



**Ngeywo & 2 others v Sitai & another (Environment and Land Appeal E005 of 2021) [2022] KEELC 3952 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E005 OF 2021**

**BN OLAO, J  
JULY 28, 2022**

**BETWEEN**

**SIMEON SITAI NGEYWO ..... 1<sup>ST</sup> APPELLANT  
PETER CHENGEK ..... 2<sup>ND</sup> APPELLANT  
STANLEY SITAI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PATRICK BARASA SITAI ..... 1<sup>ST</sup> RESPONDENT  
JOAN SIAKILO ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Judgment of HON C. M WATTIMAH (SENIOR RESIDENT MAGISTRATE) delivered on April 16, 2021 in SIRISLA PRINCIPAL MAGISTRATE’S COURT ELC CASE No E3 of 2021)***

**JUDGMENT**

- 1 The take away from this rather sad dispute, especially for men in my view, is that if you have a child outside wedlock (they are known as out growers in local parlance), then you must plan to do one of the following. If you are brave enough, then you must introduce the child to your spouse and siblings and integrate him or her into the family. Alternatively, if you cannot do that, then you must ensure that the child has a place where he or she can call home. But if you are unable to do either of the above, then you may have to consider abdicating and migrating to Mongolia or elsewhere.
- 2 The parties herein are a family. Patrick Barasa Sitai(1<sup>st</sup> Respondent), Simeon Sitai Ngeywo, Peter Chengek and Stanley Sitai (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively), are siblings all being the children of the late Fanuel Chemobo Sitai. On the other hand, Joan Siakalo (the 2<sup>nd</sup> Respondent) is the wife to the late Ernest Chemben Sitai who was a brother to 1<sup>st</sup> Respondent and the appellants.



- 3 During his life time, Fanuel Chemobo Sitai was the registered proprietor of the land parcel No North Malakisi/West Sasuri/144 measuring 14 acres which he distributed among his sons. The 1<sup>st</sup> Respondent ended up with two (2) portions measuring 0.3 Hectares and 0.5 Hectares. He is currently the registered proprietor of the land parcel No North Malakisi/ West Sasuri/2362 (the suit land).
- 4 By a plaint filed at the Sirisia Principal Magistrate’s Court on Febraury 9, 2021, the Respondents sought the main order that the Appellants, their agents, servants or representative of the funeral and burial Committee of the late Andrew Kwesi (deceased) be injuncted from burying his remains on the suit land.
- 5 The basis of the Respondents case was that between 1994 and 1998, the Appellants invaded the suit land for purposes of erecting a semi-permanent house for the deceased alleging that he was a son of the late Ernest Chemben Sitai. This was resisted by the Respondents who claimed that the deceased was not the son of Ernest Chemben Sitai nor the step son of the 2<sup>nd</sup> Respondent. Following the intervention of the Provincial Administration and family members, the deceased relocated to Chelebei – Changeyo village. It was the Respondents’ case that the Appellants were forcefully imposing the deceased as a son of Ernest Chemben Sitai. When the deceased passed away on 2<sup>nd</sup> February 2021 while undergoing treatment at Kapenguria, the Appellants invaded the suit land intending to bury him thereon. This prompted the Respondents to file the suit in the Subordinate Court and also obtained a temporary injunction stopping the burial.
- 6 The Appellants filed a joint defence in resisting the Respondents’ claim. They denied that the suit land had been bequeathed to the 1<sup>st</sup> Respondent adding that infact it belonged to Ernest Chemben Sitai and that the 1<sup>st</sup> Respondent only holds it in trust for the children of Ernest Chemben Sitai. Further, that the 1<sup>st</sup> Respondent infact has his own land. The Appellants denied having invaded the suit land between 1994 and 1998 to put up a semi-permanent house for the deceased. They pleaded further that they did not need the consent of the Respondents to inter the remains of the deceased on the suit land.
- 7 In their Counter – Claim, the Appellants pleaded that although their late father had distributed his land among his children and signed the relevant transfer forms, the 1<sup>st</sup> Respondent and Ernest Chemben Sitai were the only ones who did not obtain titles to their shares of the land although the 1<sup>st</sup> Respondent was given two portions measuring 0.3 Hectares and 0.5 Hectares one of which borders the portion of Ernest Chemben Sitai. That when Ernest Chemben Sitai died, he was buried on that portion but later, the 1<sup>st</sup> Respondent abandoned his home and moved to the said portion. That Ernest Chemben Sitai had two wives the other being one Rita Chesiro who was the mother to the deceased. That the deceased died while living on the portion of land belonging to his father where Rita Chesiro was also living before she was chased away following the demise of her husband.
- 8 The Appellants pleaded that the 1<sup>st</sup> Respondent fraudulently acquired the suit land and registered it in his names. The particulars of fraud were pleaded in paragraph 37 of the defence and Counter – Claim is follows: -
1. Transferring the land parcel No North Malakisi West Sasuri/2362 while the registered owner was deceased.
  2. Effecting transfer without doing succession.
  3. Intermeddling with the deceased Estate.
  4. Colluding to disinherit the deceased Ernest Kwesi and his family.
  5. Denying that the deceased is not the son of Ernest Chemben.



6. Demolishing the deceased's house and chasing his family away.
7. Assaulting the deceased in order to scare him away from his land.

The Appellants therefore sought orders directing the Land Registrar Bungoma to cancel the registration of the 1<sup>st</sup> Respondent as the registered proprietor of the suit land and to revert it to the name of Fanuel Chemobo. Secondly, a declaration that the deceased's remains were entitled to be interred in the suit land which belongs to Ernest Chemben. Further, the Appellants sought an injunction order that the Respondents should not interfere with the burial ceremony of the deceased on the suit land. They also sought the dismissal of the Respondents' suit. No doubt the order for injunction has been over – taken by events.

- 9 The Respondents filed a reply to the defence and defence to the Counter – Claim. They joined issues with the Appellants and denied the allegations of fraud levelled against them with respect to the creation of the suit land. They also pleaded that the trial Court had no jurisdiction to determine the Counter – Claim which touches on succession matters and a Preliminary Objection would be taken during the trial.
- 10 At this point, I must state that it is not clear whether the deceased's name was Andrew Kwesias per the plaint, or Ernest Kwesi Chesetoas per the defence and Counter – Claim. There is no doubt however that both names refer to one and the same person.
- 11 The suit was heard by Hon C M Wattimah (Senior Resident Magistrate) who in a Judgment delivered on April 16, 2021 found in favour of the Respondents. The trial Magistrate consequently issued an order restraining the Appellants by themselves, their agents, servants, representatives and the burial Committee from interring the remains of Andrew Kwesi aka Ernest Kwesi Cheseto on the suit land. Each party was directed to bear their own costs.
- 12 Aggrieved by that Judgment, the Appellants promptly filed this appeal on April 23, 2021. The following 4 grounds have been proffered in urging this Court to allow the appeal and set aside the trial Court's Judgment: -
  1. That the learned trial Magistrate erred in law and fact when she held that the deceased Ernest Kwesi Cheseto alias Andrew Kwesi was not the son to the late Ernest Chembe against the strength of the evidence on record.
  2. That the learned trial Magistrate erred in law and fact when she held that the remains of the deceased Ernest Kwesi Cheseto alias Andrew Kwesi had no right to be interred in land parcel No North Malakisi/West Sasuri/2362 being held by the 1<sup>st</sup> Respondent in trust for the family of the late Ernest Kwesi.
  3. That the learned trial Magistrate erred in law and fact when she allowed the Respondents' case in disregard of the evidence on record.
  4. That the learned trial Magistrate erred in law and fact when she disregarded the Appellant and their witnesses' testimonies, documentary evidence and Counter – Claim thus arriving at a wrong conclusion.
- 13 The appeal has been canvassed by way of written submissions. These have been filed both by Mr Wamalwa instructed by the firm of Wamalwa Simiyu & Company Advocates for the Appellants and by Ms Change instructed by the firm of Elizabeth Change & Company Advocates for the Respondents.
- 14 I have considered the record of appeal as well as the submissions by Counsel.



- 15 This being a first appeal, my duty is to consider and re – evaluate the evidence that was adduced in the trial Court and draw my own conclusions. I must also be guided by the decision in *Peters v Sunday Post* 1958 E A 424 where Sir Kenneth O’connor P said: -

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate Court might itself have come to a different conclusion.”

Similarly, in *Selle & Another v Associated Motor Boat Company Ltd* 19689 E A 123 the then Court of Appeal for Eastern Africa stated that duty in the following terms: -

“An appeal to this Court from a trial by the High Court is by way of a re – trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must re – consider the evidence, evaluate it itself and draw it’s own conclusions, though it should always bear in mind that it has neither seen nor hear the witnesses and should make due allowance in this respect. In particular, this Court is not bound to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Muhamed Sholan* 1955 EACA 270).”

Section 78(1) of the *Civil Procedure Act* provides that the powers of an Appellate Court are: -

- “(a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.”

- 16 In ground No 1 of the Memorandum of Appeal, the trial Magistrate is faulted for making a finding that the deceased Ernest Kwesi Cheseto alias Andrew Kwesi was not the son to the late Ernest Chemben Sitai. After summarizing the evidence on that issue, the trial Magistrate addressed herself as follows at page 5 of her Judgment: -

“From the evidence, I find that the deceased was circumcised at the late Ernest Chembeni’s home. The question is whether that proves he is a child of that home. Now, this Court is of the view that to answer this question, we must start on what prompted the 1<sup>st</sup> defendant to bring back the deceased herein for circumcision. Was there a family/ clan meeting that resolved that the deceased was a son to Ernest and thus should be brought home. I have not seen such resolutions. That therefore means it could have been an individual’s decision.”



17 The trial Magistrate goes on to add as follows at page 6: -

“Paternity of a child is proved by way of DNA or documentation e.g production of Birth Certificates. In this case, we cannot do DNA test since the deceased’s father is also deceased, samples cannot be taken. There is no other documentation produced to proof (sic) that he was a child to Ernest.”

There is no doubt that a DNA test and/or production of a Birth Certificate is the best way of proving paternity and the trial Magistrate placed a high premium on that requirement. However, I do not think that it is an inexorable rule that a DNA test and/or production of a Birth Certificate is the only evidence to prove paternity of a child. The Court must, in my view, be able to resolve such an issue on the basis of other available cogent evidence. To insist otherwise would be a cause of great injustice. That is why Section 118 of the *Evidence Act* reads: -

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after it’s dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

It is also a matter of general and local notoriety, which this Court can take judicial notice of under Section 60(1) of the *Evidence Act*, that not all parents, especially in the rural areas, considered it important to obtain Birth Certificates for their children perhaps until later in life when such documents are needed for securing other services. In his submissions on this issue, Counsel for the Appellants has stated that when the deceased was born Ernest Chemben Sitai was living with Rita Chesiro and the two were living as man and wife. Counsel for the Respondents has submitted that the issue of the deceased’s paternity was arbitrated upon by the elders who decided that the Appellants should look for an alternative parcel of land for the deceased since there was no proof that he was the son to Ernest Chemben Sitai.

18 What then was the evidence before the trial Magistrate on this issue? The 1<sup>st</sup> Respondent insisted during the trial that the deceased was not a son to his late brother Ernest Chemben Sitai. He also denied that his late brother had another wife by the name Rita Chesiro. He added that he never saw the deceased at their home during the life time of his late brother. He was supported in that regard by the 2<sup>nd</sup> Respondent who stated that she did not know Rita Chesiro and that her deceased husband did not have any child when they got married and neither did he tell her about the deceased.

19 Eliud Kanetested as the Respondents’ witness PW 3. His evidence as per his witness statement was basically that Ernest Chemben Sitai’s only wife was Joan Siakilothe 2<sup>nd</sup> Respondent. He added that he was not aware that Ernest Chemben Sitai had any other wife or that the deceased was his son.

20 The Appellants’ case, on the other hand, was that deceased had two wives the first one being Rita Chesiro who was the mother of the deceased. That was clear from the evidence of Simeon Sitai Ngeywothe 1<sup>st</sup> Appellant and whose testimony was supported by Peter Chengek and Stanley Sitai (the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants) who recorded their statements supporting that of the 1<sup>st</sup> Appellant. Valentine Chepkwemoi Chenge a daughter to the deceased recorded a statement confirming that Rita Chesiro was her grandmother and that the 2<sup>nd</sup> Respondent was her step – grandmother. That she was born on the original land parcel No North Malakisi/West Sasuri/ 144 but the 1<sup>st</sup> Respondent kept telling the deceased to leave because he was not her son. Diana (Jeina) Cheptumbuk, Jason Kisach, Gedion Boiyo, Daniel Mwotei and Daniel Chemaket all recorded statements (though undated) and testified



in support of the Appellants' case. The trial Magistrate's record, however, refers to them, wrongly, as plaintiffs' witnesses.

- 21 From what I can glean of the evidence, I am satisfied that the deceased was indeed a son to Ernest Chemben Sitai. There is the un – controverted evidence that the deceased was infact circumcised at the home of Ernest Chemben Sitai and although the 1<sup>st</sup> Respondent tried to deny that fact, the 2<sup>nd</sup> Respondent did confirm it in cross – examination when she said: -

“They brought Andrew to my home, they circumcised him and they took him to Simeon's home.”

That event was confirmed both by Rita Chesiro the deceased's mother, the Respondents, Daniel Mwotei and Jason Kisachas having taken place in 1994. The trial Magistrate did not think that the said event was of any significance. She brushed it aside as follows at page 6 of the impugned Judgment:-

“The defendants insist the deceased was a son to Ernest because he was circumcised at the plaintiff's home. This has been admitted by the 2<sup>nd</sup> plaintiff. The plaintiffs allege he was thereafter nursed at the 1<sup>st</sup> defendant's home. From evidence, it appears to have been one person's decision to bring the deceased for circumcision. No clan/family minutes were produced to confirm this resolution. In my view, the circumcision ceremony even though conducted sounds like it was an ambush on the plaintiffs. This cannot be proof that the deceased is a son to Ernest Chembeni. There is no proof that the 1<sup>st</sup> defendant was enforcing the late Ernest Chembeni's wishes.”

It is not always that a family allows a stranger to undergo such an important rite in their home. The evidence on record shows that by the time the deceased was being circumcised, his father was already deceased having passed away in 1982. It is also clear that by the time the deceased was being circumcised, there was already bad blood between him and the Respondents. Therefore, as the uncle to the deceased, it is not strange that Simeon Sitai Ngeywo, 1<sup>st</sup> Appellant, brought the deceased to their home for that important rite in the absence of his father. That can only be an affirmation that the Appellants recognized the deceased as a son to their late brother Ernest Chembeni.

- 22 Then there is the Baptismal Certificate showing that the deceased was Baptized on December 25, 1973 and given the names Ernest Kwesi Cheseto. His father's names are given as Ernest Chemben and the mother's as Rita Chesiro. That was an important milestone in the life of the deceased and there is no evidence to suggest that Ernest Chemben Sitai objected to his name being inserted on the Certificate yet he was still alive at that time.
- 23 There is also both oral and documentary evidence that Ernest Chemben Sitai and Rita Chesiro infact performed a customary marriage. This was documented by being reduced in writing on October 20, 1973 which shows that dowry payment of two (2) cows, one (1) goat and cash Kshs 3,000/= was made as a down payment on that day out of the agreed dowry of seven (7) cows, two (2) goats and cash Kshs 10,000/= for Rita Chesiro's father and another Kshs 5,000/= for the mother. And although that Marriage Agreement was reduced in writing in 1974, it was Rita Chesiro's testimony as contained in her statement dated February 26, 2021 that she started living with Ernest Chemben Sitai in 1972 and gave birth to the deceased in 1973 and that both she and Ernest Chemben Sitai were present when the deceased was baptized. In 1975 when Ernest Chemben Sitai went to college, Rita Chesiro stayed at the matrimonial home for some time before returning to her father's home together with the deceased and later got married elsewhere leaving the deceased with her mother.



24 Given all the above, I have no doubt that the deceased was the son to Ernest Chemben Sitai. The trial Magistrate erred both in law and fact when she decided otherwise against the strength of such cogent and over – whelming evidence.

25 That ground of appeal succeeds.

26 Grounds No 2, 3 and 4 can be determined together. The Appellants assail the trial Magistrate for holding that the remains of the deceased could not be interred on the suit land, disregarding evidence the 1<sup>st</sup> Respondent is a trustee holding the suit land in trust for the family of the deceased and for failing to consider the Appellants’ evidence on their Counter – Claim.

27 It is common ground that the 1<sup>st</sup> Respondent is the registered proprietor of the suit land. He currently holds the title deed there to issued on September 18, 2018. That title is therefore *prima facie* evidence that he is the absolute ad indefeasible owner of the suit land and is entitled to all the rights and privileges belonging or appurtenant thereto as provided under Sections 24 and 25 of the [Land Registration Act 2012](#). However, Section 25(2) of the same Act has a proviso that: -

25(2) “Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 28(b) of the same Act similarly recognizes as some of the overriding interests that affect registered land as: -

“trusts including customary trusts”

In the case of [Kanyi v Muthiora](#) 1984 KLR, the Court stated as follows: -

“The registration of the land in the name of the Appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu customary law and neither did it relieve the appellant of her duties or obligation under Section 28 as trustee  
.....

The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under customary law, if the Act had intended to exclude customary law rights it would have been clearly stated so. In the case of [Mbui Mukangu v Gerald Mutwiri Mbui](#) C A Civil Appeal No 281 of 2000, the Court of Appeal held that a customary trust is a concept of intergenerational equity where land is held by one generation for the benefit of succeeding generations. It also held that possession and occupation are key elements in determining the existence of a customary trust.

28 However, although the issue of trust has been raised as a ground of appeal, it was not pleaded by the Appellants in their Counter – Claim. I have also perused the proceedings in the trial Court and the issue of trust was neither raised during the trial nor determined.

29 In their Counter – Claim, the Appellants pleaded that by the time their late father Fanuel Chemobo Sitai passed away on May 14, 2016, he had distributed his land parcel No North Malakisi/West Sasuri/144 measuring 14 acres, and from which the suit land was hived. That he had however only signed transfer forms for his other sons except the 1<sup>st</sup> Respondent and Ernest Chemben the deceased. It is their case that the 1<sup>st</sup> Respondent subsequently obtained the registration of the suit land fraudulently. Particulars therefore have been set out above. In their defence and Counter – Claim, the Appellants pleaded in paragraph 27, 28, 29 and 30 as follows: -

27 “That the land of Patrick Barasa Sitaiat uplands borders that of Ernest Chemben Sitai.”



- 28 “That Ernest Chemben Sitaidied and was buried in his share of land which borders that of Patrick Barasa Sitai.”
- 29 “That after the demise of the said Ernest, the plaintiff moved and inherited the 2<sup>nd</sup> plaintiff who was the wife of the late Ernest.”
- 30 “That the 1<sup>st</sup> plaintiff abandoned his home and went to stay with the 2<sup>nd</sup> plaintiff in the late Ernest Chembeni land.”

And in their plaint, the Respondents pleaded in paragraph 3, 4, 5 and 8 as follows:-

- 3: “That al all material times, this matter involves a claim of a permanent injunction and subsequently an order on disputed burial site of the late Andrew Kwesiwho demised on February 2, 2021 over land reference number North Malakisi/West Sasuri/2362 which is registered in the names of the 1<sup>st</sup> plaintiff.”
- 4: “That the said land was created out of land reference number North Malakisi/West Sasuri/144 which was sub – divided by the original owner the late Fanuel Chemobo Sitai(deceased) who was the father of the 1<sup>st</sup> plaintiff and who bequeathed him the above mentioned portion of land to his sons who include the defendants and the husband of the 2<sup>nd</sup> plaintiff the late Ernest Chemben Sitai.”
- 5: “That the 2<sup>nd</sup> plaintiff is the widow of the late Ernest Chemben Sitai who demised on the February 28, 1989 and is suing jointly with the 1<sup>st</sup> plaintiff on behalf of the deceased husband to protect the interest of her late husband in the title herein which the 1<sup>st</sup> plaintiff holds in his own interest and trust of the children of his late brother.”
- 8: “That at all material times, the defendants have jointly and severally continued to forcefully and illegally interfere with the suit land especially the portion that belongs to the Estate of the late Ernest Chemben Sitaiand the 2<sup>nd</sup> plaintiff without her consent.” Emphasis added.

30 It is clear from the Respondents’ plaint that they recognized Ernest Chemben Sitai as the owner of the suit land. Infact in paragraph 5 of the plaint, the 1<sup>st</sup> Respondent admits that he holds the title to the suit land “in his own interest and trust of the children of his late brother.” What I find strange is why he took it upon himself to protect the interest of his later brother Ernest Chemben Sitai in the suit land when the 2<sup>nd</sup> Respondent was perfectly capable of doing so in her own right. The answer to that can only be that having inherited his later brother’s wife, he decided to also take over the suit land. And to reduce any future competition over the suit land bearing in mind that the deceased was the only son to his later brother, the best way to accomplish his selfish mission was to ensure that the deceased is not buried on the suit land. That was the driving force behind the suit. This Court has already found that the deceased was the son to Ernest Chemben Sitai. The Appellants were therefore entitled to bury him on the suit land.

31 It is of course not in doubt that the 1<sup>st</sup> Respondent is the registered proprietor of the suit land. However, as is now clear from his own pleadings, the suit land was the share of his late brother Ernest Chemben Sitai. It is not enough that the 1<sup>st</sup> Respondent holds the title thereto. Where a title to land is, as pleaded by the Appellants herein, alleged to have been obtained fraudulently, it is not enough for the 1<sup>st</sup> Respondent to simply wave that title as evidence of ownership. In *Munyu Maina v Hiram Gathiba Maina* C A Civil Appeal No 239 of 2009, the Court of Appeal said: -

“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of



title that is in challenge and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Among the particulars of fraud levelled against the 1<sup>st</sup> Respondent is that he registered the suit land in his name when the proprietor was dead and before doing succession, intermeddling with the Estate of a deceased person, and denying that the deceased was the son of Ernest Chemben Sitai in order to disinherit him. It is not in dispute that the suit land was a sub – division of the land parcel No North Malkisi/West Sasuri/144 measuring 14 acres and which was registered in the names of Fanuel Chemobo Sitai the late father of the Appellants, the deceased Ernest Chemben Sitai and the 1<sup>st</sup> Respondent. It is admitted that the later Fanuel Chemobo Sitai died in 2016 yet the 1<sup>st</sup> Respondent obtained the title to the suit land two years later in 2018. There is no documentary evidence to demonstrate whether the 1<sup>st</sup> Respondent obtained a Grant of Letters of Administration allowing him to transfer the suit land in his names yet there is evidence showing that before his demise, the late Fanuel Chemobo Sitai had not yet transferred the suit land to the 1<sup>st</sup> Respondent or even the deceased Ernest Chemben Sitai. That is evidence upon which the trial Court ought to have found that the allegations of fraud were proved.

32 The trial Magistrate also took the view that the deceased ought to have enforced his right to the suit land when he was alive. This is how the Court addressed that issue: -

“It is also evidence that the deceased herein and the plaintiffs were not peaceful as evidence by the case in Court, family meetings and the meetings before the D O. It would have made a whole difference if the defence proved the deceased lived on the said land for 26 years uninterrupted.

Apart from the criminal case where the 2<sup>nd</sup> plaintiff was the complainant, the deceased herein ought to have followed proper legal channels to get his rights over this land while he was still alive. The deceased slept on his rights and is guilty of *laches*.”

Since the deceased is not a party in these proceedings, it cannot be said that he “slept on his rights and is guilty of *laches*.” It must be remembered that the suit land was never registered in the name of his father Ernest Chemben Sitai. However, there is evidence that the deceased lived on the suit land where he even constructed his house although his relationship with the 2<sup>nd</sup> Respondent was always acrimonious and for obvious reasons. Indeed, on December 9, 2013, the deceased was charged at the Sirisia Court for creating a disturbance in a manner likely to cause a breach of the peace by threatening to beat the 2<sup>nd</sup> Respondent and also for burning her trees. His father having died way back in 1982 without any title deed in his name, it would have been a tall order for the deceased to pursue any claim with respect to the suit land which, in any event, was only created in 2018. There is documentary evidence that both the Provincial Administration through the District Officer Cheptais Division as well as the family Clan Chairman Jason Kisachi tried to resolve the dispute between the 2<sup>nd</sup> Respondent and the deceased over the latter’s occupation of the suit land. It was the 2<sup>nd</sup> Respondent’s complaint that Ernest Chemben Sitai had not informed her that the deceased was his son. The meeting resolved that the deceased be given three (3) months to vacate the suit land. Of course Ernest Chemben Sitai was long deceased by then. However, as is now clear, there was sufficient evidence from his siblings demonstrating that the deceased was in fact his son. That evidence was ignored by the trial Court and that was an error which calls for the intervention by this Court.



33 Finally, it is clear from the impugned Judgment that the trial Magistrate did not consider the Appellants' Counter – Claim. In paragraphs 40, 41 and 42 of their Counter – Claim, the Appellants sought Judgment in the following terms: -

40: “The plaintiff’s (sic) prayer against the plaintiffs is for an order directing the land register of Bungoma to cancel the name of the 1<sup>st</sup> plaintiff as the proprietor of the said land comprised in land parcel No N Malakisi/W Sasuri/2362 and the same to revert to the name of the deceased Fanuel Chemobo.”

41: “The defendants further pray for a declaration that the deceased Ernest Kweisi is the son to the late Ernest Chembenias such his remains entitled to be interred in land parcel NoN Malakisi/W Sasuri/2362 which land belongs to the late Ernest Chembeni.”

42: “The defendants pray for an order injuncting (sic) against the plaintiffs, the plaintiffs’ agents, daughters, relatives and/or friends from interfering with the burial ceremony of the late Ernest Kweisi in part of land parcel NoN. Malakisi/ S Sasuri/2362 property of Ernest Chembeni.”

In her Judgment, the trial Magistrate at page two (2) only identified the following issues for determination: -

1. Whether the deceased is a son to the late Ernest Chembeni.
2. Whether the deceased should be buried on land parcel title NoNorth Malakisi/West Sasuri/2362.

And after considering the evidence, the trial Magistrate made the following findings: -

- 1: “That the defendants are hereby jointly and severally restrained by themselves, their agents, servants, representatives and the burial Committee from interring the remains of the late Andrew Kweisi on land parcel NoNorth Malakisi/West Sasuri/2362.”
- 2: “Each party shall bear its own costs.”

There was no mention of the Appellants Counter – Claim. The trial Magistrate did identify the two (2) issues which I have stated above. However, as is clear from the pleadings, those were not the only issues which the parties wanted the Court to determine. The Appellants pleaded issues of fraud on the part of the Respondents in the manner in which the 1<sup>st</sup> Respondent acquired the suit land. They also sought various remedies in their Counter – Claim. These ought to have been considered and either allowed or disallowed. Unfortunately, there was no mention, even in passing, of those weighty issues. Yet, Order 21 Rules 4 and 5 of the Civil Procedure Rules provides that: -

4: “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

5: “In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefore, upon each separate issue.”

Looking at the issues framed by the trial Court, they were confined to the Respondents’ claim and completely ignored those raised by the Appellants. That was an error both in law and in fact. The Judgment did not comply with the above mandatory provisions yet it was the responsibility of the trial Magistrate to do so.



34 I have perused the submissions of Counsel for the Appellant in the trial Court. In urging the Magistrate to make a finding in favour of the Appellants, Counsel made the following submissions at paragraph 6:-

“Alternatively, the defendants’ relief sought in the Counter – Claim should be allowed as prayed. The Court should allow the deceased to be buried in his late father’s land as he is a son to the late Ernest Chembeniwho is the true owner of land parcel NoN Malakisi/W Sasuri/2362.”

And although the trial Magistrate did address the issue as to whether or not the deceased was a son to Ernest Chemben Sitai, she made no reference to the remedies which the Appellants sought in their Counter – Claim. That left the allegations of fraud and cancellation of the name of the 1<sup>st</sup> Respondent as the proprietor of the suit land un – resolved. That was a contravention of the provisions of Order 21 Rules 4 and 5 of the Civil Procedure Rules. A Judgment which does not comply with the law is not a Judgment and on that ground alone, this appeal is for allowing. By not making any findings on the Appellants’ Counter – Claim, the trial Magistrate abdicated her Judicial role because the Appellants are still in the dark on whether or not the issues which they raised were considered and if so, with what results. This is because, in the final disposal orders, the trial Court did not even state whether the Counter – Claim had been dismissed and if so, for what reasons. That was an error both in law and in fact.

35 That error of failing to make a determination on the Appellants’ Counter – Claim is, however, not without a remedy. This is because, Section 78 of the *Civil Procedure Act* which I have already referred to above, provides for the powers of an Appellate Court in the following terms: -

78(1) “Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power –

- a. to determine a case finally;
- b. to remand a case;
- c. to frame issues and refer them to trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

This Court shall therefore invoke that jurisdiction and make appropriate orders in the disposal of this appeal. Indeed, in their Memorandum of Appeal, the Appellants have not only urged this Court to allow the appeal and set aside the lower Court’s Judgment. They have further urged this Court to “evaluate the evidence on record and arrive at it’s own conclusion as it deems fit.”

36 Having re – considered and re – evaluated the evidence that was before the trial Court as well as the Record of Appeal, I am persuaded that this appeal is meritorious and is for allowing. There was credible and cogent evidence upon which the trial Magistrate could have made a finding that the deceased was a son to Ernest Chemben Sitai and that the Appellants were entitled to bury him on the suit land. There was also sufficient evidence to show that the suit land in fact belonged to Ernest Chemben



Sitai and not to the 1<sup>st</sup> Respondent. The Appellants led evidence proving that the 1<sup>st</sup> Respondent obtained registration of the suit land fraudulently. The 1<sup>st</sup> Respondent's contradictions with regard to the ownership of the suit land further compounded the fraud. While in paragraphs 3 and 18 of his plaint he alleges that the suit land is his property by virtue of holding the title deed thereto, in paragraph 5 he flip-flops by stating that he holds the said title "in his own interest and trust of the children of his late brother." A party cannot approbate and reprobate at the same time. And if indeed he holds the title in trust for the children of his late brother, the deceased is one such child. Therefore, when the Appellants were looking for a place to bury the deceased, as a good trustee, it was his duty to own up and allow the burial to proceed on the suit land. However, and as is now clear from the totality of the evidence, the claim that he is a trustee was simply a ploy to take over the suit land. The trial Magistrate did not address the Appellants' Counter – Claim and if she had done so, there is no doubt that she would have arrived at the inevitable conclusion that the 1<sup>st</sup> Respondent acquired the suit land fraudulently. She would not have granted the order restraining the Appellants, their agents, servants and the burial Committee from interring the remains of the deceased on the suit land. That is now of course water under the bridge.

37 Ultimately therefore, this appeal is allowed and the Judgment of the Senior Resident Magistrate delivered on April 16, 2021 is hereby set aside. In its place there shall be Judgment for the Appellants as sought in their Counter – Claim as follows: -

1. An order is issued directing the Land Registrar Bungoma to cancel the name of Patrick Barasa Sitai as the proprietor of the land parcel No North Malakisi/West Sasuri/2362 and the same to revert to the name of Fanuel Chemobo.
2. A declaration that the deceased was entitled to be interred in the land parcel No North Malakisi/West Sasuri/2362 which belonged to his late father Ernest Chemben Sitai.
3. The Administrator to the Estate of the late Fanuel Chemobo shall ensure that both Joan Siakilo and the wife to the deceased Ernest Kwesi Cheseto alias Andrew Kwesi have a share in the land parcel No North Malakisi/West Sasuri/2362.
4. This being a family dispute, each party shall meet their own costs both here and in the Court below.

**BOAZ N OLAO.**

**J U D G E**

**28<sup>th</sup> July 2022.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28<sup>TH</sup> DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL.**

Right of Appeal explained.

**BOAZ N OLAO.**

**J U D G E**

**28<sup>th</sup> July 2022.**

