Kombo v Kagina & 4 others (Environment & Land Case 356 of 2015) [2022] KEELC 2466 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2466 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 356 OF 2015

A KANIARU, J

JUNE 29, 2022

BETWEEN

FLORENZIO KIVARA KOMBO .... PLAINTIFF

AND

ESTHER MBANDI KAGINA .... 1ST DEFENDANT

THE ASSISTANT COUNTY COMMISSIONER MBEERE SOUTH SUB-COUNTY .... 2ND DEFENDANT

THE DISTRICT LAND ADJUDICATOR OFFICER MBEERE DISTRICT .... 3RD DEFENDANT

THE CABINET SECRETARY FOR LANDS .... 4TH DEFENDANT

THE ATTORNEY GENERAL .... 5TH DEFENDANT

JUDGMENT

Introduction

1. This suit was instituted by way of a plaint dated December 10, 2015and filed on December 11, 2015. It was instituted by Florenzio Kivara Kombo Who is the Plaintiff against Esther Mbandi Kagina, The Assistant County Commissioner Mbeere South Sub-county, The District Land Adjudicator Officer Mbeere District, The Cabinet Secretary For Lands, The Attorney General who are the defendants.

The Pleadings

2. The plaintiff brought the suit in a representative capacity as son and legal representative of Kombo Munyiri. He alleges that his father bought land from one Ndwiga Mugambia in the year 1957 and paid a consideration of Kshs. 200/=. He pleaded that at the time, the process of land adjudication and demarcation was yet to commence. It was said that upon purchase, the plaintiff's father requested

to be shown the boundaries but that the vendor failed to adhere to the request, thus prompting the plaintiff's father to lodge a complaint with the Area Chief who was said to have handled the dispute together with two assistant chiefs and the elders. According to the plaintiff, the vendor was ordered to mark the boundary for the land but he failed to adhere to the verdict by the Area Chief and the Elders.

3. It was also said that a suit was then filed by the Plaintiff's father in Civil Case Number 48 of 1968 and in the judgment that ensued, the vendor was ordered to mark the boundary for the land or in the alternative pay a sum of Kshs. 1,700/= being refund of the purchase price together with costs and expenses of the suit. The vendor is alleged to have marked the boundary as ordered instead of refunding the amount ordered by the court.

4. Another suit was then said to have been filed by one Namu Gacirati against the vendor on claims that he had also purchased the land from the vendor. It is alleged that the suit was dismissed on grounds that land parcel had already changed hands. According to the plaintiff, at the time of adjudication, the suit parcel was assigned land parcel number 41 within Mbita Adjudication section and the land was said to have been subject of Committee case No. 3 of 1973 and Objection Case No. 329 of 1980. The plaintiff's case is that the land was illegally and fraudulently awarded to one Silas Kagina Gichoni who is alleged to have refunded the purchase price to the vendor, an allegation that was termed as false. The title was then said to have been issued in Silas Kagina Gichoni's name but a restriction registered against the land for the reason that an appeal before the minister had been filed against the tribunal's decision.

5. The plaintiff outlined particulars of fraud, misrepresentation, illegality and collusion between Silas Kagina Gichohi and the other defendants as a result of which he alleged to have been deprived of the land. His case is that the appeal to the Minister was determined and the land awarded to the 1st defendant, Esther Mbandi Kagina, wife to Silas Kagina Gichoni, who was deceased at the time, and also to the District Commisioner Mbeere South. He averred that the suit land, Mbeere/Mbita/41, was then subdivided into land parcels Mbeere/Mbita/4257 and Mbeere/Mbita/4258, which were then registered in the names of the District Land Commissioner, Mbeere South, and the 1st defendant respectively. The plaintiff expressed fears that the 1st defendant was now in the process of subdividing land parcel Mbeere/Mbita/4258 in a bid to dispose of it to third parties. He maintains that the resultant subdivisions of the suit land belong to his late father and that the decision by the Minister for lands in Appeal No. 38 of 1999 was erroneous and illegal.

6. The plaintiff sought declaratory orders that Land Parcels Mbeere/Mbita/4257 and 4258 which are resultant subdivisions of Land Parcel number Mbeere/Mbita/41 belong to the Estate of Kombo Munyiri and that the decision of the Minister for lands in Appeal Number 38 of 1999 was erroneous and illegal and should be quashed. He also asked that the name of the 1st defendant and the district Commissioner, Mbeere South, be deleted from the register and that instead his name be entered as legal representative of the Estate of Kombo Munyiri to hold the land on his behalf and on behalf of the other beneficiaries. Finally, he sought for costs of the suit.

7. The 1st defendant responded to the suit by filing a defence on December 31, 2015. He alleged that the clan had been against the sale of the land to the plaintiff's father as it was against custom and that further the amount of Kshs. 1,700/= ordered to be paid by the vendor had been deposited to court for onward transmission to Kombo Munyiri by the late Silas Kagina Gichoni. The allegations that the decision of the Committee in case No. 3 of 1973 and Objection No. 329 of 1980 were illegal, fraudulent and illegal was denied and so were the particulars of fraud, misrepresentation and collusion.

8. It was said that the court did not have jurisdiction to determine the matter in view of the provisions of the *land adjudication Act* and the Minister's decision in Minister's Appeal Case No. 38 of 1999. The

suit was said to be res judicata, bad in law, defective and an abuse of the court process. The 1st defendant similarly challenged the capacity and authority of the plaintiff to institute the suit.

9. The 2nd, 3rd, 4th and 5th Defendants jointly responded to the suit via a defence dated March 3, 2017 and filed on May 15, 2017. They denied being privy to the facts of the case and averred that the dispute is between the plaintiff and the 1st defendant. They confirmed that in the Minister Land Appeal No. 38 of 1999 the suit land had been awarded to Silas Kagina Giconi, the 1st defendant's husband. They equally denied the allegations of fraud, illegality, misrepresentation and collusion claimed against them and in the alternative stated that registration of the land in the name of the 1st defendant's husband and the District Commissioner Mbeere South was based on documents presented before it's officers upon exercising due diligence. It was said that the officers were performing their duties as prescribed by the law. With regard to Parcel of land Mbeere/Mbita/4258 the same was said to be registered in the names of the 1st defendant and the plaintiff was put to strict proof of the contrary. The also denied receiving the notice of intention to sue.

The Trial

10. The matter came up for hearing on October 25, 2021. PW1 was the plaintiff. He adopted his witness statement. His testimony was basically a summary of the averments in the suit. His evidence was that his father bought the land from Ndwigah Mugambia for Kshs. 200/=; that the land was not registered at the time but was later registered as Land parcel 41 Mbita Adjudication Section; and it was later subdivided into Mbeere/Mbita/4257 and Mbeere/Mbita/4258 and registered in the names of District Commissioner Mbeere South Distict and the 1st Defendant respectively.

11. The land was said to have been the subject of several disputes and that the plaintiff's brother, Jenesio Njagi Kombo, had represented them in the appeal before the minister. He is said to have died during the pendency of the appeal and his son Benjamin took over the case. His evidence was that there had been a dispute before the Arbitration Committee - Case No. 3 of 1973 - which was between the vendor and Jenesio Ita Kombo (his brother) in which the land was awarded to his brother. But an objection was later filed that made a determination in favour of the vendor. His brother then appealed to the Land adjudication officer in case No. 329 of 1980. That case too was determined in favour of the vendor. An appeal was then filed by his brother to the Minister challenging that decision but the brother died shortly after. The brother's son took over the case but that the appeal had been determined in favour of the vendor. According to him, the land was only awarded to the vendor for reason that he had allegedly paid Kshs. 1,700/= to the court. Regarding the appeal to the Minister, it was said to have been conducted in the year 2009 secretly and they were not aware of it.

12. During cross examination by Counsel for the 1st defendant, he confirmed that his brother represented the family in the cases but that upon his demise they never instructed his son to take over the case. His evidence was that the boundaries were marked in the presence of the 1st defendant. He testified that his father resided on the land from the year 1954 and had built a house on it but that the land was now owned by the family of Ndwiga Muthambia.

13. On cross examination by Counsel for the 2nd defendant, he confirmed that he had gone through the entire adjudication process; that when the appeal was filed before the minister they placed a restriction on the land but that it was removed after determination of the appeal; and that he could have placed another restriction after removal of the initial one but this was not done as he was not aware of when the appeal was determined. In re-examination he confirmed the statements in his evidence in chief. With that, the plaintiff's case was closed.

14. The defence commenced it's hearing by calling two witnesses. DW1 was Esther Mbandi Kagina, the 1st defendant. A preacher and farmer, she adopted her witness statement dated April 7, 2017 and sought to rely on the list of documents in support of her case. Her evidence was basically that the outcome of the appeal was in her favour and that she was awarded part of the suit parcel of land and the other part awarded to the government.

15. In cross examination by Counsel for the plaintiff, she stated that the plaintiff had been refunded his money. She was however referred to an order issued on October 31, 1969which she stated showed that the vendor had marked the boundary to the land. She gave evidence that the dispute had undergone all the adjudication processes. She testified that her husband was deceased and she had no grant to represent her late husband's estate. She disputed the sale between the vendor and the plaintiff's father. In her evidence, she stated that her husband had paid the refund money to Siakago court but that she was not aware whether the money had been collected. On the issue of representation of the plaintiff, she averred that Benjamin represented the plaintiff during the appeal before the minister but that he had removed himself from the case. She confirmed that her husband had surrendered a portion of the land to the government free of charge for reason that there were government facilities on it.

16. DW2 was Margaret Mutai, the Principal Land Registrar Kiritiri. She adopted the statement of N. K. Nyaga filed on July 5, 2017as defence evidence together with the list of documents filed therein. The said N.K. Nyaga was a land registrar in Siakago and Kiritiri areas but was said to have since retired. In cross examination by Counsel for the Plaintiff she testified that the parties in the dispute were Janesio Njagi Kombo (Deceased) and Silas Kagina Giconi (Deceased). It was her evidence that Benjamin had withdrawn from the case and there was nothing to show that the Minister sought an alternative representative to the estate of Janesio.

Submissions

17. After hearing, submissions were filed. The 2nd, 3rd, 4th and 5th Defendants filed their submissions on March 16, 2022. They identified three issues for determination by the court. The first was whether the suit was defective and properly before the court. They invoked Section 19 of the *Civil Procedure Act* which provides that suits are to be instituted in such manner as prescribed by the rules. They also relied on the case of *Samuel Chege Thiari & Another vs Eddah Wanjiru Wangari & 3 others* which stated that other statutes also govern how suits are to be commenced and in that regard they relied on Section 29(1) of the *Land Adjudication Act* which stipulates the procedure to be followed when one is aggrieved by the determination of an objection in a land adjudication matter. It was argued that in Minister Appeal No. 38 of 1998, the suit land had been awarded to Esther Mbandi Kagina in place of her husband, Silas Kagina, and that decision was final pursuant to Section 29(1) of the *Land Adjudication Act*.

18. It was said that the only way the Minister's decision could be challenged was through Judicial Review. The high court or Environment and Land Court was said to only have supervisory jurisdiction by way of prerogative writs and by virtue of that, then the Plaintiff's suit was defective as it did not disclose any reasonable cause of action. It was said that failure to follow the laid down procedure goes to the root of litigation and that the circumstances could not be salvaged by invoking Article 159 of *the Constitution*, Sections 1A,1B & 3A of the *Civil Procedure Act* or Order 51 of the *Civil Procedure Rules*. To support this, the defendants relied on the case of *Raila Odinga vs I.E.B.C & others* [2013] eKLR where it was stated that Article 159(2)(d) was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. Further, reliance was made on the case of *Board of Governors Nairobi School v Jackson Ireri Geta* [1999] KLR and the case of Speaker of the *National Assemly vs James Njenga Karume* [1992] eKLR. They ultimately submitted that claim was incompetent, defective and should be struck out with costs.

19. The second issue was whether the orders to quash the decision of the Minister Appeal No. 38 of 1999 should issue. On this, they invoked the provisions of Order 53 Rule 2 of the *Civil Procedure Rules* which guide the Judicial Review Proceedings. It was said that an application seeking to quash orders of a quasi- judicial body should be filed within six months and the plaintiff's claim was said to have been filed 6 years after the award had been issued.

20. The defendants relied on the case of *Osolo v John Ojiambo Ochola & another* [1995] eKLR which cited with approval the case of *Republic v National Irrigation Board, Mwea Irrigation Settlement Scheme and another Ex parte John Murimi Gichobi* [2021] eKLR. It was ultimately submitted that the orders sought could not be issued as the orders of certiorari had been sought beyond six months.

21. The last issue was on whether the suit was filed in violation of the *Public Authorities Limitations Act,* to be specific Sections 3(1) and (2) of that Act. It was said that the particulars of tort were particularized against the 2nd, 3rd and 4th who were public officials as per Section 2 of the Limitations of Actions Act and the Interpretations and General Provisions Act. The claim was said to be against the government, hence it ought to have been brought within twelve months as per Section 3(1) of the *Public Authorities Limitation Act*.

22. The Plaintiff filed his submission onMarch 29, 2022. He gave the background of the case and contended that the decisions at the objection stage and the appeal before the Minister were erroneous. He submitted that the suit was properly before the court and in support of this relied on the case of *Ngige vs Chomba & 3 others* (2004) 1KLR 597, where it was held that a declaratory suit is an alternative to judicial review proceedings. In reference to Section 29 of the *Land Adjudication Act*, it was stated that though the decision of the Minister was final, this did not mean that the decision could not be challenged in the High court under Article 165(6) of *the Constitution*.

23. It was stated that the high court's jurisdiction could not be limited by an Act of Parliament. The plaintiff relied on the case of *Nicholas Njeru v Attorney general & 8 others* [2013] eKLR and the case of *PYX Granote Co. Ltd v Ministry of housing & local Government* [1958] 1QB 554. It was said that there are no statutory underpinnings that bar parties from seeking redress by way of declaration. The plaintiff submitted that he had proved his case on a balance of probabilities, hence judgment should be entered in his favour.

24. The 1st defendant filed her submissions on April 11, 2022. She first argued that the plaintiff lacked capacity to prosecute the claim. She contested the letters of administration ad litem submitted by the plaintiff, which according to her, were only limited to filing of the suit but not participating or prosecuting of the suit. She sought reliance on Section 54 of the *law of Succession Act* and Form 90B [P&A 90B]. It was said that such letters neither made the plaintiff a personal representative or an administrator to the estate of the late Kombo Munyiri.

25. The 1st defendant relied on the case of *Estate of Henry Kithia Mwitari* (Deceased) 2021 and the case of *Kipngetich Kalya Kones v Wilson Kiplangat Kones* Kericho: ELC 34 of 2019 where the court stated the purpose of a grant adlitem. Ultimately the Plaintiff was said to lack locus and that the suit was incompetent.

26. The second issue was that the suit was res judicata. It was said that the issues raised in the suit had already been litigated upon in the subordinate court and all through the dispute mechanisms provided for under adjudication law, and that no new issues had been introduced in this case hence rendering the suit res judicata. The third issue was on jurisdiction of the court to handle the dispute in view of the *Land Adjudication Act* and the Minister's Appeal Case No. 38 of 1999. The suit land was said to be in an adjudication area and there were clear dispute resolution mechanisms for a party aggrieved when

the land is in an adjudication area. Reliance was made on Section 29(1) of the *Land adjudication Act* and it was stated that the decision by the minister was final. That decision was said to be an outright application of the doctrine of finality. Also the suit was said to be time barred in view of Section 7 of the *Limitation of Actions Act*.

27. The next issue was on the allegations of fraud, illegality, misrepresentation and collusion by the defendants. These were said not to have been proven and were in fact an afterthought. The threshold for proof of the allegation was said to be higher than balance of probability. The plaintiff was equally accused of not bringing an independent witness to corroborate his allegations or to prove the case. It was averred that the 2nd to 4th defendants' witness had confirmed that the registration of the 1st defendant was done in accordance with the law. The 1st defendant was said to have been living on the land from the year 1968 and it was argued that this evidence was never controverted. It was also argued that the plaintiff was represented in the appeal and their representative had renounced his right or interest on the suit property. The 1st defendant Prayed for dismissal of the suit and for costs to be awarded to her upon such dismissal.

Analysis and Determination

28. I have considered the pleadings, the evidence given and the rival submissions. Several issues were raised by both sides but my considered view is that the following four (4) issues suffice to effectively dispose of the entire matter.

    i) Whether the plaintiff has capacity to institute the suit?

    ii) Whether the suit is properly before the Court?

    iii) Whether the case is proved on a balance of probabilities?

    iv) Who should bear costs?

29. On the first issue (issue (i)), the 1st defendant contended that the plaintiff lacks the requisite capacity to prosecute the suit. The suit has a representative character, the plaintiff having filed it on behalf of the estate of his late father, Kombo Munyiri. In order to file it, the plaintiff first sought and acquired a grant ad Litem. According to the 1st defendant, the said grant is only enough to enable filing of a suit, not its prosecution. To drive home the point, the 1st defendant invoked Section 54 of the *Succession Act* (Cap. 160) and Form 90B of the Probate and Administration Rules. According to the 1st defendant, the combined import of these two is that only filing is allowed and further action in a case can only take place once a full grant is issued.

30. The 1st defendant even proffered two cases – *In the matter of the Estate of Henry Kithia Mwitari (Deceased)*: Succession Cause no. 493 of 2013, Nairobi [2021] eKLR And *Kipngetich Kalya Kones v Wilson Kiplangat Kones*: ELC No. 34 of 2019, Kericho [2021] eKLR - to further buttress his position.

31. My understanding of the law is that a grant ad litem is normally issued to enable institution and/or prosecution of a suit where a full grant has not yet been issued. In some instances, it is also issued for purposes of defending a suit. It is sometimes called a grant for special purposes. A person issued with this grant does not acquire full rights in respect of the estate of a deceased person. The grant is purpose – specific. The very meaning of its name suggest its sufficiency for purposes of litigation. Ad Litem is Latin for "during litigation". A person who gets the grant becomes an administrator ad Litem, also called "Administrator ad prosequendum" in some jurisdictions, which means "administrator during prosecution".

32. I hold the view, that a grant ad Litem is sufficient to file and prosecute a suit. No one files a suit intending it to rest at that stage. It is to me a useful legal device meant to progress a case before a full grant is issued. I think its scope is possibly even greater than that. I say this because it is conceivable that it can be granted for purposes of defence. If a defendant sued in a case were to be allowed to use it for filing the defence only, such a defendant would be a happy person for he would stall the plaintiffs case by deliberately being slow or even refusing to get a full grant. It is also easy to appreciate that some of the cases filed on the strength of grant *ad Litem* come with applications filed under a certificate of urgency. Litigants who come to court that way want immediate temporary reliefs. Would it be fair to turn away such litigants from the seat of justice because the grant they have is limited to filing the case only? It is important to appreciate that when you entertain an application like that, which in my view is the only fair and logical thing to do, you are already involved in what one may call interlocutory prosecution of the matter.

33. Bearing all this in mind, I think the judicial approach to an issue like this should be pragmatic. It should be liberal rather than restrictive; purposeful rather than pedantic. A different approach would un-necessarily clog or slow the process of justice and would make nonsense of the constitutional edict that justice shall not be delayed. I therefore disagree with the 1st defendant on this issue. I may add that I don't understand the cases cited by him as standing for the position that a grant *ad Litem* can not be used to prosecute a case.

34. The second issue [issue (ii)] is whether the suit is properly before the court. The plaintiff instituted this suit in a representative capacity on behalf of the estate of Kombo Munyiri. According to the plaintiff, his late father purchased the land in dispute from one Ndwiga muthambia. According to him, the land belongs to his late father and the first stage of the dispute during the adjudication process rightfully found as much. It is the plaintiffs position that the subsequent stages of the dispute during adjudication were marred by fraud, misrepresentation, illegality and/or collusion. The suit before this court was filed with a view to overturning the decision of the minister awarding the disputed land to the 1st defendant. The 2nd, 3rd, 4th and 5th defendants are viewed as part and parcel of the malpractices that were said to have attended the adjudication process. The plaintiff would wish that the court declares that the disputed land belonged to his late father and, arising from that, an order be issued quashing the minister's decision that vested ownership of the land in 1st defendant. He would wish too that he is registered as owner of the land instead of the 1st defendant. Finally, the plaintiff wants costs of the suit.

35. But the defendants have a different view. To the defendants, the land falls within an adjudication area and the dispute has already been conclusively determined within the mechanisms that apply in an area under adjudication. This suit was said to offend Section 29 of the *Land Adjudication Act*, which, among other things, declares that the minister's decision is final.

36. Given this background, it is now necessary to consider whether this is a viable or feasible case in light of the applicable law. At the end of it all, I hope to have answered whether this suit is properly before me. The first thing that come to mind, and which the defendants have mentioned, is Section 29 (1) of the *Land Adjudication Act*. The section provides as follows:

29 (1): Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the minister by;

a. Delivering to the minister an appeal in writing specifying the grounds of appeal; and

b. Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order as he thinks just and the order shall be final.

37. It is clear from Section 29 of the *Land Adjudication Act* that the decision of the Minister regarding the merits of the matter brought before him is final. There is no provision for further appeal against such decision. The *Land Adjudication Act* itself has set out in clear terms a dispute resolution process that starts at what is called a committee stage and ultimately ending as an appeal before the minister. Once a party exhausts such mechanism, the only recourse open is to invoke the process of judicial review before a competent court of law. Such process does not interrogate the merits of case. It is normally meant to address the flaws or shortcomings of the decision making process.

38. The plaintiff has argued that despite the dispute resolution mechanisms put in place for land falling under adjudication area, courts have powers to issue declaratory orders which are alternative to judicial review. It is his position that there is no limitation whatsoever for a court to issue such orders. He relied on the case of *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR. He also relied on the old case of PYX Granite Co Ltd v Ministry Of Housing & Local Government [1958] IQB 554.

39. I have no problem with this position. I think it expresses the correct legal position. But it is useful to add that the declaratory orders sought and the prayers sought to actualise or effectuate any declaratory orders granted should, in tenor, meaning, and effect, address what the judicial review process would have addressed had it been invoked. As pointed out earlier, the judicial review process is not normally concerned with the merits of a case. It is usually focussed on defects or flaws arising from decision making process.

40. The matter before me is one founded on fraud. It is fraud that has a long history. It started in the early stages of dispute processes during adjudication and according to the plaintiff, went on un-addressed and un-appreciated in all the other subsequent stages including the final stage before the minister. Fraud is a tort and an action based on it requires proof on the merits. To the extent that the suit before me is questioning the merits of the ministers decision and the merits of the decisions before that, then it violates Section 29 of the *Land Adjudication Act* (Cap 284), and this is so even if the suit is ingeniously styled as a declaratory one or even if the orders sought are formulated to look like they are broadly similar in effect to those that would be sought in a judicial review.

41. But basing the suit on fraud and wrongs related to fraud also poses another legal problem. The plaintiff needed to appreciate that a cause of action based on fraud has a lifespan of three (3) years. Section 4 (2) of *Limitation of Actions Act* (Cap 22) states as follows:

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

Without doubt the suit herein was filed long after the requisite period for filing a case based on fraud had long expired. Even assuming that the fraud being challenged is the one that allegedly attended the ministers decision – and it seems clear that the fraud being challenged allegedly took place much earlier – it is clear that the Minister's decision was delivered on December 3, 2009. This suit itself was filed on December 11, 2015. It seems clear that this is about six (6) years from the time of the fraudulent decision said to have been made by the minister. Obviously, this was long after the 3-year period that the *Limitation of Actions act* provides for.

42. It appears to me therefore that even if the suit is assumed to be one that is not caught up by provisions of Section 29 of the *Land Adjudication Act*, it would certainly be caught up by Section 4(2) of the

Limitation of actions Act (Cap 22). Related also to the issue of Limitation of time is the legal position to be found at Section 3(1) of the *Public Authorities Limitations Act* (Cap 39). I raise this issue in regard to the institution of this suit against the 2nd, 3rd, 4th and 5th defendants. These defendants themselves raised the issue also. The section provides as follow:

> Section 3(1) No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date on which the cause of action accrued.
>
> The 2nd, 3rd, 4th and 5th defendants are government bodies or agencies. The plaintiffs suit against them is founded on the tort of fraud. It is therefore clear that the suit should have been filed within one year from the time the alleged fraud occurred. The suit before the court was filed against them several years – after the tort of fraud was allegedly committed. As against these defendants therefore, the suit can not stand.

43. But there is still more regarding the legal hurdles that the plaintiff's suit faces. At the time the minister's decision was made, the legal regime governing the registration of land that had undergone adjudication was the Registered *Land Act* (Cap 300) which is now repealed. Section 143(1) of that Act provided as follows:

> Section 143 (1)
>
> > Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

It appears to me clear that this suit is also caught up by this provision. It is a provision that excuses or legalises fraud that attends a first registration. After the objection stage, it is clear that the disputed land was registered in the name of Silas Kagina Gichoni,the 1st defendant's husband. A restriction was however placed on the register as there was still a pending appeal to the minister. It was a serious lack of tact or strategy for the plaintiff to allow the name of Silas to appear in the land register.

44. When the name of Silas Kagina Gichonientered the land register, Silas became the first registered owner of the land and the only thing that could change that position was the outcome of the pending appeal before the minister. As it turned out, the outcome did not change that position. What this in effect means is that Silas became owner by dint of first registration. It stand to reason therefore that even if there was fraud, such fraud could not in law be challenged in any court as SILAS was owner by virtue of first registration. The 1st defendant and even the other defendants could become, and in my view became, lawful title holders because the first registered owner – Silas Kagina Gachoni – could, by operation of the law, pass a good title to them. This is so because fraud could not legally be invoked against Silas Kagina Gichoni who was the first registered owner.

45. I have tried to look at this suit from various legal angles in order to establish whether it is a viable or feasible suit before this court. A consideration of Section 29 (1) of the *Land Adjudication Act* (Cap 284), Section 4(2) of the *Limitation of Actions Act* (Cap 22), Section 3(1) of *Public Authorities Limitation Act* (Cap. 39), and Section 143(1) of the Registered *Land Act* (Cap 300, now repealed) show clearly that the suit is not viable or feasible. The applicable law is decidedly against it. I don't buy the plaintiffs argument that the superior court has inherent or unlimited jurisdiction to entertain it. This argument is a legal fallacy. The truth of the matter is that where a statute clearly expresses itself on an issue, such inherent or unlimited jurisdiction is either extinguished or rendered subservient to the express provisions of the statute. It is therefore a type of jurisdiction that only comes in handy where

there is a lacuna or grey area in law. It can not be used to contradict or override express provisions of a statute. It is clear that there are laws of this land which clearly spell out the position that this suit as conceived, conceptualised, and filed can not be prosecuted before the courts of this country. The upshot is that the suit is improperly before this court.

46. I now come to the third issue (issue (iii)) which is whether the plaintiff has proved his case on a balance of probabilities. Flowing from my finding on issue (ii), it is clear that the suit does not even require this consideration as it is improperly before the court. But even if I were to assume that I needed to find out whether fraud was proved on the merits, I would observe that the particulars of fraud stated in the pleadings were not demonstrated through evidence. The plaintiff only pleaded fraud but the evidence he made available only insinuates it. Fraud is not proved sufficiently where a plaintiff shows it was possibly there. It is not also proved by showing it is probable. It is only proved where the plaintiffs shows it is more than probable. In *Jennifer Nyambura Kamau v Humphrey Nandi*: Civil Appeal No. 342 of 2010, Nyeri [2013] eKLR, the court of Appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence; and, more importantly that the standard of proof is beyond a balance of probabilities. This is the same position one finds in the cases of *Gudka v Dodhia* Ca. No. 21 of 1980, Nairobi, *Richard Akwesera Onditi v Kenya Commercial Finance Co. Ltd*:C.A. No. 329 of 2009, And *Denis Noel Mukhulo Ochwanda & Another v Elizabeth Murungari Njoroge & Another*: C.A. No. 298 of 2014, Nairobi[2018] eKLR.

47. The law therefore requires that evidence of especially high quality and strength is required to prove fraud in civil cases. It is therefore a burdensome task to prove fraud. That is why I am saying that even if the merits of the case were to be considered, I would still find it hard to make a determination that fraud has been sufficiently demonstrated. The pleadings allege and particularises it. But there is no tangible evidence proffered to show well how it happened.

48. I also saw and heard the plaintiff alleging that they were not represented during the hearing of the appeal. It is clear that in the beginning, the plaintiff's late brother represented the family. That brother died and it seems clear that the brother's son took the place of his father in the appeal. The plaintiff says they had not appointed that son. The point the plaintiff is making is that they were denied a chance to be heard. This, if properly demonstrated, is a good point in a declaratory suit or even in judicial review. But the point was not raised in the pleadings. It seems to be very much an afterthought. Besides, the plaintiff was duty bound to explain whom they appointed to represent them in the appeal after the death of his brother. He didn't explain. The minister couldn't wait for them forever. The appeal had to be decided. The plaintiff of course knew his brother had died. He knew too that the appeal was pending. Yet he made no effort either to take over the appeal himself or appoint somebody in place of his late brother. It is therefore insincere on his part to turn around and try to argue that the family was not represented. I don't agree with him. He was not denied a chance to be heard; he didn't simply utilise the chance to be heard.

49. The final issue is about costs. The plaintiff has lost this case. It is trite law that costs follow the event. In my view, this case should not have been filed in the first place. It is the plaintiff therefore who should pay costs. The end result is that this case is dismissed with costs to the defendants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 29TH DAY OF JUNE, 2022.

In the Presence of

M/S Nzekele for Okwaro For Plaintiff;

MS Isika for 1st Defendant and

Kiongo (Ag's Office) for 2nd To 5th Defendants.

Court Assistant: Sylvia W.

A.K. KANIARU

JUDGE