



**Chanzu (Suing as the legal Administrator of the Estate of Elam Chanzu  
alias Elamu Chanzu-Deceased) v Solomon (Environment & Land Case  
30 of 2021) [2022] KEELC 2490 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 30 OF 2021  
E ASATI, J  
MAY 12, 2022  
FORMERLY KAKAMEGA ELC NO. 380 OF 2021**

**BETWEEN**

**MIRIAM MUSIMBI CHANZU ..... PLAINTIFF**

**SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ELAM  
CHANZU ALIAS ELAMU CHANZU-DECEASED**

**AND**

**JANET VUGUTZA SOLOMON ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated 17<sup>th</sup> October 2017, the plaintiff as an Administrator of the estate of Elam Chanzu sued the Defendant herein. The Plaintiff's case is that at all material times she and the dependants of her late father Elam Chanzu (herein called Elam) have a beneficial and equitable interest in land parcel known as Kakamega/mbale/865 (the suit land herein). That however, the Defendant fraudulently caused the suit land to be transmitted and registered in her name to the exclusion of the Plaintiff and other dependants of Elam.
2. The Defendant vide her Statement of Defence dated 1<sup>st</sup> February 2018 denies the Plaintiff's claim and contends that the suit land belonged to her late father Shadrack Mwanzi Angomia (herein called Shadrack) exclusively and that at no time did he sell it to Elam. That upon the death of her father she followed lawful channels to cause the land to be registered in her name. She further contends that the Plaintiff's claim is incompetent, frivolous, unsustainable and improperly before the court and prays that the same be dismissed with costs.



## The evidence

3. Both parties testified and called witnesses.
4. PW1, the Plaintiff adopted her witness statement dated October 17, 2017 as her evidence. She stated that she is the Administrator of the Estate of her father Elam. That she brings the suit on behalf of her mother and siblings as beneficiaries of the estate of her father, Elam. That the suit land belonged to her grandfather (herein, the Original owner). That she grew up on the land and Shadrack used to visit. That her family and her have beneficial and equitable interest in the suit land. That her father purchased the suit land from Shadrack on 12<sup>th</sup> December 1989 because the land had been bequeathed to Shadrack by the original owner in whose name That the suit land was registered in the name of the original Owner. That after selling the suit land to Elam, Shadrack moved to South Nyanza with his family and settled there until his death. That subsequently, the Defendant fraudulently caused the suit land to be registered in her name to the exclusion of Elam's dependants. That the Defendant intends to evict the Plaintiff and members of her(plaintiff's) family from the ancestral home. She produced certificate of death for Elam as exhibit 1, copy of Grant of Limited Letters of Administration *ad Litem* in respect of the Estate of Elam as exhibit 2, certificate of official search for the suit land as exhibit 3, certificate of death for the original owner as exhibit 4, green card as exhibit 5, certificate of confirmation of grant in favour of the Defendant as exhibit 6, death certificate for Shadrack exhibit 7 and Kenya Gazette as exhibit 8, court order withdrawing application as exhibit 9, caution on the suit land exhibit 10, minutes on negotiations exhibit 13, eviction notice 17 and notice of intention to sue exhibit 18. She testified that her family and her are still living on the suit land to date.
5. PW2 adopted his witness statement as his evidence. He testified that both parties in the case were his cousins. That efforts had been made to resolve the issue amicably but were told that there was a case at Hamisi Court and the Defendant did not attend the meeting that was called to resolve the matter. In his witness statement he stated that since he was born up to now the family of the late Elam have always lived on the suit land. That it was not true that the Defendant's father died in Mbale sub-location but rather at Migori.
6. PW3 also adopted the contents of his witness statement dated 17<sup>th</sup> October 2017 as his evidence. It was his evidence that the suit land belonged to the parties' grandfather the original owner who bequeathed it to Shadrack who in turn sold it to Elam and bought land in Migori. That after buying the suit land, Elam, moved there and occupied it. That the Plaintiff and her mother live on the land. That Shadrack was buried at Migori. That a family meeting had been convened to resolve the dispute but the Defendant did not attend. He added that the father of the plaintiff was buried on the suit land.
7. The Defendant testified as DW1. She adopted the contents of her witness statement dated 1<sup>st</sup> February 2018 as her evidence. She stated that she is the legal owner of the suit land. That her grandfather one Andusu Angomia had three (3) sons. That he divided his land among his three sons. That Elam being the first-born son was given a parcel of land away from home. That Shadrack being the last born was allocated the land on which the said grandfather was living which is the suit land herein. She admitted that the plaintiff and her family live on the suit land but that they know that the same belonged to Shadrack. That the Plaintiff sold the land he inherited from the original owner and went to stay in town but later came back home and was allowed to stay on the suit land by original owner. That after the death of Shadrack the Plaintiff's family took control of the property. That they even built a house thereon because the Defendant was not able to stop them. She stated that her father never sold the suit land to the Plaintiff's father. That she followed all the legal procedures in filing Succession to her late father's estate vide Hamisi Succ. C NO. 43 OF 2016. On cross-examination she stated that her grandfather, grandmother and Elam were buried on the suit land but her father was buried at Migori.



That Miriam and her brothers were not willing to have a meeting. That currently it is Miriam who is occupying the suit land.

8. DW2 adopted the contents of his witness statement dated 1<sup>st</sup> February 2018 as his evidence in chief. He stated that the suit land originally belonged to Andusu Angomia the grandfather of the parties herein. That the father of the Defendant bought land and relocated to South Nyanza and that the father of the Plaintiff took advantage of the Defendant and acquired the suit land from the Defendant. That the father of the Plaintiff sold the land he was given by his father and hence ended up settling on his brother's land; the suit land.
9. DW3 similarly adopted the contents of his witness statement dated 1<sup>st</sup> February 2018 as evidence. He stated that one Andusu Angomia had three sons. That the Plaintiff's father as the eldest son of the three was given a piece of land far away from home. That it is not true that the Plaintiff's father bought the suit land from the Defendant's father. On cross-examination, he stated that it is the family of Elam who are on the land.

### Submissions

10. At the close of the evidence, parties opted to file written submissions in support of their respective cases.
11. Written submissions dated 4<sup>th</sup> April 2022 were filed by the law firm of Ben Oduol Nyanga & Company Advocates on behalf of the Plaintiff. Counsel submitted that the Plaintiff's father and the Defendant's father were siblings and that the suit land was registered in the name of their late father. That the plaintiff's father's family was not involved in the succession proceedings. Relying on the provisions of section 26 of the [Land Registration Act](#), Counsel submitted that the title deed that the Defendant now holds was acquired un-procedurally as the Defendant did not involve the family of the Plaintiff who are beneficiaries of their grandfather as this was ancestral land and they are in occupation of the suit land. That under the provisions of section 80 of the [Land Registration Act](#), the title that the Defendant holds should be cancelled as the same was acquired fraudulently. Counsel further submitted that fraud has been proved as per the standard of proof set in the case of [Koinange & 13 Others vs Koinange](#) [1986] KLR 23.
12. Written submissions dated 28<sup>th</sup> March 2022 were filed by the law firm of Mukabi & Company advocates on behalf of the Defendant. Counsel submitted that from the evidence, it is clear that the suit land belonged to the grand father of the parties herein. That it was allocated to the Defendant's father while the Plaintiff's father was given land elsewhere far away from home in accordance with Luhya customs. That the Defendant followed all the legal processes so as to cause the transmission of the suit land in her favour. Relying on section 50 the [Law of Succession Act](#) Section 51(i) of the [Land Act](#) and the case of [Babola Mkalindi vs Michael Seth Kseme & 2 others](#) [2012] eKLR Counsel submitted that the Defendant is the rightful registered owner of the suit land. Counsel submitted further that the law protects sanctity of the title having been obtained without any dispute. Counsel relied on article 40(1) of [the Constitution](#) of Kenya 2010, section 24 and 25 of the [Land Registration Act](#) to augment his argument. Relying on section 26 of the [Land Registration Act](#) Counsel submitted that a certificate of title is *prima facie* evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner of the land subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and that the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme. Counsel submitted that the plaintiff did not prove fraud to the required standard of proof. That the Defendant has a beneficial interest and equitable interest in the land in dispute as it belonged



to her late father. Relying on the provisions of Section 112 of the *Evidence Act* Counsel submitted that the Plaintiff has failed to discharge the burden of proof in the case and urged the court to dismiss it.

### Issues for determination

13. Having read the pleadings filed, the evidence tendered and the submissions made, the court identifies the following as the issues for determination in this matter:
  - i. Whether or not the Plaintiff and her family have a beneficial and equitable interest in the suit land.
  - ii. Whether the suit land was registered in the name of Shadrack before it was transmitted in the Defendant's name.
  - iii. Whether or not the Defendant's title to the suit land should be cancelled.
  - iv. Whether the plaintiff is entitled to the orders sought.
  - v. What orders to make on costs.

### Analysis and determination

14. This court is enjoined by the provisions of Order 21 Rule 4 *Civil Procedure Rules*, 2010 to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. With this in mind this court proceeds to analyse the evidence and decide the issues framed.
15. The first issue is whether the Plaintiff and her family have a beneficial and equitable interest in the suit land. In paragraph 4 of the Plaint the Plaintiff pleads that her family and her have a beneficial interest and equitable interest in the suit land. The basis of the beneficial and equitable interest according to the Plaintiff is that the suit land is ancestral land. It belonged to her grandfather. Secondly, that her father bought the suit land from Shadrack to whom the original owner had bequeathed it. And thirdly the plaintiff and members of her family have lived on the suit land for a long time since the year 1989 when her father bought the land.

The Defendant's position is that the plaintiff and her family members do not have any beneficial or equitable interest in the suit land as the same belonged exclusively to Shadrack.

This court has considered the evidence. The land sale agreement was only marked for identification but never produced as exhibit. Such a document is of no evidential value as the same is not formally produced as exhibit and proved. See case of *Kenneth Nyaga Mwige vs A ustine Kiguta & 2 others* [2015] eKLR. And even if the same had been produced as exhibit, there is no evidence that the same was subjected to the mandatory provisions of the *Land Control Act*. It cannot therefore form the basis for the claim for the land the subject matter of the alleged sale. The Defendant denies that there was any such sale.

It is however common ground that the suit land originally belonged to the Original Owner and that he bequeathed the same to Shadrack. According to the Plaintiff, Shadrack relinquished his rights over the suit land when he sold it to Elam and let Elam and his family to settle thereon. That when he bought land at Migori and relocated and settled there with his family Shadrack left the suit land to Elam exclusively. That in his lifetime Shadrack only used to visit Elam on the suit land as a visitor. That even the Defendant used to visit. The Defendant however contends that Elam found himself on the suit land because he was welcome back by the original owner as he had become homeless after selling



his inheritance. That the original owner welcomed him there and gave him a small house (Simba) for him to use with his family. Neither the original owner nor Shadrack chased Elam from the suit land thereafter. The original owner and his wife died and were buried on the land. Elam lived on the land with his family until he passed on and was buried there. There is evidence that Elam's widow lives on the land together with her children including the Plaintiff. Neither the Defendant or her late father have any possessions or developments on the suit land.

16. The next issue is whether the suit land was registered in the name of Shadrack before it was transmitted in the Defendant's name.

The green card produced as exhibit shows that the suit land was first registered in the name of Angomia Mwanzi on 9.7.1973. According to the Plaintiff, Angomia Mwanzi was the original owner of the suit land and the grandfather of the parties herein. The Plaintiff pleads that up to 25 July 2017 when it was transmitted to the Defendant, the suit land was registered in the name of her grandfather Angomia Mwanzi. The Defendant never indicated that the suit land was ever registered in the name of her father. In her defence (see paragraphs 10 & 11) she refers to the original owner as Andusu Angomia. In her witness statement she says he was called Andusu Angomia. On cross-examination in court she said that her grandfather (the original owner was called Jonathan Angomia. Her witnesses also referred to the original owner as Andusu Angomia. Three certificates of death were produced by the Plaintiff as exhibits as follows exhibit P7 dated 17/6/2016 for Shadrack Mwanzi Angomia who died on 10/4/1998 aged 64, exhibit P4 dated 17/11/2016 for Angomia Mwanzi who died on 20/03/1977 aged 82 and exhibit P1 dated 21/7/2017 for Elam Chanzu Angomia who died 30/01/2015. From these, it is clear that Angomia Mwanzi and Shadrack Mwanzi Angomia are 2 different and distinct persons. The name on the green card just before the name of the Defendant was entered was Angomia Mwanzi. This is the same name on the death certificate produced as exhibit 4 as certificate of death in respect of the original owner.

My findings, based on the above analysed evidence is that the suit land was not registered in the name of Shadrack at the time it was transmitted in the Defendant's favour but in the name of the original owner. There is no evidence that any succession has been undertaken in respect of the estate of the original owner.

17. The next issue is whether or not the Defendant's title to the suit land should be cancelled. The Plaintiff prays for cancellation of the title on the grounds that the same was obtained by fraud. Particulars of fraud are itemized under section 10 of the plaint that the defendant fraudulently misrepresented to the court handling the succession cause that Shadrack had died at Mbale instead of Migori, that the Defendant misrepresented to the court that Shadrack and the original owner were one and the same person, that the Defendant transferred the land into her name exclusively. The Defendant denies the fraud. Under section 80 of the *Land Registration Act*, a land register can be rectified by cancellation of title if the registration was obtained, made or omitted by fraud to which the proprietor was party. Under section 26 of the same Act a certificate of title can be subject to challenge on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

While the succession cause was in respect of the estate of Shadrack, the asset the subject thereof was property registered in the name of the original owner. The gazette notice (produced as exhibit P8) indicates that the succession was in respect of Shadrack Mwanzi Angomia who died on 10/4/1998.

My finding is that the Plaintiff has proved that the title was obtained by fraud in which the Defendant was party and hence the same is subject to be challenged. Defendant admitted that it was not true that her father died or was buried at Mbale as indicated in the gazette Notice but at Migori. She did not



deny that it was not true that Angomia Mwanzi and Shadrack Mwanzi Angomia were not one and the same person.

18. The next issue is whether the plaintiff is entitled to the orders sought. The orders sought in the plaint are:
- i. A declaration that the person originally registered as owner of land parcel Kakamega/mbale/865 is Mwanzi Angomia the Plaintiff and the Defendant's grandfather hence the Plaintiff was not liable to take out Letters of Administration
  - ii. An order cancelling the Defendant's title vide Kakamega/mbale/865
  - iii. A permanent injunction prohibiting and restricting the Defendant or her agents, assigns or executors from trespassing, selling or disposing of Kakamega/mbale/865
  - iv. Costs of the suit
  - v. Any other or further relief this honourable court deems just to grant.

19. In the case of *Willy Kimutai Kitilit vs Michael Kibet* [2018]eKLR the Court of Appeal held as follows:

“By article 10(2)(b) of *the Constitution* of Kenya, Equity is one of the national values which bind the courts in interpreting any law...The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary ninth edition will suffice for our purpose

...2. The body of principles constituting what is fair and right.

...3.the recourse of principles of justice to correct or supplement the law as applied to particular circumstances

...4 The system of law or body of principles originating in the English Courts of Chancery and superseding the Common law (together called “law” in the narrow sense) when the two conflict.

Thus since the current Constitution has by virtue of article 10(2)(b) elevated equity as a principle of justice, to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle among others, it follows that equitable doctrines of constructive trust and proprietary estoppel are applicable and supersede the *land Control act* where transactions relating to an interest in land is void and not enforceable for lack of consent of the Land Control Board.”

It is my considered view that this is a proper case for the court to uphold equity as a principle of justice. The plaintiff and other beneficiaries of ELAM have been on the suit land since 1989. The estate of the original owner has not been succeeded. The orders sought are essentially to preserve the said estate.

20. The jurisdiction of this court as provided for in article 162 (2)(b) and the *Environment and Land Court Act* is to hear and determine disputes relating to the Environment and the use and occupation of, and title to land. The claim herein is based on the use, occupation and ownership of the title to the suit land.
21. On costs although section 27 of the *Civil Procedure Act*, provides that costs of any action, cause or other matter, or issue follow the event, it also gives the court discretion in awarding costs. As the parties are close relatives, it will be just that any of them is burdened with costs.



## **Conclusion**

22. This court has found that the plaintiff as representative of the Estate of Elam has a beneficial and equitable interest in the suit land that the suit land was registered in the name of the original owner as at the time it was transmitted in favour of the defendant, that the title which the Defendant holds was obtained fraudulently, the court holds that the plaintiff has proved her case on a balance of probabilities. Judgement is thus entered in favour of the Plaintiff as prayed in the Plaint. Each party to bear own costs.

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 12TH DAY OF MAY 2022.**

**E. ASATI**

**JUDGE, ELC.**

**In the presence of:**

**Edaki Advocate for the Plaintiff**

**No appearance for the Defendant**

**Ajevi- Court Assistant**

**E. ASATI**

**JUDGE, ELC.**

