



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**ENVIRONMENT AND LAND CASE NO. 100 OF 2012**  
**[FORMERLY HCCC NO. 49 OF 2012]**

SAMUEL SAMITA NAMUNYU ..... PLAINTIFF

VERSUS

PHILIMON MACHINA NDIWA

ERNEST NJUYA NDIWA

RUTH MULEMIA NDIWA

DAVAGA KUNDU WAMONO ..... DEFENDANTS

**JUDGMENT**

1. The plaintiff vide his plaint dated 22<sup>nd</sup> April 2010 presented to this court for determination, seeking the following prayers;

(a). An order of cancellation of land title numbers Ndivisi/Muchi/7312, 7313, 7314 and 7315 from the defendants respectively and revert back into the original number Ndivisi/Muchi/339 in the name of the late Ndiwa Namunyū until succession is carried out.

(b). Costs of this suit.

(c). Any other relief as this honourable court may deem fit to grant.

2. The brief summary of the plaintiff's claim as contained in the pleadings and the evidence is that he is entitled to a portion of land measuring 12 acres from L.R. Ndivisi/Muchi/339 (hereinafter referred to as the "suitland") as per the decree in Webuye land case no. 16 of 2002. According to the plaintiff, the defendants fraudulently subdivided the suit land and processed titles into their names without the owner's consent and in a bid to avoid execution of the decree arising from Webuye land case no. 16 of 2002.

3. Mr. Moses Samita, the son to the plaintiff gave evidence on the plaintiff's behalf. He told the court the plaintiff had difficulty of hearing. He testified that his father and Ndiwa Namunyū were brothers. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are sons to Ndiwa Namunyū - deceased while the 3<sup>rd</sup> defendant is the widow. The 4<sup>th</sup> defendant is a purchaser of part of the suit land. He continued that the clan resolved that the land no. 339 be divided between the plaintiff and his deceased brother. When Ndiwa died, his sons carried out succession of his estate and shared out the land

between themselves without considering the decree issued earlier by the tribunal case which had given the plaintiff 12 acres. He said the defendants destroyed the boundary planted by the surveyor. In his evidence cancellation of the titles will enable the parties to get two titles between Ndiwa – deceased and the plaintiff.

4. The witness said he had registered cautions on the four titles he seeks to cancel. That the decree from Webuye land case still stands as the application seeking to challenge it was dismissed. He annexed copy of the ruling in his list of documents. He felt bitter that the case was still in court while the defendants are exclusively using the land. He urged the court to allow this suit with costs. The defendant's counsel had no objection to the documents filed by the plaintiff being produced as exhibits. The documents list dated 11<sup>th</sup> June 2010 and filed in court on 29<sup>th</sup> June 2010 are thus treated as plaintiff's exhibit 1-7 respectively

5. During cross -examination, PW1 stated that article 22 and 23 of the Constitution allows parties to act on behalf of those who are unable to. His father (the plaintiff) was working in Kisii when Ndiwa got himself as sole registered owner in 1967 and obtained the title in 1988. The plaintiff bought another land where they live on currently. The plaintiff stopped using the suit land in 2010 when the defendants chased him. They learnt of the fraud in March 2010. They reported to the police but no investigation was carried out. They had given the decree to the land registrar but the registrar said he needed the original title deed before executing the order. That L.R. 339 is the plaintiff's father's ancestral land. At this point, the plaintiff closed their case but later re-opened it to call other witnesses.

6. Andrew Ngome testified as PW2. He said he knew the plaintiff and the 1<sup>st</sup> – 3<sup>rd</sup> defendants as they were family but does not know the 4<sup>th</sup> defendant. He can remember this case was in court in 1999 after a complaint brought against Ndiwa Namunyu- deceased. PW2 was the clan secretary then and did the summons to the deceased, delivering personally one of the letters but Ndiwa-deceased never responded. In their clan deliberation, they resolved that the plaintiff gets 12 acres and the deceased retains 15 acres of the suit land. In cross examination, he confirmed none of the members of Ndiwa-deceased family was present in their meeting. The plaintiff had two brothers –Ndiwa and Busuru but Busuru died earlier. Before the complaint was filed, the plaintiff lived in Milo on a land he bought and only came to the suit land after 1999.

7. PW3, Jacob Simiyu Kilasi gave evidence that he knew the plaintiff and all the defendants. According to him, the suit land belonged to the father of the plaintiff and defendants who had shared the suitland amongst his 3 wives. He continued that the plaintiff and his deceased brother did not agree on the mode of sharing hence the plaintiff's complaint to the clan. On cross-examination, he said that the suit land was to be shared amongst the 3 sons. However Busuru died leaving no child and the land is 26 acres. He did not know why Ndiwa-deceased did not attend the clan meeting. The plaintiff closed his case after this witness concluded his testimony.

8. The suit is defended via the joint statement of defence of the defendants filed on 24<sup>th</sup> May 2010. In their defence, the defendants have admitted Ndiwa Namunyu –deceased died in December 2008. It is also their case that the decree in Webuye LDT no. 16 of 2002 was challenged vide Bungoma H.C. Misc. Civ. Appl. no. 112 of 2002 which is still pending. They have denied the particulars of fraud pleaded in the plaint. They concluded that the prayers sought by the plaintiff are not available to him and urged the court to dismiss the suit with costs to them.

9. The defendants then presented oral evidence through the testimonies of 1<sup>st</sup> – 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant testified as DW1. He works with Nzoia Sugar Co. and the plaintiff is his uncle. The suit land was registered in his father's name in 1967. His evidence is that the plaintiff is not entitled to share in this land as he got himself registered as owner of L.R. 267. That the plaintiff has never lived on this land and each of the sons lived on their shares. He was never invited to attend any clan meeting regarding the dispute over the suit land.

10. DW1 continued that he got his title deed in 2010 as their father had signed for them transfer forms before he died. He produced copies of the title deeds for L.R. Ndivisi/Muchi/7312, Ndivisi/Muchi/7314 and Ndivisi/Muchi/7313 in their names and which were resultant numbers after subdivision of the suit land. He concluded his evidence that he was not a party to Land Disputes Tribunal no. 16 of 2002 and when they did subdivision there was no restriction on the title. He opposed the prayers for cancellation of their titles.

11. He was cross examined by PW1 on behalf of the plaintiff. He said his grandfather had 3 wives. In 1999, his father was still alive and the land was bearing the name of Ndiwa Namunyu. He was unaware of the vesting order and that the suitland was to be shared between his father and plaintiff. He was unaware of the D.O's letter that ordered cancellation of their titles neither did he see the surveyors and police map out the land for sub-division. He had not seen the mutation form signed by the executive officer. They followed the right procedure in acquiring their titles. He did not have title documents to show L.R. 267 belonged to the plaintiff. In re-examination, he said he was not aware of clan meeting of 1999. The District officer never stopped them from getting consent for subdivision and there was no house built by the plaintiff on this land.

12. Ernest Ajuya Ndiwa, the 2<sup>nd</sup> defendant testified as DW2. He agreed with and adopted the evidence of DW1. He said the two titles 339 and 267 were all ancestral land and each of the brothers was given a parcel each. In cross examination, he said he was aware of the meeting about sharing land but no agreement was reached. The title deeds they currently have were not available to them in 1999. The plaintiff did not build any house on the land. He denied that the plaintiff had bought the land they were living on as it was ancestral and the plaintiff has never lived on the suitland.

13. DW3 Ruth Mulemia Ndiwa is the mother to 1st and 2<sup>nd</sup> defendant and widow of Ndiwa-deceased. She is a sister – in-law to the plaintiff. She said she has lived on the suitland from 1957 together with her husband. When her husband (Ndiwa) fell ill, he decided to share out his land amongst his sons before dying. The plaintiff has never lived on this land. She was not aware of the case before the Land Disputes Tribunal but was aware of a dispute before the chief. In cross-examination she said her husband won the case before the chief. The transfers were done later after they got money for it. She never saw any surveyor come to survey the land. That the plaintiff does not own any portion of their land. The plaintiff and his sons have been beating her to leave the land. With this evidence, the defendants closed their case.

14. The parties then agreed to take a date for judgment. On this date the plaintiff had put in his submissions therefore the defendant was to file theirs before judgment. The plaintiff's submissions was a summary of the evidence adduced and on record hence I need not reproduce it here. The defence submitted on both law and facts. They submit that the decree from Webuye Land Disputes Tribunal in case no 16 of 2002 is a nullity as the same was made without jurisdiction. They referred this court to the case of **Motor Vessel Lilian S vs Caltex Oil Kenya (1989) KLR 1**. The defence further submits that the claim is time barred as it was brought 43 years later contrary to the provisions of section 7 of the Limitation of Actions Act. Finally, they submitted that the allegations of fraud made against them were never proved. On this, the defendant referred to this court's decision in Joseph **Wanyonyi Ondieki vs Henry Wanyonyi Masinde, Bgm HCCC no 57 of 2008 (unreported)**. Having considered all the oral and documentary evidence adduced and the submissions filed, I find the following questions arising for determination;

1. What is the effect/validity of the decree obtained in Webuye Land Disputes Tribunal no. 16 of 2002?
2. Did the plaintiff prove fraud committed by the defendants?.
3. Is the plaintiff entitled to the orders sought?

15. **Effect/validity of decree in Webuye LDT no. 16 of 2002**

From the evidence adduced by the plaintiff, it shows he had sued Ndiwa Namunyu – deceased before the Webuye land disputes tribunal and got an award in his favour. However Ndiwa died before the decree was executed as he had declined to surrender the original title deed as required by the Land registrar. The 1<sup>st</sup> – 3<sup>rd</sup> defendants denied in their evidence being aware of this decree but pleaded in paragraph 5, 7, and 8 of their defence thus;

**5: “The contents of paragraph 8 and 9 of the plaint is denied and the defendants by way of defence aver that the decree in Webuye Land Disputes Tribunal no. 16 of 2002 was challenged vide Bungoma HC. Misc. Civl. App. No. 112 of 2002, which is still pending in court.**

**8: “The contents of paragraph 12 of plaint are denied ..... this case is over and about the same challenging the decree in Webuye Land Disputes Tribunal 16 of 2002 vide Bungoma HC Misc. No. 112 of 2002 yet to be determined by the high court.”**

16. From the contents of the defence, it is clear the 1<sup>st</sup> -3<sup>rd</sup> defendants are aware of this decree and cannot therefore feign ignorance as they tried to do in their testimony. The plaintiff, in response to this defence produced his documents filed which included a ruling made in Bungoma Hc. Misc no. 112 of 2002. In the ruling, copy of which is annexed, that application was struck out on 16<sup>th</sup> November 2005. Although the defendants pleaded it was still pending, they did not show by way of documentary evidence that status. I will therefore dismiss their averment that the same is pending and hold that the application was struck out as per the evidence presented by the plaintiff.

17. On the second limb of this suit being *res judicata*, the defendants never made any submissions why they held that view. In the present suit, the plaintiff is seeking cancellation of title nos. Ndivisi/Muchi/7312, 7313 and 7314. When the Land Disputes Tribunal case was decided, these titles did not exist and the action of subdividing the suit land had not taken place. Therefore it was not a cause of action that was capable of being determined then before the Webuye Land Disputes Tribunal. Consequently in my view the decree passed in Webuye Land Disputes Tribunal no. 16 of 2002 is still in force although executing it may be a challenge the plaintiff will have to deal with given the changes in the title number that have taken place.

18. The last question on the decree is whether it is a nullity having been made in excess of jurisdiction by the decision making body. The defendant did not raise the issue of jurisdiction during the trial but decided to spring it up in their submissions. Is this court bound to consider it? In celebrated case of **Motor Vessel Lilian S** supra at par 5, the court of appeal held that,

**“A question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court.”**

The decree formed part of the evidence for the plaintiff. It was not the only reason the plaintiff brought the claim. The plaintiff stated that the clan elders resolved that he was entitled to a share of the suit land being his father’s. The plaintiff’s claim was also based on fraud allegedly committed by the defendants. In my opinion therefore, it is not proper to deal with the issue of jurisdiction of the tribunal herein as the proceedings emanating from it comprised evidence and not core of the claim. The defendants had the chance to object to the plaintiff relying on it but they chose not to.

19. **Did the defendants acquire their titles fraudulently?**

Fraud was the mainstay of the plaintiff’s case. It is not disputed that the defendants acquired their titles after the death of Ndiwa Namunyu- deceased who owned the suit land from

which they received their titles on subdivision. The defendants aver in their evidence that their father signed the transfer forms during his illness. However, neither the plaintiff nor the defendants showed copies of transfer forms as exhibits to demonstrate dates when they were signed. The 1<sup>st</sup> – 3<sup>rd</sup> defendants' father and husband respectively died in 2008. The title deeds produced as ex. D1 show they were issued on 24<sup>th</sup> March 2010. The explanation given by the 3<sup>rd</sup> defendant for delaying transfer process when the deceased was still alive was lack of money. The plaintiff stated that the defendants secretly transferred the parcels without informing him. He also stated that he was not included as a beneficiary in succession cause of the estate of Ndiwa Namunyu – deceased. However from the evidence on record, it seems letters of administration of estate of Ndiwa Namunyu- deceased has not been undertaken.

20. The question therefore is whether the transfer of title from name of deceased person to the defendants without certificate of grant of the estate of their father/husband and subsequent sale to the 4<sup>th</sup> defendant can be treated as fraudulent as pleaded by the plaintiff. Under section 45 of the Law of Succession Act cap 160 of the laws of Kenya, provides that ***“no person shall, for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person. 45 (2) 9a) and any person who contravenes the section is guilty of an offence and liable to fine.”***

Fraud is defined in the legal free dictionary as ***“a false representation of a matter of fact – whether by words or conduct, by false or misleading allegations or by concealment of what should have been disclosed – that deceives and intends to deceive another so that the individual will act upon it to her or his legal injury.”***

21. The law of evidence requires that he who alleges a fact has the burden to prove/establish it. See **Koinange & 13 others vs. Koinange [1968] KLR 23**. Secondly in the case of **R.G Patel vs/ Lalji Makanji [1957] E.A. 314 at 317** it was held that allegations of fraud must be strictly proved. It was incumbent upon the plaintiff therefore to demonstrate to this court that the transfers of the titles to the defendants' names was fraudulent and specifically explain the actions which constituted the fraud. One way of doing this would have been to produce the copies of transfer forms to rebut the defence that they were signed before the death of their father. The plaintiff made these statements in his evidence in chief;

***“They used L.R 339 to process title within the Ndiwa family without considering what the court had ruled; the defendants got titles though false means; the defendants processed these titles while this case was pending.”***

None of these statements can be said to be anywhere close to proving fraud. In cross-exam, he said he did not know what documents the defendants used to process the titles into their names. The plaintiff's witness's evidence did not touch on the allegations of fraud. The plaintiff prosecuted his case by shifting the burden of proof to the defendants whom he seems he left to show the court the transfer documents. As in the case of **Joseph W. Ondieki** supra cited by the defendants, that burden cannot be shifted. The standard of proof required in fraud is higher than standard of probabilities as in civil cases. I find therefore that the plaintiff failed to prove any of the allegations of fraud pleaded in paragraph 11 of his plaint.

## 22. **Limitation of the claim;**

The defendants have raised for the first time in their submission that the plaintiff's claim is time barred. Their explanation is the suit was commenced 43 years after the cause of action arose contrary to the provisions of section 7 of Limitation of Actions Act, Cap 22. I have read through their defence and do not find anywhere this pleading. The closest they did is par 9 of the defence,

***“...The defendants shall at the opportune moment crave for leave of the court to strike out the suit herein for being bad in law, premature and an abuse of the court process.”***

Order 2 rule 4 of the Civil Procedure Rules sets out matters which must be pleaded. Any relevant statute of limitation is given as one of those matters which must be pleaded. Order 2(9) allows parties to plead points of law. Guided by the provisions of this rule and reading of the defence statement on record, I make a finding that the claim being time barred was not pleaded. The defence instead pleaded the suit was **premature** which cannot be taken in the same breath as time barred. In **Chalicha FCA Ltd. Vs. Odhiambo & 9 others [1987] KLR 182** it was held that cases must be decided on issues on record.

In **Chumo Arap Songok vs. David Keigo Rotich [2006] e KLR** it was held that parties are bound by their pleadings and the court has to pronounce judgment only on issues raised by pleadings.

23. The Civil Procedure Rules provides that parties are generally bound by their pleadings. The purpose of which is to stop parties from springing surprises on each other without giving the affected party an opportunity to defend itself. This line of submission therefore fails for the reason that it was not pleaded. In any event, the plaintiff adduced evidence that he was using the land until 2010 when the defendants chased him away. In my opinion, it was a continuing claim. He had also filed a suit before the tribunal in 2002 which made an award in his favour. This case was filed in 2012 which is less than 12 years from the earlier case. Be that as it may, this court has found the submission to be late in the day and it is disallowed.

24. In conclusion, is the plaintiff is entitled to the orders he is seeking. Under section 26 of the Land Registration Act, title of a proprietor of land can only be cancelled if fraud to which the proprietor is a party is proved. My finding that the plaintiff failed have to prove the fraudulent acts complained of against the defendant. Consequently I dismiss this suit but with an order that each party to bear their costs.

**Dated, Signed and Delivered** in Bungoma this **17<sup>th</sup>** day of **September** 2014.

**A. OMOLLO**

**JUDGE**