have her title cancelled.



101. The modalities of the burden of proof was discussed by the Court of Appeal in *Palace Investments Ltd vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR where it observed;

“Denning J in *Miller vs Minister of Pension* (1947) ALL ER 372 discussing the burden of proof had this to say

“That degree is now settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win however narrow.”

102. My finding is bolstered by the Court of Appeal decision in *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR where the learned Judges discussed the importance of a disputant going beyond simply showing the title deed to prove ownership.

103. The Court was emphatic that one must trace the process through they acquired proprietary rights in land. The learned Judges rendered themselves as follows;

“...when a registered proprietor’s root of the title is under challenge, it is not sufficient to dangle the instruments of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

104. The Plaintiff herein failed to achieve the above. But on the other hand, I am afraid that the Defendant’s Counter-claim also failed in so far as she purported to demonstrate that the late husband acquired the land from *Trans Nzoia Investment Company Limited*. However, the Defendant led evidence to the effect that she, her late husband and family had been on the suit land since 1971 until 2017 when the Plaintiff showed up to lay claim on the portion of land she claimed to have title to. She called DW2 the village elder who testified to the same. She also adopted the evidence of Imelda, the deceased neighbour, which was to the effect that they had been neighbours with the Defendants for long. She testified that he even buried her son among other kin on the parcel of land. This fact of some of the Defendant’s kin being buried on the land was also admitted in her testimony. On the contrary, the Plaintiff was the only one who testified that she owned the land. She stated that she was a teacher, did not come onto the land until 2016. She wished the Defendant to be ordered to remove the remains of her kin from her (Plaintiff’s) land which now the Court has found to have been acquired unlawfully.

105. Again, as I stated at the beginning of this Judgment, this is one of those cases which was not well pleaded and even the evidence not well led. But in the adversarial system the Court can only do a limited role in the conduct of a matter.

106. This Court is alive to the findings in *Civil Appeal 43 of 2011, David Katana Ngomba -vs- Shafi Grewal Kaka* [2014] eKLR, where the Court of Appeal discussed the bounds within which an adversarial Court operates. It was observed;

A court of law in adversarial system as ours cannot venture into the arena of litigation on behalf of the parties. The presumption is that the parties understand their claims, their cause of action and those whose actions have aggrieved them. It is not the business of the court to invite parties for contestation before it and thereafter declare the winner in a judgment.



107. Thus, what is the appropriate rule of the Court at this point where it has found that from the paucity of pleadings, particularly, the Defendant has lost her case on a technicality?
108. The essence and holistic position of a court both in law and equity is to do justice to parties. Under Article 159(2)(d) of *the Constitution*, 2010, the Court is enjoined to go beyond technicalities in determination of disputes and do justice to parties. In the circumstances it can in the interest of justice fashion a remedy that evidence of parties points to.
109. The essence of doing substantive justice the parties was aptly captured by the Court of Appeal decision in Civil Application No. Nai. 173 of 2010, Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others. The Learned Judge rendered themselves as hereunder;

In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party...”

110. The evidence of DW1 and DW2 was clear that the late John Pilipili Simiyu started occupying the suit land from 1974 as DW2 stated in his adopted Statement. After he became sick and violent, his wife, DW1, left him on the land all through until 2015 after he died. For reason that the Plaintiff claims to have bought the land on 01/11/1990 and give no evidence of having occupied the land until 2017, the land was in quiet possession of the Defendant.
111. It is not disputed that even after the Plaintiff fraudulently acquired title to the land it was not for the whole of the land. The Defendant was still left occupying and ‘claiming’ the remainder of the land being one and half acres while. She testified that her husband having sold 1 acre to the neighbour she only claims the 4 acres that remained after the Plaintiff took two and half acres.
112. In sum, I find that on the one hand the Plaintiff’s claim fails in totality. On the other hand, the Defendant’s Counterclaim succeeds.
113. In case I were to be wrong in my finding that the Plaintiff committed fraud and the title she acquired was by way of fraud, then it is my finding that still her title would not stand and ought to be cancelled and registered in the name of the Defendant as trustee of the estate of John Pilipili Simiyu for reason that the late John Pilipili Simiyu and his family resided on the land in an uninterrupted period of more than twelve (12) years hence in terms of Sections 7 and 17 of the *Limitation of Actions Act*, the Plaintiff’s title to the 0.971 acres was extinguished and instead became an entitlement to the estate of John Pilipili Simiyu.
114. In the end, the Defendant’s ‘Counterclaim’ succeeds and the following final orders hereby issued;
- i. A declaration be and hereby issued that the Plaintiff registration of Land Parcel No. Kwanza/ Namanjalala/ Block5/175 was fraudulent and unlawful.
 - ii. An order be and hereby issued that the registration as proprietor of Land Parcel No. Kwanza/ Namanjalala/ Block5/175 be cancelled forthwith by the land registrar in charge of Trans Nzoia County and the register be rectified forthwith to the effect that Jane Naliaka Simiyu be registered as proprietor in trust of the estate of John Pilipili Simiyu (deceased).



- iii. That the Defendant, her servants, agents and or assigns are entitled to the exclusive and unimpeded right of use and possession and enjoyment of the portion of land registered as Kwanza/Namanjalala Block 5/175 in addition to the portion she occupies.
- iv. The Plaintiff's Claim is hereby dismissed in its entirety.
- v. The Plaintiff, by herself, her family, agents or whomsoever claiming under her are hereby ordered to vacate the registered as land Parcel No. Kwanza/ Namanjalala/ Block5/175 within the next 30 days and in default eviction to issue in accordance with the law.
- vi. Costs of the suit and the Counterclaim to be borne by the Plaintiff.

115. It is so Ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 20TH NOVEMBER, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE

