



**Ngoge v Awendo & another; Land Control Board through the District Officer  
(Kasipul Division) & 4 others (Interested Parties) (Environment & Land  
Petition 9 of 2021) [2023] KEELC 22290 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22290 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND PETITION 9 OF 2021  
GMA ONGONDO, J  
DECEMBER 6, 2023**

**BETWEEN**

**PETER ODIWUOR NGOGE ..... PETITIONER**

**AND**

**DICKSON AROGO AWENDO ..... 1<sup>ST</sup> RESPONDENT**

**YUKABETH MIDIGO OWIYO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE LAND CONTROL BOARD THROUGH THE DISTRICT OFFICER  
(KASIPUL DIVISION) ..... INTERESTED PARTY**

**THE DISTRICT LAND REGISTRAR RACHUONYO DISTRICT INTERESTED  
PARTY**

**MR JOSEPH SHELLEMIH MBAKA ..... INTERESTED PARTY**

**THE FORMER AREA CHIEF MR LAWRENCE OCHICH .... INTERESTED  
PARTY**

**HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY**

**JUDGMENT**

1. In a petition dated 26<sup>th</sup> May 2017, amended on 19<sup>th</sup> September 2017, further amended on 17<sup>th</sup> September 2019 and filed on 19<sup>th</sup> September 2019, the petitioner through the firm of O.P Ngoge & Associates Advocates has sought that;
  - a. A declaration that the highly secretive collusive and fraudulent transfer of the parcel of land known as West Kasipul/Kotieno-Kochich/359 (the suit land herein) into the names of the



1<sup>st</sup> respondent herein in or about the year 1990 and its subsequent subdivisions and transfer thereof to the 2<sup>nd</sup> respondent herein as a gift and further alienation to other unknown third parties were null and void, unconstitutional, fraudulent and unlawful and contrary to section 31 of the [Law of Succession Act](#) and sections 6 and 8 of the [Land Control Act](#).

- b. Orders of certiorari to issue to bring forthwith and remove to this Honourable Court for the purposes of quashing illegal, unconstitutional and fraudulent transfer of the suit land in the names of the 1<sup>st</sup> respondent plus all subsequent sub-divisions and transfers thereof to the 2<sup>nd</sup> respondent as a gift and to unknown third parties, such that the suit land reverts automatically back to the estate of the late Mzee Ongadi Kibat Oketch alias Ongadi Nyagweru (Deceased-1) to await distribution to all the beneficiaries of the estate of deceased-1 in line with the [Law of Succession Act](#) and immediately thereafter, the same be registered in the names of the petitioner herein since the suit land had been gifted to the petitioner herein under Section 31 of the [Law of Succession Act](#) by Deceased-1 in the year 1987.
- c. An order of certiorari to issue to bring forthwith to this Honourable Court for the purposes of quashing the consent granted by the Land Control Board on the 7<sup>th</sup> January 2010 authorizing the 1<sup>st</sup> respondent to unlawfully transfer of land reference number West Kasipul/Kotieno Kochich/801, a subdivision of the suit land, as a gift and without any consideration to the 2<sup>nd</sup> respondent to the detriment of the petitioner who was thereby condemned contrary to rules of natural justice and disinherited considering that his un surveyed portion was included in the two subdivisions namely LR Nos. West Kasipul/Kotieno Kochich/801 and West Kasipul/Kotieno Kochich/802.
- d. A declaration that the fraudulent transfer and the subsequent subdivisions of the main title being the suit land collusively by the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, on diverse dates from the year 1990 as aforesaid, is null and void and invalid and contrary to [the Constitution](#), the [Land Control Act](#) and the [Law of Succession Act](#) and the same be cancelled.
- e. The former area Chief Mr. Lawrence Ochich Oliech and the current area Chief Mr. Shellemiah Mbaka (the 4<sup>th</sup> and 3<sup>rd</sup> interested parties respectively herein) or the local administration be directed to liaise and co-ordinate with the clan elders and family members of the petitioner and the respondents on the ground to determine the boundary of the un-surveyed portion of land which had been allocated or gifted to the petitioner by Deceased-1 and to assist the Land Surveyor in surveying and delimiting the said portion from the main title.
- f. That general damages be assessed and awarded to the petitioner as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein and against the Registrar of Lands for deliberately subverting the fundamental human rights of the petitioner as alleged and for deliberately misleading the Land Control Board and the District Land Registrar to authorize and effect the said unlawful transfers and subdivisions of the suit land, which property had been conditionally gifted to the petitioner herein under Section 31 of the [Law of Succession Act](#) by Deceased-1 and thereby contravening Articles 10, 25, 27, 40 and 47 of [the Constitution](#) and contrary to Sections 26, 29 and 31 of the [Law of Succession Act](#).
- g. That the costs of the suit be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the interested parties herein.
- h. Further or in the alternative, the petitioner prays that the suit land which was gifted to the petitioner by Deceased-1, under Section 31 of the [Law of Succession Act](#) in the year 1987, be registered in the names of the petitioner herein forthwith, after which the petitioner herein be



at liberty to subdivide the said property and give the 2<sup>nd</sup> respondent herein the portion which Deceased-1 had pointed out to the petitioner herein that the same should be carved out of the main title and given to the 2<sup>nd</sup> respondent herein because the 2<sup>nd</sup> respondent herein used to give Deceased-1 food.

2. In a nutshell, the petitioner's lamentation is that in or about the year 1987, Deceased-1 being the proprietor of the suit land, allocated/gifted a substantial un-surveyed portion of the suit land to the petitioner in the presence of many people including the petitioner's family members and the respondents. That during that time, the petitioner was a minor who was in class seven at Ondiko Primary School hence, his parents acted as his trustees thereof. That under Luo customs and tradition, deceased-1 inherited the petitioner's grandmother, Sarah Opere (Deceased-2) who died in the year 1997 and had planted euphorbia trees to demarcate and delimit the suit land and prevent it from unlawful encroachment. That deceased-1 died in 1996 and was buried in the suit land.
3. Further, the petitioner laments that he perused records at the Land Registry and discovered that in the year 1990, the 1<sup>st</sup> respondent fraudulently and secretly without the knowledge and consent of the family of deceased-1 and deceased-2, transferred the entire suit land to his own name as the sole proprietor. That the 1<sup>st</sup> respondent obtained consent of the local land control board and subdivided the suit land into LR numbers West Kasipul/Kotieno-Kochich/800, 801 and 802 which he sold to a 3<sup>rd</sup> party, the 2<sup>nd</sup> respondent and another 3<sup>rd</sup> party respectively without carrying out any succession thereof. That the council of elders arbitrated over the matter and ruled that the actions of the respondents were unlawful. That the respondents' actions including the transfer and the subdivisions thereof, are unlawful, null and void.
4. The 1<sup>st</sup> respondent through the firm of Achillah and company Advocates, opposed the petition by his replying affidavit sworn on 3<sup>rd</sup> September 2018 and filed on 5<sup>th</sup> September 2018 herein. He deposed inter alia, that in the year 1970, while he was working in Kericho, deceased-1 approached his father, Sulman Awendo (Deceased-3) with an intention of selling the portion of the suit land. That the 1<sup>st</sup> respondent returned home after consultation with deceased-3 and purchased the said portion from deceased-1 and paid ten cows as consideration by instalments. That in the year 1986, Deceased-1 and himself went to the Land Control Board and obtained consent, transfer of the suit land and thereafter, title deed thereof.
5. Furthermore, the 1<sup>st</sup> respondent averred that he moved to the suit land in 1973 and built his home thereon. That he has been staying on the suit land to-date. That the petition has no basis and the petitioner is just harassing him because he has the means and capacity to grab the suit land.
6. By the petitioner's affidavit sworn on 6<sup>th</sup> November 2018 and filed on 7<sup>th</sup> November 2018 in response to the 1<sup>st</sup> respondent's replying affidavit to the petition, it is averred in part that some of the contents of the said replying affidavit are false. That the 1<sup>st</sup> respondent acquired the suit land belonging to deceased-1. That the records at Rachuonyo Lands office show that the 1<sup>st</sup> respondent fraudulently transferred and acquired the whole of the suit land without the knowledge of deceased-1 and his wife as there was no written agreement, consent and instrument of transfer thereof.
7. The 2<sup>nd</sup> respondent, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> interested parties, duly served, did not participate in this petition. The 5<sup>th</sup> interested party filed a memorandum of appearance dated 8<sup>th</sup> October 2019 on 11<sup>th</sup> December 2019.
8. It is noteworthy that the petitioner applied for withdrawal of the petition against the 3<sup>rd</sup> and 4<sup>th</sup> interested parties. On 10<sup>th</sup> November 2021, the court allowed the application with no orders as to costs.



9. By dint of the petitioner's submissions dated 2<sup>nd</sup> December 2021 at paragraph 45, order number (e) sought in the further amended petition, is hereby marked as withdrawn with no orders as to costs.
10. As reported by the petitioner on 23<sup>rd</sup> October 2019, the parties attempted alternative dispute resolution in this matter. That the same aborted.
11. Initially, the instant petition was lodged at Migori Environment and Land Court. The same was transferred to this court for hearing and determination with effect from 20<sup>th</sup> September 2021 as envisioned under Articles 6 (3) and 48 of *the Constitution* of Kenya, 2010.
12. The court heard this petition by way of written submissions as disclosed in the proceedings of 10<sup>th</sup> November 2021.
13. The Petitioner filed submissions dated 2<sup>nd</sup> December 2021 and stated that the amended petition is unopposed. That Deceased-1 who was childless gifted the petitioner the suit land under Section 31 of the *Law of Succession Act* (Cap 160 Laws of Kenya) in the presence of other people including the 4<sup>th</sup> interested party and 2<sup>nd</sup> respondent. That the 1<sup>st</sup> respondent conspired with the 1<sup>st</sup> and 2<sup>nd</sup> interested parties and transferred the whole of the suit land into 1<sup>st</sup> respondent who obtained consent of Land Control Board and subdivided it into three portions. That a council of elders handled the dispute and the 2<sup>nd</sup> respondent was allowed by deceased-1 to put up homestead on it as he used to give him food. That at some point, deceased-1 inherited deceased-2 who died in 1997 under Luo Customary laws.
14. Also, the petitioner submitted that he has locus standi herein as the 1<sup>st</sup> respondent obtained the suit land fraudulently. To buttress the submissions, the petitioner relied on his list of authorities dated 2<sup>nd</sup> December 2021 serial numbers 1 to 10 which include; Re Estate of Nguthari Mbogori (Deceased) (2019) eKLR, Muchanga Investments-vs-Safaris Limited (Africa) Ltd & 2 others (2009) eKLR, Paulina Chemtai Chirchir-vs-Kipyegon Arap Sang & others (2015) eKLR and Elijah Makeri Nyangwara-vs-Stephen Mungai Njuguna & another Eldoret ELC case number 609B of 2012 and Section 120 of the *Law of Succession Act* (Cap 160 Laws of Kenya).
15. By the submissions dated 1<sup>st</sup> April 2022, learned counsel for the 1<sup>st</sup> respondent stated that the 1<sup>st</sup> respondent bought the suit land from deceased-1 in 1970 and took possession of the same in 1973. That the 1<sup>st</sup> respondent secured its formal transfer and registration in 1986. That deceased-1 died in 1996 and the death registered in 2019. That there is no evidence inclusive of date, time and why the suit land was not transferred to petitioner who was aged 20 years at the time it was allegedly gifted to him. Counsel relied on the case of Cain-vs-Moon 1986 QB 283 by stating that the 1<sup>st</sup> respondent is registered as the owner of the suit land under Section 24 of the *Land Registration Act*, 2016 (2012) and there is no proof of exceptions under Section 26 (1) of the same Act. That no oral evidence was presented to prove fraud, misrepresentation, illegality and irregularity on the part of the 1<sup>st</sup> respondent and that the petitioner started to pursue the instant claim 21 years after death of Deceased-1.
16. Further, the 1<sup>st</sup> respondent submitted that the petitioner has no locus standi to lodge this petition as a grant of letters of administration of the estate of Deceased-1 was obtained on 29<sup>th</sup> April 2021. That the claim by petitioner does not meet the threshold under Section 31 of the *Law of Succession Act* (Cap 160) and thus, the same fails and it be dismissed with costs.
17. The petitioner filed further written submissions in reply to the 1<sup>st</sup> respondent's submissions dated 1<sup>st</sup> April 2022 to the effect that deceased-1 sold land not disclosed and that the alleged sale agreement was not produced in evidence. That therefore, the acquisition of title thereof was fraudulent, un-procedural, corrupt and unlawful. That the court has the jurisdiction to impeach the title as the



petitioner is claiming his gift of the suit land obtained from deceased-1 in the year 1987 and there is no need of letters of administration in that scenario.

18. In the foregone, the issues for determination herein are compressed to whether;
  - a. The petition has attained threshold of a Constitutional petition,
  - b. Is the petitioner entitled to the orders sought in the petition?
19. It is important to note that this court has the mandate over the petition pursuant to Article 162 (2) (b) of *the Constitution* and Section 13 (3) of the *Environment and Land Court Act*, 2015 (2011); see also Jane Frances Angalia-vs-Masinde Muliro University of Science and Technology and others (2010) eKLR.
20. Constitutional violations must be pleaded with a reasonable degree of precision as held in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272. This position was restated by the Court of Appeal in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR where the Court stated;

“.....However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example,.....No particulars were enumerated.....”
21. Indeed, no particulars of alleged violations and the manner thereof are set out on the face of the petition. As such, the petition has not attained the requisite threshold.
22. The petitioner alleged that the 1<sup>st</sup> respondent transferred and acquired the suit land fraudulently. In Black’s Law Dictionary 10<sup>th</sup> Edition at page 775, the term “Fraud” means;

“ A knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment”
23. It is well settled that fraud and misrepresentation as grounds of impeaching a certificate of title, be distinctly pleaded and proved; see Kuria Kiarie and 2 others-vs-Sammy Magera (2018) eKLR.
24. A party can present documentary or oral evidence to establish allegations of fraud. It is not enough to infer fraud from the facts of the as noted in the case Kinyanjui Kamau-vs-George Kamau (2015) eKLR. Fraud was not distinctly pleaded on the face of this petition. There was no sufficient material availed to prove that there was fraud on the part of the 1<sup>st</sup> respondent in the acquisition of the suit land as stated in Kiarie and Kamau cases (supra).
25. Moreover, in Section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the term ”Legal representative” is defined as;

“ a person who is in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person in whom the estate devolves on the death of the party so suing or sued.”
26. In Alfred Njau and others-vs-City Council of Nairobi (1982-88) 1 KLR 229, the Court of Appeal observed;

“ .....locus standi is the right to appear or be heard in court or other proceedings.....”



27. In the case of Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) KLR, the Court of Appeal remarked;
- “...A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession....”
28. Similarly, in Omari Kaburu-vs-Industrial and Commercial Development Corporation (2007) KLR, Wanjiru Karanja, J (Now, JA), held;
- “...The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”
29. Article 22 of *the Constitution* provides for enforcement of the Bill of Rights inclusive of protection of right to property as enshrined in Article 40 of the same Constitution. Article 23 (3) of the said Constitution sets out the appropriate relief that a court can grant to parties.
30. In the circumstances, I endorse the decision of H. Ong’undi J in the case of Republic-vs-The Attorney General and Another Ex-parte John Mugo (2013) KLR, that;
- “....The applicant cannot fail to follow the procedure and hide under Article 22 (1) (2) of *the Constitution*.....He therefore lacks locus standi.....”
31. It is crystal clear that this petition was lodged on 19<sup>th</sup> September 2019. The deceased died on 23<sup>rd</sup> May 1996. Interestingly, the petitioner obtained the grant of letters of administration in respect of the estate of the deceased-1 on 29<sup>th</sup> April 2021. Therefore, his want of locus standi in the instant petition cannot be sanitized thereby.
32. Furthermore, the petitioner asserted in part that he obtained the suit land as a gift from deceased-1 under Section 31 of the *Law of Succession Act* Chapter 160 of the Laws of Kenya. It is common ground that he is not in possession of the suit land. So, his claim has not satisfied the characteristics of gift as held in Cain case (supra) and under the said statutory provision.
33. Section 28 (b) of the *Land Registration Act*, 2016 (2012) provides for customary trust as an overriding interest in respect of registered land. I am guided by the Supreme Court of Kenya decision on some of the elements of customary trust as noted in the case of Isack M’Inanga Kiebia-vs-Isaaya Theuri M’Lintari & another (2018) eKLR. Besides, it has not been established that the suit land registered in the name of the 1<sup>st</sup> respondent, is held in trust for the petitioner.
34. Wherefore, this petition is incompetent and it fails. Thus, the same is hereby struck out.
35. On costs, this court has the mandate to award the same further to Section 13 (7)(i) of the *Environment and Land Court Act*, 2015 (2011) and the proviso to Section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
36. In Jasbir Singh Rai & 3 others-vs-Tarlochan Singh Rai & 4 others (2014) eKLR, the Supreme Court of the Republic of Kenya noted that the basic rule that costs follow the event is not an invariable rule. That indeed, the ultimate factor on award or non-award of costs is the judicial discretion.
37. Given the nature of this petition, each party to bear their respective costs of the same.
38. It is so ordered.

DATED and DELIVERED at Homa Bay this 6<sup>th</sup> day of December 2023.



G. M. A ONGONDO

JUDGE

PRESENT;

a. Petitioner-Virtually

b. 1<sup>st</sup> Respondent.

c. Mr T.Achillah learned counsel for the 1<sup>st</sup> Respondent-Virtually.

d. 2<sup>nd</sup> Respondent

e. Luanga, court assistant

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