



**Masaza v Gosi & 2 others (Environment & Land Case 85 of 2021)
[2023] KEELC 22645 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 85 OF 2021
AE DENA, J
NOVEMBER 14, 2023
FORMERLY MSA ELC74 OF 2017**

BETWEEN

MOHAMMED ABDALLA MASAZA PLAINTIFF

AND

MOHAMED ABDALLA GOSI 1ST DEFENDANT

THE KWALE REGISTRAR OF LANDS 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

The Suit

1. The Plaintiff Mohammed Abdalla Masaza, vide his plaint dated 8th March 2017 filed this suit against the Defendants seeking the following orders; -
 - a. A declaration that Plot No. 2390/Kwale/Ng'ombeni is to be held in trust for the beneficiaries of the estate of Suleiman Mwamguza.
 - b. That the 2nd defendant do rectify the register in respect of Plot No. 2390/Kwale/Ng'ombeni and replace the name of Mohamed Abdalla Gosi with that of Mohamed Abdalla Masaza as trustee for the beneficiaries of the estate of Suleiman Mwamguza.
 - c. A permanent injunction do issue against the defendant, his agents, servants and or family members prohibiting them from constructing, interfering and or dealing in any manner with Plot No. 2390/Kwale/Ng'ombeni to disposes the heirs of the estate of Suleiman Mwamguza.
 - d. Costs of this suit and interest thereon at court rates



- e. Any other remedy this court deems fit

Plaintiffs Case and Evidence: -

2. The Plaintiff pleaded in his plaint that he and the 1st Defendant are grandchildren of Suleiman Mwamguza. That the suit property originally Kwale/Ngo'mbeni/233 was family land held in common registered in the names of Mwinyihamisi Hamisi Mwamguza (the defendants' father), Ramadhan Mohamed Mwamguza, Muichande Alfah Mwamguza, Hamisi Abdallah mwamguza and Abdalla Suleiman Mwamguza (the plaintiff's father). That the said plot was subdivided into five portions Kwale/Ngo'mbeni/2388 earmarked as graveyard, Kwale/Ngo'mbeni/2386,2387, 2390 registered to Mwinyihamisi Hamisi Mwamguza as trustee, and 2389 registered to Abdalla Suleiman Mwamguza as trustee.
3. It is averred that Mwanamwinyi Abdalla Masaza occupied and developed plot No. 2390 and which is where their grandmother Miathumani Mwamguza lived. That the entire suit property being ancestral land parties administered it for the benefit of the heirs of Suleiman Mwamguza and held in in trust for the beneficiaries. The Plaintiff further avers that since 1990 the 1st Defendant has repeatedly attempted to evict him and his siblings through numerous litigations which he particularized. That the 1st Defendant with assistance of the office of the 2nd and 3rd Defendants fraudulently changed the particulars of title Kwale/Ngo'mbeni/2390 to include his names and in breach of the trust claims absolute ownership. The particulars of fraud and breach of trust are highlighted in paragraph 10 of the Plaint. That following this the 1st Defendant trespassed into Kwale/Ngo'mbeni/2390 and constructed a foundation and demolished the existing structures/perimeter walls.
4. The case proceeded exparte on 3/10/22 but the proceedings were set aside at the instance of the 1st defendant who vide a ruling delivered on 9/2/23 I allowed to defend his case. The case was heard on 18/4/23.
5. The Plaintiff testified as PW 1. It was his testimony while adopting his witness statement dated 8/3/2017 that they were cousins with 1st Defendant, their fathers being brothers. That everyone knew their portion out of the original plot Kwale Ngombeni 233 but later in 1990- 2000 the 1st defendant started disturbing him and later the Land Disputes Tribunal awarded him 1 acre which decision was adopted as a judgement by the court. That the 1st defendant successfully appealed to the Mombasa Provincial Land Appeal Tribunal (Coast Province Land Appeal Tribunal) after which he demolished the plaintiff's structures and changed plot 2390 to be in his name. PW1 stated the 1 acre used to belong to his maternal grandmother and where he has built his structures. That the 1st defendant's houses are in plot 2390 and had they known this at the time of subdivision they would have objected. That despite two letters dated 22/4/93 and 22/8/97 by the registrar the 1st defendant never surrendered the titles. That the 1st defendant never involved them in any succession proceedings at the Kadhis court.
6. PW1 added that he never saw any surveyor on the ground and his siblings were never summoned to be shown their portions. That the subdivisions cannot have happened without the participation of the Land registrar. He stated he had sued the Land Registrar and the Attorney General for purposes of enforcement of the orders of the court. The Plaintiff stated that he wanted the court to give him his portion or in the alternative to order fresh subdivision. That the plot in his father's name is 2389 and he wished to have the same registered in his name.
7. The plaintiff produced as his evidence the documents in the List of Documents filed on 8/3/2017 and supplementary list of documents dated 10/3/2022, Adjudication Letter dated 28/1/2017, Letters dated 22/4/97, 22/5/97 and 25/2/98. Land Dispute Tribunal proceedings, Ruling in SRMC 34



- of 2001, Court Order in SRMCC 17 of 2002, Findings of Provincial Land Appeal Tribunal, Letters dated 24/9/2002, 25/3/2007 and 31/7/2002, Official search Certificate for Plot No. Kwale/Ng'ombeni/2390, bundle of photographs, Demand letters, Extract of the Land Registry file for Plot No. Kwale/Ng'ombeni/2390, Application for Registration by transmission dated 5/6/2009, Transfer by Personal representative dated 5/6/2009, Kadhis Court Succession Cause No. 22 of 2009, Extract of Land Registry file, caution dated 3/3/2017, Application for partition dated 17/5/1996, Land Control Board Application for Consent dated 27/10/1989 and Adjudication records. Produced as Pexh 1-19.
8. On cross examination PW1 stated he did not know who undertook the original subdivision of plot 233 as his father was already deceased then. That he only knew of the subdivision when he was being evicted. He stated that plot 2389 belonged to his father while 2390 was allocated the 1st defendant and his father.
 9. PW1 further stated that he was currently on plot 2390 and not 2389 which is his fathers. The witness stated that they remained on parcel 2390 because they were in occupation of the same before subdivision. He stated that he was not claiming the entire plot 2390 but just the portion 1HA where the grandmother cultivated and planted coconut trees and where he resides and has built his home. The same has not been demarcated or surveyed. He admitted there was nothing in writing during subdivision that stated the Plaintiffs were to continue living on plot no 2390. That he was not aware who had surveyed the original property and stated that he only came to know of the same in the early 1990s when their grandfather died.
 10. That the 1st Defendant filed a suit against the Plaintiffs the same being No. 34 of 2001 but judgement was made in favour of the Plaintiff. That he was never involved in the matter before the Kadhis court and there was an ongoing construction during the pendency of the suit despite injunction orders being in place. He stated that there was an appeal in 2002 which the Plaintiffs won.
 11. On cross examination by Mr. Makuto the witness was referred to the adjudication record of 10/1/1978. That according to the record his father was given plot No. 2389. That Abdallah Suleiman was given 2387 which was currently in occupation of Mwachanda Alfani. 2389 was given to his nephew. He conceded his name did not feature in the succession records though the same showed each of the beneficiaries was to get 1/5 of the property. That his late father had 8 heirs him included and they were all to get equal shares. He stated that he wouldn't mind the other parties being given 2389 as long as he would remain in 2390.
 12. On reexamination he testified that he reiterated he wanted 2390 where he was in occupation and stated that he also wanted his families 1/5 share of the property like the rest of his father's siblings.
 13. With the above the Plaintiff's case was closed.

1st Defendants Case and Evidence

14. The 1st Defendant filed a defence dated 13/4/2017 and denied the averments raised in the plaint save for the descriptive parts. It is denied that the Plaintiff owns and occupies the suit property. The 1st Defendant states that the Plaintiff has no claim over the suit property as the 1st Defendant is the registered owner and is holding the same in trust for his siblings and not the plaintiff.
15. The 1st Defendant counterclaims against the plaintiff and states that he is the registered owner of the suit property Kwale/Ngombeni/2390 where he resides to date. He states that the land dispute between him and the Plaintiff was fully heard and determined in previous suits. According to the 1st Defendant, the Plaintiff forced his way into the suit property and has subjected the 1st Defendant to many threats.



- That the plaintiff is keen on forcing the Plaintiff out of the land which will cause the 1st Defendant great loss and damage.
16. The 1st Defendant prays for judgement as per the counterclaim.
 17. DW1 Mohammed Abdalla Gosi adopted his statement his evidence in chief. It was further his testimony that the plot in dispute was 2390. He stated that he was born on that particular portion and had resided on the same for over 70 years. That he was holding it in trust for the rest of his family as per the order of 5/6/2009. He acknowledged that the Plaintiff was known to him as their grandfathers were brothers. He narrated that when the mother parcel 233 was subdivided, his father got parcel 2390. That all the 5 portions were equal. That the plaintiff had entered 2390 by force and began construction thereon. That he was awarded the land by the tribunal. He stated that he had not involved the Plaintiff in the succession cause as he was not his brother nor heir to his father. That he had obtained the title to the plot from the land registry through the order from the Kadhis court. That the plaintiff had been on the land for about 10 years and had been informed of the decision by the tribunal but he refused to comply. That the plaintiff has his own parcel which is 2389 and should go back to the same. Further that he had tried to resolve the issue with the elders but the Plaintiff had refused to cooperate.
 18. The 1st defendant produced documents contained in the list and further list of documents dated 8/3/2021 and 5/11/2021 respectively namely Copy of Title deed Kwale/Ngombeni/2390 in the name of Mohamed Abdalla Gozi issued on 12/6/2009, Copy of title deed in the name of Mwinyihamisi Hamisi Mwamguza issued on 4/11/1996, Copies of official search dated 22/3/2009, Limited Grant dated 5/6/1998, Order from Kadhis Court issued on 5/6/2009 in succession cause No. 22 of 2009, The Provincial Land Appeal Tribunal Coast Land Appeal No. Land/ta/223/2002 and its decision/ findings dated 24/7/2007, Court Order dated 24/9/2007 arising from HCCC Misc. application No. 1025 of 2007 Nairobi Judicial Review (Now ELC No. 335/2011 and Bundles of photographs, 1st Letter from Directorate of Criminal Investigations Officer (DCIO) Kwale dated 23/6/2021 and Letter by the 1st defendants' Advocate dated 18/6/2021. Dexh 1- 10.
 19. On cross examination the witness testified that obtained the suit plot 2390 through succession. On cross examination by Mr. Mutugi DW1 indicated that he was 46 years old at the time of subdivision of the suit property. That the Plaintiff has lived in plot 2390 for about 10 years though he and his siblings were apportioned 2389. That on the ground the boundaries were clear including the graveyard. The witness denied the proceedings of the Matuga Committee of 24/4/2002.
 20. On reexamination the witness testified that he was not involved in the subdivision. That he did not make any decision with regards to the subdivided portions. That it is the Plaintiff who had his share but was again claiming a portion of plot 2390.
 21. With the above the 1st Defendants case was marked closed.

Submissions

Plaintiffs Submissions

22. The Plaintiff's submissions were filed on 19/5/2023. On whether or not the original land was family land it is submitted that since it is not in dispute that the original land belonged to Suleiman Mwamguza the common grandfather to the Plaintiff and 1st Defendant, this confirmed the 5 families were entitled to the property Kwale/Ngombeni/233 save for the portion belonging to the Plaintiff's grandmother.



23. On whether or not the Plaintiff is entitled to the one-acre portion under contention it is submitted there was no contest about this portion which belonged to the Plaintiff's paternal grandmother who resided therein and had already developed the same. That the Plaintiffs and his siblings have already constructed their houses on said portion and developed the farm which they call their home. That the portion was the subject of proceedings of the Matuga Land Dispute Tribunal held on 4/11/2002 where it is alleged that the 1st Defendant admitted to a woman having resided on the disputed parcel earlier. That the Plaintiff while testifying at the tribunal was able to demonstrate how the 1st Defendant and his brothers subdivided the land without involving other family members and without any survey exercise and therefore the one acre of the disputed parcel Kwale/Ngombeni/2390 should be given to the Plaintiff and the rest to the 1st Defendant. The Plaintiff states that the decision of the Provincial Land Appeals Tribunal had a lot of pitfalls by setting aside the award of the Matuga Tribunal on grounds of indefeasibility of title.
24. On whether or not the title for Kwale/Ngombeni/2390 is indefeasible it is submitted that where a party is able to demonstrate to court that a fraud or illegality has been perpetuated in obtaining a title deed the same should be cancelled. The case of *Kenya National Highway Authority Versus Shalieu Masood Mughal & 5 Others* [2017] eKLR is cited on this. The plaintiff further quotes an excerpt from the case of *Alberta Mae Gacci Versus Attorney General & 4 Others* which stated that courts of law will never aid in illegal acquisition of titles.
25. The Plaintiff states that he has been able to demonstrate to this court that the 1st defendant perpetrated fraud in 1996 by allocating himself a larger portion. It is stated that at the time of making the fraudulent subdivision and registration the 1st Defendant removed the name of one Hamisi Abdalla Mwamguza by setting it aside as a graveyard. That the 1st Defendant's family members have registered a caveat over parcel 2390 for reasons that the said party registered himself as the owner without including them.
26. As to whether the suit is time barred or res judicata it is submitted that a ruling by Justice Yano dealt with the issue in the sense that a finding was made to the effect that issues to do with the suit property have continually been before court and the most recent case over the same being Judicial Review HC Misc. Civil Application no 335 of 2011. That the judicial review application was defeated by the order transferring all judicial review matters to Nairobi by the then chief justice.
27. It is lastly submitted that the Plaintiff has proved his case on a balance of probabilities. The court is invited to order cancellation of all titles resulting from Kwale/Ngombeni/233 and to order for a physical survey of the entire parcel to remove the 1 acre belonging to the Plaintiff's family and order the remaining portion be shared equally to the 5 families.

1st Defendants Submissions

28. It is submitted that LR No Kwale/Ngombeni/233 was subdivided into 5 portions and to each son of the deceased Suleiman Mwanguzi.
29. That the subdivision process was conducted well and in the presence of all the parties involved and who appeared before the land control board at Matuga save for Hamisi Abdalla Mwanguzi who died before the process was concluded. That as per the statement of Mohamed Alfani recorded at the land tribunal proceedings held at Matuga on 4/11/2001, the titles were produced during subdivision and every beneficiary got their portions of land.
30. In answering the question as to who was present during the subdivision, it is submitted that as per the evidence of Mohammed Alfani during the tribunal proceedings, the father of the plaintiff herein



Abdalla Suleiman Mwanguzi and the father to the 1st Defendant Mwinyi Hamisi Mwanguzi were present and consented to all the processes.

31. It is submitted that the 1st Defendant lodged a complaint on the encroachment of the suit property by the Plaintiff at the Land Dispute Tribunal in Matuga on 4/11/2001 but which was determined in the plaintiff's favour. That the 1st Defendant appealed to the Provincial Land Appeal Tribunal and the decision of the Matuga Land Dispute Tribunal was set aside and Plaintiff was directed to move out of the disputed parcel. No appeal has been preferred against the said decision to date. The 1st defendant submits that he is the registered proprietor of the parcel Kwale/Ngombeni/2390 having obtained the title on 4/11/1996 and has been in occupation of the same since 1970.
32. It is submitted that the Plaintiff has failed to prove that the title was obtained fraudulently by the 1st defendant. The Plaintiff has not produced any mutation form in proof that the 1st Defendant signed the same and allocated himself the biggest share.
33. According to the 1st Defendant the initial beneficiaries to the subdivision of the mother parcel agreed to the shares as allocated and had never complained of the same. That Plaintiff was not a party in Succession Cause No. 22 of 2009 as he was not a beneficiary of LR No Kwale/Ngombeni/2390.
34. On excision of 1-acre portion from LR No Kwale/Ngombeni/2390 it is submitted that during demarcation as per PExh 1 there was no mention of other beneficiaries of the suit property such as the plaintiff's grandmother other than the 5 sons of the late Suleiman Mwanguzi. The Plaintiff and his family have their separate parcel and which is Kwale/Ngombeni/2389 and the 1st Defendant has no claim over it.
35. On the 1st Defendants counterclaim it is submitted that the plaintiff has forcefully entered and /or trespassed into the 1st defendants land Kwale/Ngombeni/2390 and has lived thereon from the year 2008. That it has been confirmed several eviction orders have been sought by the 1st Defendant against the Plaintiff and reports of intimidation by the Plaintiff made at the Diani Police Station. The 1st Defendant submits that the suit herein does not raise any cause of action against him and that the same is an abuse of the court process.
36. It is also submitted that the suit is time barred pursuant to the provisions of section 7 of the Limitation of Actions Act. That the Plaintiff is guilty of laches in instituting the suit 16 years which is beyond the 12 years statutory limit. Reliance is placed on the findings in the case of Nyaberi and 4 Others ELC No 26 of 2018 KE ELC 2328[KLR] and in Soban Lal Durgass Rajput & Another V Divisional Integrated Development Programme Co Ltd [2021] eKLR. That the subdivision of the mother parcel was done on 16/11/1986 and the Plaintiff never filed any case or complaint against the said process until the filing of this suit in 2017. It is further averred that the suit is res judicata as there has been previous litigation over the suit property and which have been determined. It is further submitted that the suit is also time barred pursuant to the provisions of Section 26 as read with Section 4[2] of The Limitation of Actions Act. Reliance is placed in the findings in the case of Edward Moonge Lengusuranga Versus James Lanaiyara & Another [2019] eKLR and in Gathoni Versus Kenya Cooperative Creameries Ltd [1981] eKLR.
37. The 1st defendant also submits that the Plaintiff lacks locus standi to institute the instant suit and the same ought to be dismissed. The same is for the reason that he has not stated what interest he has in the suit and has further confirmed that there is a separate parcel of land that belongs to him and his family. It is further submitted that the suit is frivolous, vexatious and an abuse of the court process as was defined in the case of Muchanga Investment Limited Versus Safaris Unlimited [Africa]Ltd & 2 Others Civil Appeal No 25 of 2002[2009] KLR 229.



38. In conclusion It is submitted that the Plaintiff has failed to prove his case to the required standard and the suit should be dismissed with costs and judgement be entered as per the 1st Defendants counterclaim.

Analysis and Determination

39. Upon consideration of the Plaintiff, Defence and Counterclaim, Witness Testimony, Exhibits and Submissions, the following are the issues for determination:

- a. Whether the Plaintiff has proved his case to the requisite standard for grant of the orders sought,
- b. Whether the 1st Defendant and Plaintiff in the counterclaim has proved ownership of Kwale/ Ngombeni/2390 to be entitled to the eviction orders sought.
- c. Who bears the costs of this suit and counterclaim.

40. The 1st Defendant has raised two issues of law which if proved will definitely lead to the immediate striking out of the suit before this court. The same are that the suit is res judicata and time barred.

41. *Res judicata* is provided under Section 7 of The [Civil Procedure Act](#) as;

" 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".

42. The test in determining whether a matter is res judicata was summarized in [Bernard Mugo Ndegwa - v- James Nderitu Gitbae and 2 Others](#) (2010) eKLR, that; -

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

43. It is not in dispute that initially the plaintiff herein filed suit at the Matuga Land Disputes Tribunal with regard to ownership of the suit property. He was awarded a portion of the suit property as sought before the tribunal. Aggrieved by the said decision, the 1st Defendant filed an appeal at the Coast Provincial Land Disputes Tribunal and succeeded. The Plaintiff did not appeal against the said decision within the set 60 days and instead as per the 1st defendant's pleadings filed the instant suit after allegedly invading the suit property and putting up structures thereon

44. The question therefore is whether the tribunals decision as rendered can be termed as conclusive and lawful and adjudication of the same would amount to res judicata. Section 3 (1) of the [Land Disputes Tribunals Act](#) Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows; -

- 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



45. From the above provisions of the law, it is imperative to state that the Matuga Land Dispute Tribunal acted ultra vires in deciding as to the ownership of the suit property. Nothing can come out of an illegality. I am persuaded by the finding in the case of *Masagu Ole Naumo v Principal Magistrate Kajjado Law Courts & Another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR where Odunga J held as follows-

" In my view the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land".

Consequently, the plea of res judicata as claimed by the defendant has to fail in the context of the decision by the tribunal.

46. It has further been raised that the suit is time barred. Section 7 of the *Limitation of Actions Act* provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

47. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. There has been previous litigation of the suit property, as evidenced by the pleadings and the testimonies of both the plaintiff and 1st defendant. That being the case, it cannot be really determined when the cause of action really accrued.

48. In any case this court is called upon to uphold substantive justice. Only a hearing on merits would achieve justice in my view and enable a closure on this dispute which will set free the warring parties.

49. Having dealt with the preliminary issues I will proceed to discuss the issues seriatim.

Whether the Plaintiff has proved his case to the requisite standard for grant of the orders sought

50. The Plaintiff has sought for a declaration that Plot No. Kwale/Ng'ombeni /2390 is to be held in trust for the beneficiaries of the estate of Suleiman Mwamguza and secondly for rectification of the register in respect of the suit parcel Plot No Kwale/Ngombeni/2390 and replace the 1st defendants name with his name as trustee for beneficiaries of the estate of Suleiman Mwamguza.

56. The plaintiff as per his plaint dated 8/3/2017 claims the entire plot 2390. However, during his evidence in chief and cross examination he was categorical that he was claiming only a portion of parcel No. 2390 measuring about 1acre. It was his evidence that this was apportioned to his grandmother Miathumani Mwamguza.

57. In an adversarial system the burden of proof is always on he who alleges to prove the facts they assert to exist to the required standard. Section 107 of the *Evidence Act* provides that

" Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

58. In the case of *Stephen Wasike Wakhu & Another* (2006) eKLR the court aptly stated that a party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available.

59. I will first deal with the portion the Plaintiff claims by dint of it having been apportioned to his grandmother which appear to be the genesis of this dispute. It is not in dispute that the suit property



Plot No. Kwale/Ng'ombeni/2390 is a subdivision of plot No. Kwale/Ngombeni/233 (mother title) which belonged to the deceased Suleiman Mwanguzi (patriarch) a grandfather to the disputing parties herein. The Plaintiff produced Adjudication letter dated 28/1/2017 for plot No. 233 Ng'ombeni. This letter showed that at the time of demarcation the deceased sons were recorded namely Mwinyi Hamisi Mwanguzi, Ramadhani Mohammed Mwinyikai, Mwichende Alfani Mwanguzi, Hamisi Abdalla Mwanguzi and Abdalla Suleiman Mwanguzi. Also produced by the Plaintiff is an extract of the parcel file for parcel no. 233 Pexh 15 showing that as at June 1982 these sons were registered as proprietors in common in equal undivided shares.

60. From the evidence and the proceedings it also is not in dispute the mother title was subdivided as follows; -

Mwinyihamisi Mwanguzi Kwale/Ngombeni/2390

Ramadhani Mohammed Mwinyikai Kwale/Ngombeni/2386

Mwichende Alfani Mwanguzi Kwale/Ngombeni/2387

Hamisi Abdalla Mwanguzi [Graveyard] Kwale/Ngombeni/2388

Abdalla Suleiman Mwanguzi Kwale/Ngombeni/2389

61. The evidence that this court has been led to is that the mother parcel was subdivided between the initial owners who were the 5 brothers before raling down to the beneficiaries of their estates and who include the plaintiff and 1st defendant. It has not been indicated that the plaintiff's grandmother was apportioned a part of the suit property. It is clear from the above that the name of the said grandmother Miathumani Mwanguzi does not feature in the initial adjudication record and nor does it feature in the above subdivisions which are clearly noted in the parcel register as at June 1982. I note that during cross examination DW1 admitted he knew Miathumani though she lived in her own plot and not plot 2390. The Plaintiff has submitted that at the Matuga Land Dispute Tribunal held on 4/11/2002 the 1st Defendant admitted to a woman having resided on the disputed parcel earlier. To me the presence of Miathumani does not translate to her having being the owner of the same unless proved and which was not proved.

62. From my review of the proceedings the above subdivision of the suit property was spearheaded by the parents to the said parties and who were brothers and yet being more privy to the issue left out Miathumani Mwanguzi. In any case it is pleaded at paragraph 7 of the Plaintiff herein that the said grandmother was the wife to the patriarch. The question I asked is how then would she be counted separately as a spouse. PW1 also testified that they were found there at subdivision but admitted that he did not have anything to show that it was agreed during the said subdivision that he would remain at the plot. Further PW1 admitted in evidence that the said portion belonging to the grandmother has not been demarcated or surveyed. In my view it was not demarcated because it was part of the mother title and which was only subdivided into 5 portions.

63. To me there was nothing before court to show that Miathumani held 1 acre in the mother title or even plot 2390 and it is my finding that the Plaintiff has not proved this limb to the required standard.

64. The Plaintiff has also moved this court seeking that the title Plot No. Kwale/Ng'ombeni /2390 should be impeached on the basis of fraud. It is pleaded that the 1st defendant has fraudulently with the 2nd and 3rd defendants' officers changed the particulars of registration of the said title to include his name and in breach of the trust. The particulars of fraud and breach of trust are given as follows; -



1. Substituting the 1st defendants name with that of Mwinyi Hamisi Mwamguza as trustee in respect of the heirs without consulting the Plaintiff and other heirs
 2. Substituting the 1st defendants name with that of Mwinyi Hamisi Mwamguza without carrying out any succession cause or obtaining any court order
 3. Substituting the 1st defendants name with that of Mwinyi Hamisi Mwamguza with the aim of dealing in the property and transferring title to the same
 4. Purportedly to be proprietor of Plot No. Kwale/Ng'ombeni /2390 and attempting to evict the heirs and beneficiaries thereon.
65. Amongst the set of laws governing the indefeasibility of a title and issues of ownership of land is 24(a) of the [Land Registration Act](#) which provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the [Land Registration Act](#) states as follows:

“ The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except; –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

66. Rectification of the register in regard to a registered title can only be effected if fraud is proved under. Section 80 (1) of the [Land Registration Act](#), 2012 provides thus: -

80

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

67. PW1 stated in his evidence in chief that he was currently on plot 2390. That he was not in plot 2389 which is the plot belonging to his father. This he reiterated in cross examination that plot 2389 is a separate parcel of land that belongs to him and his family. On being shown the adjudication record of 10/1/1978 PW1 admitted his father was given plot No. 2389 and where in fact his nephew resided. He admitted there was nothing in writing during subdivision that stated the Plaintiffs were to continue living on plot no 2390. These admissions alone militated the veracity of the Plaintiffs claims of fraud



pertaining to Plot No. Kwale/Ng'ombeni /2390. Clearly the Plaintiff belongs to where his father's plot is and not plot 2390.

68. As earlier stated in this judgement as deduced from the pleadings, the mother parcel belonged to the deceased Suleiman Mwanguzi a grandfather to the disputing parties herein. At the time of subdivision of the suit property, the parents to the said parties and who were brothers spearheaded the same and had the land subdivided to 5 portions. While the Plaintiff stated on cross examination he did not know who undertook the original subdivision of plot 233 as his father was already deceased then, he also did not successfully link the 1st defendant to the same. It is clear from the oral testimonies that none of the parties herein were involved during this subdivision.
69. The 1st defendant stated in re-examination that he inherited the land and his father obtained a title. He produced as part of his evidence copy of the title deed for Kwale/Ng'ombeni /2390 in the name of his father Mwinyi Hamisi Mwamguza issued on 4/11/1996.
70. That upon the demise of his parent above, the 1st Defendant filed a succession suit at the Kadhis Court and states that he holds the said property in trust for the rest of the beneficiaries of the estate of his late father Mwinyi Hamisi Mwanguzi. The 1st Defendant tendered a copy of an Order from Kadhis court issued on 5/6/2009 in Succession Cause No. 22 of 2009 (DEXh 5). The Plaintiff states that he was not included in the succession cause at the Kadhis Court and which led to the transfer and registration of the suit property in the 1st Defendant's name. My perusal of the succession order shows the said 1st Defendant holds the land in trust and on behalf of co-heirs. These co heirs are listed therein. Indeed, it is true the Plaintiff is not listed as one of them.
71. The 1st Defendant gave evidence as DW1 stated that he did not involve the Plaintiff in the Kadhis proceedings because he was not his brother and therefore they could not be co-heirs with him. But let me state that from the pleadings it is evident that the Plaintiff is not a child to Mwinyi Hamisi Mwanguzi and neither has he tendered any proof of having qualified as a beneficiary to the estate of the said deceased Mwinyi Hamisi Mwamguza. The 1st Defendant in response to the allegations of fraud produced Dexh 9 a letter from Directorate of Criminal Investigations Officer (DCIO) Kwale dated 23rd June 2021. My perusal of the same revealed that the 1st defendant surrendered the original for title Kwale/Ng'ombeni /2390 as ordered by investigating officers. The letter confirms that it was confirmed upon verification that the title was duly issued in his name as trustee and that there would be no further criminal investigations. The 1st Defendant confirmed in his evidence that the title was returned to him.
72. The question therefore is, has the Plaintiff been able to prove the element of fraud alluded to on the part of the 1st Defendant in registration of the suit property Kwale/Ngombeni/2390. The standard of proof in fraud was discussed by the court in *Kinyanjui Kamau -v George Kamau* [2015] eKLR where it expressed itself as follows; -

...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo -v- Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: "...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases..." In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."



73. From this court's discussion and analysis above, the Plaintiff has simply inferred to fraud on the part of the 1st Defendant but has failed to prove the same as required under Section 107 of the Evidence Act. Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

74. Based on the foregoing the Plaintiff having failed to prove to the required standard that they are entitled to the suit property and or a portion thereof and having failed to prove fraud, his claim must fail.

Whether the 1st Defendant and Plaintiff in the counterclaim has proved ownership of Kwale/ Ngombeni/2390 to be entitled to the eviction orders sought.

75. The 1st Defendant in his counterclaim has sought for orders to the effect that he is the registered owner and proprietor of the suit property known as LR No Kwale/Ngombeni/2390. For clarity I will still refer to to him as the 1st defendant though I recognize he is the Plaintiff for purposes of the counterclaim. It is trite that a counterclaim is a suit of its own and therefore the 1st defendant also shoulders the burden of proving his case. The 1st defendant's title was also being questioned and it was incumbent upon him to demonstrate how his title was obtained. The Court of Appeal in Munyu Maina v Hiram Gathiba Maina Civil Appeal No. 239 of 2009 [2013] eKLR, stated that where the registered proprietor's title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

76. I have already enumerated in the discussions foregoing the rebuttal given by the 1st Defendant to the Plaintiff's case and the documents tendered in evidence. Briefly the 1st defendant stated that he came into possession of the suit property by transmission and through the Kadhis Court in Succession Cause No 22 of 2009. As per the evidence earlier tendered, the suit property was as a result of the subdivision of the mother parcel Kwale/Ngombeni/233. The 1st Defendant's father was given the suit property and which was later transmitted to the 1st defendant. The 1st Defendant has been able to demonstrate the process of how he acquired the title in his name and as trustee for the others. The 1st Defendant has produced before court evidence of the order from the Kadhis Court allowing him to be registered as the proprietor of the suit property as trustee. The fraud allegations as alluded to by the Plaintiff have not been successfully proved.

77. In view of the foregoing it is this court's finding that the counterclaim has been proved to the required standard. I will next consider if the prayers in the counterclaim should issue.

78. The 1st defendant craves the following prayers; -

- a. A declaration that the 1st Defendant is the registered owner and proprietor of the suit property known as LR No Kwale/Ngombeni/2390
- b. Eviction and/or vacant possession issue against the plaintiff
- c. Mesne profits of Kshs 6,000 pa from date of entry and use in 2008 to date the plaintiff vacates the suit property.
- d. Interest in [a] and [b] above at court rate.
- e. Any other relief this Honourable court may deem fit and just for grant.



79 The court finds no reason in not allowing prayer (a) of the counterclaim except with the emphasis that it is held in trust as per the record.

80. With regard to mesne profits Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -

mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

81. Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows: -

13.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

82. The Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

83. It is trite that mesne profits are special damages and ought to be proved. See *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR. The 1st Defendant in his evidence before court stated that in the year 2008 the Plaintiff invaded the suit property and has resided on the same since then. From the evidence tabled before court, the 1st Defendant has not proved that initially before the alleged invasion, the portion invaded by the Plaintiff was in use. In as much as the same is his property, for a claim of mesne profits to succeed, it has to be stated with precision the nature of damages that has been suffered. If for instance the said portion was housing business premises or was used for



farming and which was generating some form of income, the 1st Defendant is to prove the said loss. The 1st Defendant did not furnish court with any evidence in this regard to enable the court make a determination on the same. The claim for mesne profits is hereby declined.

84. The 1st defendant wants vacant possession of the suit property and or the Plaintiff to be evicted therefrom. The court takes note of the Plaintiffs testimony during cross examination that he would not have a problem if the 1st defendant were to be compensated of the portion occupied by the Plaintiff from plot 2389 and which proposal was vehemently declined by the 1st defendant. The court cannot intervene in view of this. The 1st defendant having proved ownership of the suit property I see no reason to deny the prayer for vacant possession.
85. The upshot is that the Plaintiff's suit is dismissed with costs to the 1st defendant. The 1st defendants' counterclaim is allowed and judgement is hereby entered for the Plaintiff in the Counterclaim and who is the 1st Defendant in the main suit as follows; -
- i. A declaration that the 1st Defendant is the registered owner and proprietor of the suit property known as LR No Kwale/Ngombeni/2390 as trustee.
 - ii. An eviction order be and is hereby issued directed to the plaintiff and who is the defendant in the counterclaim ordering him to vacate the suit parcel Kwale/Ngombeni/2390 within Six (6) months with effect from 1st December 2023 failure to which he shall be evicted at his own cost.
 - iii. Costs of the counterclaim is awarded to the 1st defendant and who is the Plaintiff in the counterclaim.

It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2023.

.....

A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mutugi for the Plaintiff

Ms. Chesaro for the 1st Defendant

No appearance for the Attorney General

Mr. Daniel Disii – Court Assistant

