



**Yalwala & 3 others (Sued in their capacity as Board of Trustees of Chavakali Yearly Meeting of Friends (Quakers)) v Kadenge & 3 others (Environment & Land Case 4 of 2021) [2022] KEELC 2510 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2510 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 4 OF 2021  
E ASATI, J  
JULY 21, 2022  
(FORMERLY KAKAMEGA ELC NO. 645 OF 2021)  
IN THE MATTER OF:**

**BETWEEN**

**STANENCE JUMBA YALWALA ..... 1<sup>ST</sup> PLAINTIFF  
JOSHUA OMBIMA ..... 2<sup>ND</sup> PLAINTIFF  
TOM LIHANDA ..... 3<sup>RD</sup> PLAINTIFF  
NATHAN ONDEGO ..... 4<sup>TH</sup> PLAINTIFF  
SUED IN THEIR CAPACITY AS BOARD OF TRUSTEES OF CHAVAKALI  
YEARLY MEETING OF FRIENDS (QUAKERS)**

**AND**

**JOHN ESOLYO KADENGE ..... 1<sup>ST</sup> DEFENDANT  
YONA MUGITA LUGOBA ..... 2<sup>ND</sup> DEFENDANT  
ENDESIA MESHACK NDAMA ..... 3<sup>RD</sup> DEFENDANT  
REGINA MMBONE MANYU ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. A brief background of this case is that vide a plaint dated 6<sup>th</sup> December 2014, Nathan Ondego who was sole Plaintiff therein sued the Chavakali Yearly Meeting Of Friends (quakers) (herein called the Church) through its Trustees namely; Stanence Jumba Yalwala, Joshua Ombima and Tom Lihanda and



Regina Mmbone Nanyu. The suit was filed in the Environment & Land Court at Kisumu as Kisumu ELC Case No. 645 of 2014. The Plaintiff was soon thereafter replaced with an amended Plaintiff dated 15<sup>th</sup> December, 2014 and filed on 16<sup>th</sup> December, 2014.

2. By a consent order dated 22<sup>nd</sup> January, 2015, parties were allowed to amend their pleadings. Consequently, the amended Plaintiff dated 15<sup>th</sup> December, 2014 was replaced with a Joint Statement of Claim dated 27<sup>th</sup> January, 2015. The Joint Statement of Claim has two Plaintiffs namely Chavakali Yearly Meeting Of Friends Church (suing through its Trustees namely; Stanence Jumba Yalwala, Joshua Ombima and Tom Lihanda and Nathan Ondego and four (4) Defendants namely John Esolyo Kadenge, Yona Mugiza Lugoba, John Endesia Ndama and Regina Mmbone Manyu.
3. The suit was thereafter transferred to the Environment & Land Court at Kakamega because the suit land is situated in Vihiga County. Later when the Environment and Land Court was opened at Vihiga the suit was transferred to the Vihiga Environment and Land Court for hearing and disposal. It was assigned the current case number.
4. The Plaintiffs' case as contained in the Joint Statement of Claim is that land Parcel known as North/ maragoli/mbale/1231 (the suit land herein) at all material times belonged to the 1<sup>st</sup> Plaintiff and number North Maragoli/mbale/1232 (plot No. 1232) belonged to the 2<sup>nd</sup> Plaintiff.
5. That on 26<sup>th</sup> April, 2012 the Defendants unlawfully and fraudulently caused the suit land to be subdivided into 4 parcels known as North Maragoli/mbale/1954, 1955, 1956 and 1957 and caused the said parcels to be registered in their respective names. That as a result they (Plaintiffs) have suffered loss and injury as the Defendants are holding titles they acquired illegally and continue to occupy and use the said property.
6. The Defendants amended the Statement of Defence on behalf of the 2<sup>nd</sup> Defendant dated 29<sup>th</sup> December, 2014 and replaced it with Statement of Defence on behalf of the Defendants dated 2<sup>nd</sup> February 2015. The Defendants denied the Plaintiffs' claim and contended that their registration as proprietors of their respective portions of the suit land was done in strict adherence to the law. They pray that the Plaintiffs' suit be dismissed.

### **The evidence**

8. Four witnesses testified on behalf of the Plaintiffs. PW1 was Stanence Jumba Yalwala. He relied on the contents of his witness statement filed earlier as his evidence in chief. The witness statement is dated 6<sup>th</sup> February 2014. He stated that he had been the Chairman of the Board of Trustees of the 1<sup>st</sup> Plaintiff since 2010. That the Board of Trustees for the Church manages the properties belonging to the Church in accordance with the Church Constitution and the Deed of Trust. That the Board of Trustees has power to enter into contracts including leasing, letting, charging, mortgaging, transferring, selling and buying of the Church properties. That as Trustees, they are mandated to execute all the necessary legal documents on behalf of the church.
9. That when he took over office in the year 2010, he realised that the suit land, although registered in the name of the Church, was being occupied and utilized by people unknown to the church. That the title deed to the suit land could not be traced. That he instructed the Secretary, Mr Ombima to report the loss of the title deed to the police and take the necessary steps to obtain a replacement. That the loss was advertised in the Kenya Gazette to facilitate issuance of a new title.
8. He further testified that it was not until September 2014 when they got to know that the suit land had been sub-divided and new title deeds issued in the names of the Defendants. That the Church's presiding clerk then wrote a letter to the Land Register informing the Land Registrar that the sub-



division and subsequent transfer was done without the approval of the Church and by fraud. That efforts by the Land Registrar to resolve the matter were vain.

8. He pointed out what according to him were anomalies in the whole transaction namely; that none of the Trustees attended the Land Control Board, there were no minutes at the Land Control Board authorizing the sub-division of the suit land, that the Church never entered into any agreement with the Defendants to transfer the property to the Defendants. He added that it is not true that the 3<sup>rd</sup> Defendant bought the land from the Church at Kshs 250,000/= The Church has never received such money from the 3<sup>rd</sup> Defendant and that there was no such transaction between the parties. That there is no application to the Land Control Board emanating from the Board of Trustees of the Church requesting for the sub-division of the suit land.
13. That he visited the Survey office and a surveyor by the name Violet Santa swore an Affidavit detailing how she sub-divided the suit land and prepared the mutation in respect thereof.
14. PW1 testified further that the mutation forms do not indicate the name of the person who acted on behalf of the Church and the transfer form does not indicate the name of the person who represented the Church and the stamp on the transfer form is not the seal of the Board of Trustees of the Church. That the PIN number of the transferee is not printed on the consent to transfer the lands to the defendants and yet the church has a PIN Number. That the consent to sub-divide the suit land is not in the Land Registry.
15. PW1 produced a total of 19 exhibits namely; - Sale agreement- P ex 1, Green card P ex 2, Ruling of a boundary dispute P ex 3, High Court Judgment P ex 4, Gazzete Notice form, P ex 6, Register of titles - P ex7, Mutation P ex 8, Minutes of Land Control Board- P ex 9, Transfer of Land P ex 10, Affidavit by surveyor P ex 11, Mutation P ex 12, Title of No. 1974 P ex 13, Letter of Land Registrar P ex 14, Letter of County Commissioner P ex 15. Title deed P ex 16, Letter to the 4<sup>th</sup> Defendant P ex 17. Summons to 4<sup>th</sup> Defendant P ex 18 and Trust Deed P ex 19.
16. On Cross examination, PW1 stated that he did not sign the Consent form and that the people who are in possession of the land are not members of the church. That no money was paid to the church.
17. PW2 was Joshua Ombima. He relied on the contents of his witness statement filed in court earlier as his evidence in chief. He stated that he is a member and a Trustee of the Church having been appointed by an instrument dated 26<sup>th</sup> May 2010. That he knows that the suit land belongs to the 1<sup>st</sup> Plaintiff. That he never signed any land transaction involving the suit land or any plot sub-divided from it.
18. On cross -examination he stated that there was boundary dispute involving the suit in a matter in Kisumu High Court. He stated that he was not aware that the Trustees sold the land and relocated. That the four Defendants are not members of the Church. He stated that the Church has a seal and the CEO is the custodian thereof. That any two Trustees can execute the documents. That when they took over as Trustees, the title deed was not among the documents handed over to them. That the East African Yearly Meeting Of Friends handed over to them but the title was missing. It was gazetted as lost. That he was not aware of the transfers.
19. PW3 was Violet Santa Mahangila, a private surveyor. She identified the mutation form that sub-divided the suit land to create the four parcels. She testified that she swore an Affidavit in respect of the matter and adopted the contents thereof as her evidence in chief. I will analyze the contents of the Affidavit later herein.
20. PW4 was the 2<sup>nd</sup> Plaintiff, Nathan Ondego. He relied on the contents of his witness statement recorded and filed earlier as his evidence in chief. The statement is dated 6<sup>th</sup> February 2015. He stated that he



is the owner of land parcel known as North Maragoli/mbale/1232(plot No. 1232) which borders the suit land. That sometime in November 1993 the Vihiga County Council being the owner the suit land encroached onto his land. That he lodged a boundary dispute with the Land Registrar who gave his findings that the suit land had encroached onto No, 1232 by 4.5 metres. After the Land Registrar's findings one Mr. Obando who was occupying the said encroached area refused to vacate thus necessitating him (2<sup>nd</sup> Plaintiff) to file a case in Kisumu High court vide Civil Case No. 6 of 1994.

21. That after trial the court awarded him (2<sup>nd</sup> Plaintiff) costs and damages of Ksh 350,000/= against the said Henry Obando. That the Judgment debtor was unable to pay the amount awarded and by consent he transferred his interest in the suit land to the 2<sup>nd</sup> Plaintiff in lieu of the said amount. The 2<sup>nd</sup> Plaintiff stated that he entered and took possession of the portion and demolished the structures he found thereon.
22. He testified further that on 24/9/2014 he noticed that the 4<sup>th</sup> Defendant had entered onto the same portion of land and started developments thereon. That upon inquiry at the land registry he found out that the suit land no longer existed as the same had been sub-divided into four parcels and its register closed. One of the parcels created therefrom was plot No. 1957 in the name of the 4<sup>th</sup> Defendant.
23. That he sought assistance from Provincial Administration and the area Assistant County Commissioner Chavakali wrote a letter to the Land Registrar asking the Lands office to revoke title in respect of North Maragoli /mbale/1957 and revert the registration to him (2<sup>nd</sup> Plaintiff) as he was the legal owner. That he further sought intervention of the 1<sup>st</sup> Respondent who denied any involvement in the sub-division and transfer. That the presiding clerk of the 1<sup>st</sup> Plaintiff wrote to the Land Registrar that the process was fraudulent and asking the land Registrar to correct the anomaly. That the Land Registrar wrote to the 2<sup>nd</sup> Defendant several summons asking her to stop from any transaction on the land but in vain, hence the suit.
24. When the matter came up for hearing of the Defence case on 15/3/2022, Mr. Kundu Advocate for the Defendant informed the court that the Defence would like to close its case. There was no objection by the Plaintiffs and hence the defence case was closed without calling any evidence.

### **Submissions.**

25. At the close of the evidence, parties chose by consent to file and exchange written submissions in support of their respective arguments in the case.
26. Written submissions dated 4<sup>th</sup> April, 2022 were filed by the law firm of Wasilwa Makhakara & Co. Advocates on behalf of the Plaintiffs. For the defendants written submissions dated 20<sup>th</sup> April 2022 were filed by the firm of K.N Wesutsa & Co. Advocates. I have read and considered the rival submissions.

### **Issues for Determination**

27. From the pleadings filed, the evidence on record and the submissions made, the following emerge as the issues for determination; -
  - (a) Whether or not the suit land belonged to the 1<sup>st</sup> Plaintiff before it was sub-divided and transferred to the Defendants.
  - (b) Whether or not sub-division of the suit land and subsequent transfer of the resultant portions to the Defendant was fraudulent.
  - (c) Whether or not the 2<sup>nd</sup> Plaintiff's claim is time barred.



- (d) Whether or not the Plaintiffs have proved their case.
- (e) What order to make on cost.

### **Analysis and determination**

28. 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 as framed herein.
29. The first issue is whether or not the suit land belonged to the 1<sup>st</sup> Plaintiff before it was sub-divided and transferred to the Defendants. The Plaintiffs pleaded in paragraph 4 and 5 of the joint statement of claim that on 19<sup>th</sup> July 1973 and at all material times prior to the wrongful acts complained of, the suit land was registered in the name of the Kakamega County Council and was reserved for the Idavaga Friends African Mission Church. That on 23<sup>rd</sup> March 1994 the property became registered in the name of a Church society known as East African Yearly Meeting Of Friends (reserved for Idavaga Friends African Mission Church) That the East African Yearly Meeting of Friends Church subsequently gave rise to 19 churches and among them the 1<sup>st</sup> Plaintiff herein registered on 7<sup>th</sup> March 2002 and which became entitled as successor in title to the property, assets and belongings earlier held by the East African Yearly Meeting of Friends Church.
30. The Plaintiffs produced evidence to support this. PW1 testified that when he took over office in the year 2010, he discovered that although occupied by people unknown to the Church, the suit land was registered in the name of the Church. He produced a copy of register (Green card) in respect of the suit land as P ex 7. The said exhibit shows that the register in respect of the suit land was opened on 9/7/1973. That the 1<sup>st</sup> registered owner was the County Council of Kakamega who on 23/3/1994 transferred the property as a gift to East African Yearly Meeting of Friends South (reserved for Idavaga Friends African Mission Church P.O Box 122 Maragoli). The exhibit further shows that on 26/4/2012, the title in respect of the suit land was closed upon sub-division and new numbers namely, Number 1954- 1957 opened. The PW1 in his testimony explained the relationship between East African Yearly Meeting of Friends Church and the 1<sup>st</sup> Plaintiff herein.
31. The Defendants in their written defence dated 2<sup>nd</sup> February 2015 do not dispute ownership of the suit land by the East African Yearly Meeting of friends. In paragraph 2A they admit the contents of paragraph 2,3,4 of the Joint Statement of Claim. And although they deny the contents of paragraph 5 of the Joint Statement of Claim which contains the pleading that the 1<sup>st</sup> Plaintiff was the successor of the East African Yearly Meeting of Friends Church, they never produced any evidence to controvert the evidence of the Plaintiffs. In *Edward Muriga (through Stanley Muriga –vs- Nathaniel R Schutts Civil Appeal No. 23 of 1997*, the court held that where a defendant does not adduce evidence, the Plaintiff's evidence is to be believed as the allegations in the Defence do not amount to evidence. Similarly in *Motex Knitwear Limited –vs- Gopites Knitwear Mills Limited* [2009] eKLR, the court observed that
- “although the Defendant denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> Plaintiff stand unchallenged but also that the claims made by the defendant in his defence and counterclaim unsubstantiated.”



32. This position was echoed in the more recent decision relied on by the 1<sup>st</sup> Plaintiff in its submissions in *Michael Njiru Kariuki v Ferdinand Ndungu Waititu & 3 others* [2021] eKLR where the court held that

“Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the Defence, such averment stands as a mere statement. Further if there is no rebuttal of evidence by a party, the evidence remains uncontroverted...”

33. I have considered the evidence on record and particularly the contents of exhibits 7 (the copy of register/green card in respect of the suit land) I find that the suit land was the property of the 1<sup>st</sup> Plaintiff prior to its sub-division and subsequent transfer to the Defendants.

34. The second issue is whether or not the sub-division of the suit land and subsequent transfer of the resultant portions to the Defendants was fraudulent. This issue is the crux of the dispute herein. The Plaintiff pleaded in paragraph 8 of the Joint Statement of Claim that on 26<sup>th</sup> April, 2012, the Defendants without any colour of right unlawfully and fraudulently caused the suit land to be sub-divided into four parcels known as North Maragoli/mbale/1954, 1955, 1956 and 1957 which were then registered in their respective names.

35. The particulars of illegality and fraud were itemized as;-

- (a) Causing the issuance of a letter of consent by the land Control Board for the sub-division and transfer of the said piece of land without the knowledge, consent and authority of the registered proprietor.
- (b) Misleading and falsely representing to the land Control Board that the 1<sup>st</sup> Plaintiff has issued its consents to the transaction, when indeed and in fact the Plaintiff 's Trustees have never appeared before the Land Control Board to give consent for sub-division or transfer nor before the Land Registrar or Chitwa Advocates to sign transfer forms.
- (c) Falsely representing a mutation form, sketch development plan, Field diagram and site observation for, to a public officer purporting that the boundaries proposed in the sub-division had been drawn, shown. or created in the presence of the proper officers of the 1<sup>st</sup> Plaintiff when in fact and indeed that was wholly untrue.
- (d) Causing the sub-division of the said piece of land without the knowledge, consent and authority of the Plaintiffs.
- (e) Causing the registration of instrument of transfer of title to themselves without the knowledge, consent and authority of the Plaintiffs.
- (f) Falsely representing to the Land Registrar, that the officers or Trustees of East African Yearly Meeting Of Friendshad on 30<sup>th</sup> October 2012 appeared before Chitwa D. Chegenye Advocate to append their respective signatures on the Transfer of Title and that on doing so had been identified by their personal identification numbers.
- (g) Presenting instruments of Transfer of Title in the Defendants' respective favour for registration fully knowing or when each of them ought to have known that no proper officer of the church has executed it or attached their respective documents of identification and KRA registration to the said transfer.

36. The Plaintiffs' witness testified and denied that the 1<sup>st</sup> Plaintiff was involved in the sub- division or transfer of the suit land in favour of the Defendants. PW1 testified that none of the Trustees of the



- 1<sup>st</sup> Plaintiff attended Land Control Board in respect of the impugned transaction. That there were no minutes authorising the transaction, there was no agreement for the Church to transfer the land to the Defendants at all. That the defendants did not buy the suit land from the Church. That there was no representative of the 1<sup>st</sup> Plaintiff during the survey and that the mutation forms do not give the name of the person who acted on behalf of the Church
37. PW1 produced an Affidavit sworn by the surveyor as exhibit P ex 11. I have read the Affidavit. It was sworn by the surveyor one Violet Santa on 21<sup>st</sup> October 2014. The said surveyor testified in court as PW3. She adopted the contents of exhibit P ex 11 as her evidence in chief. In the Affidavit, she deposed that on 7<sup>th</sup> of December 2012, she received instructions to carry out survey over the suit land from one who introduced himself to her as Endesia Meshack Ndama. (from the pleadings this is the 3<sup>rd</sup> Defendant herein) That Mr. Ndama had the original title deed for the suit land and informed the surveyor that the Church elders who are the Trustees of the Church will be on the ground during the survey. That the title was in the name of East African Yearly Meeting of Friends Church.
38. The surveyor deposed further that the following day she proceeded to the site and found Mr. Ndama in company of several people. That Mr. Ndama introduced several people to the surveyor whom he claimed represented the Church and they alleged that they had the authority to represent the Church during the survey. The other beneficiaries of the land introduced by Ndama to her (surveyor) were Regina Manyu Mmbone (4<sup>th</sup> Defendant herein) and Yona Mugita Lugoba (2<sup>nd</sup> Defendant herein).  
That she did the survey as per the instructions and prepared the mutation forms and other necessary forms to facilitate the sub-division. That after sometime, Mr. Ndama brought consent for sub-division for registration with the Land Registrar.
39. The surveyor deposed further that on 1<sup>st</sup> October 2014, she was called by the Land Registrar over some irregularities on the survey and sub-division. That at the office of Land Registrar she found Jumba Yalwala and Joshua Ombima whom the Land Registrar introduced to her as the Chairman and Secretary of the Board of Trustees of Chavakali Yearly meeting of Friends Church (Quakers) and the 2<sup>nd</sup> Plaintiff who introduced himself to the surveyor as the owner of Land Parcel No. North Maragoli/mbale/ 1232. That she had not met these people before and that they were not present when she was surveying and sub-dividing the suit land. She stated further that she had been dubbed by the beneficiaries of the sub-division and had carried out the survey by their false representation. That it is now obvious that Mr. Ndama falsified representation of the Church Trustees so as to fraudulently receive land without using proper channel.
40. PW1 produced a copy of the mutation form as exhibit Pex 12. He denied that the signatures on the same are of the Church Trustees. He further denied that the official seal of the church is not on the mutation, that the name of the person who transacted on behalf of the church is not shown on the mutation. PW2 the secretary Board of Trustees of the 1<sup>st</sup> Plaintiff denied ever signing any transaction involving the suit land or any portion of land sub-divided therefrom.
41. In their statement of defence, the Defendants averred that their registration as the proprietors of their respective parcels of land was done in strict adherence to the law.
42. Fraud has been defined in Black's Law Dictionary 11<sup>th</sup> Edition as  
“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”  
It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in paragraph 8 of the Joint Statement



of Claim and the particulars thereof itemised. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

“ It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

43. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

Also in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”  
In case where fraud is alleged it is not enough to simply infer fraud from the facts.

44. Under the provisions of sections 107 to 109 of the *evidence Act*, the burden of proof is on the Plaintiff to prove that the transactions were fraudulent.
45. I have considered the evidence on record and particularly the evidence of PW1, PW2 and PW3. It shows that the Trustees of the 1<sup>st</sup> Plaintiff as the owner did not participate in the process of sub-division of the suit land and subsequent transfer of the resultant parcels in favour of the Defendants. That other people other than the said Trustees, coordinated by the 3<sup>rd</sup> Defendant signed the documents in place of the Trustees. The Transfer form in respect of parcel No. 1957 was produced as exhibit it shows that East African Yearly meeting of Friends appeared before the advocate to sign the transfer form. This cannot be possible as such organisations can only appear through their authorised officials /agents; in this case, the Trustees. Pw1 in his testimony pointed out numerous anomalies on the instruments of the transaction. The Plaintiff’s evidence stands unchallenged.
46. Having carefully analysed the evidence placed before the court I find that the Plaintiffs have discharged the burden of proof and demonstrated to the required standard of proof that the sub-division of the suit land and subsequent transfer of the resultant portions in favour of the Defendants was fraudulent. Consequently, the titles held by the Defendants are defective pursuant to the provisions of sections 26 (1) (a) and (b) and 80 of the *Land Registration Act* and ought to be cancelled.
47. The 3<sup>rd</sup> issue is whether or not the 2<sup>nd</sup> Plaintiff’s claim has become time barred. The claim of the 2<sup>nd</sup> Plaintiff is contained in paragraph 7 of the joint statement of claim. It is that by a Judgment of the



court issued in Kisumu High Court Civil Case No. 6 of 1994, the 2<sup>nd</sup> Plaintiff acquired a beneficial and registrable interest as proprietor of a portion measuring 0.015 Ha of the suit land in respect of which the 1<sup>st</sup> Plaintiff is ready and willing to transfer to him but has been prevented from doing so by the unlawful acts of the Defendants.

48. The 1<sup>st</sup> Plaintiff did not deny the 2<sup>nd</sup> Plaintiff's claim.
49. The Defendants in response to the 2<sup>nd</sup> Plaintiff's claim pleaded in paragraph 3A of their statement of defence that although the Defendants admit that the 2<sup>nd</sup> Plaintiff vide an order made in Kisumu High Court Civil Case No. 6 of 1994 became entitled to ownership of a portion of land comprised within the suit land, the said order is incapable of execution due to laches as prescribed under Section 4(4) of the Limitation of Actions Act. Counsel for the Defendants submitted that after the lapse of the 12 years from the date of the order, the 2<sup>nd</sup> Plaintiff's claim became stale. Section 4(4) of the Limitation of Actions Act provides that:-

“An action may not be brought upon a judgement after the end of twelve years from the date on which the judgement was delivered.”

50. The Judgment the basis of the 2<sup>nd</sup> Plaintiff's claim herein was produced as exhibit P ex 4. It is dated 29<sup>th</sup> January 1997. The suit was filed on 6<sup>th</sup> December 2014. No doubt twelve years had elapse by the time the suit was filed. The court of appeal handling the issue of limitation of actions under section 4(4) of the Limitation of Actions Act in the case of Mikaria M'rinkanya & another v Gilbert Kabeere M'mbijiwe [2007]eKLR the court held that

“...from the above analysis, it is clear that a judgement for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgement is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the act and judgement debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher vs Donovan* [1948] 2 All ER 11 which we consider still good law in this country and the previous decisions of this court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore that to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4(4) of the Act would be inconsistent with the law of adverse possession.”

51. The import of this is that once a judgement has been given the same must be executed within 12 years. It follows that the judgement contained in P ex 4 cannot be the basis of an action the same having been passed more than twelve years before the suit was filed.
52. The fourth issue is whether the Plaintiffs are entitled to the relief sought. The relief sought by the Plaintiffs is for:
- a) An order of permanent injunction do issue restraining the Defendants whether acting by themselves, their agents, servants, employees or any person claiming through them from entering into the remaining in dealing with constructing upon, occupying or in any manner whatsoever transferring to third parties property known as North/maragoli/mbale/1954, North Maragoli/1955, North Maragoli 1956 and North Maragoli/1957.
  - b) A declaration that the sub-division of the property known as North Maragoli/mbale/1252 and the subsequent creation of properties known as North Maragoli/1954, North Maragoli/



mbale /1955, North Maragoli/1956 and North Maragoli/1957 was fraudulent, illegal and unlawful.

- c) The registration of properties known as North Maragoli/mbale/1954, North Maragoli/1955 and North Maragoli/1996 and North Maragoli/1955, North Maragoli 1956 and North Maragoli 1957 be revoked and cancelled and the name of the 1st Plaintiff viz Chavakali Yearly Meeting of Friends Church(quarkers) restored on the registrar of title.
  - d) Such parts measuring 0.015 Ha be subdivided out of Land Parcel No.1231 and transferred to the 2nd parcel member
  - e) The defendant to fully and severally pay the cost of the suit.
53. This court has determined firstly, that the suit land belonged to the 1<sup>st</sup> Plaintiff before it was sub-divided and the resultant portions transferred to the Defendants. Secondly that the sub-division of the suit land and subsequent transfer of the resultant portions thereof in favour of the Defendants was fraudulent. Thirdly that by reason of the said fraud, the titles held by the Defendants are defective and liable for cancellation. On the basis of these findings, this court find that Plaintiffs have largely proved its claim on a balance of probabilities.
54. As concerns the claim by the 2<sup>nd</sup> Defendant, for 0.05 ha of the suit land, the court finds that the same was filed out of time pursuant to the provisions of section 4(4) of the Limitation of Actions Act. However, as the 1<sup>st</sup> Plaintiff does not deny or oppose the 2<sup>nd</sup> Plaintiff's claim, the 1<sup>st</sup> Plaintiff may transfer the portion claimed by the 2<sup>nd</sup> Plaintiff to him once the title reverts to the 1<sup>st</sup> Plaintiff. I enter judgement in favour of the 1<sup>st</sup> Plaintiff as follows:
- i. A declaration that the sub-division of the suit land namely North Maragoli/mbale/1231,the subsequent creation of land parcels known as North Maragoli/1954, North Maragoli/mbale /1955, North Maragoli/1956 and North Maragoli/1957and transfer of the same to the Defendants was fraudulent.
  - ii. A declaration that the titles held by the Defendants in respect of land title No. North Maragoli/1954, North Maragoli/mbale /1955, North Maragoli/1956 and North Maragoli/1957 are defective having been obtained by fraud.
  - iii. Title in respect of land parcel numbers North Maragoli/ Mbale/1954, NorthMaragoli/mbale/1955, North Maragoli/ Mbale/1956andNorth Maragoli/1957registered in the names of the Defendants respectively are hereby cancelled and the original parcel NoNorth Maragoli/mbale/1231 reinstated.
  - iv. The register in respect of land parcel known as North Maragoli/mbale/1231be rectified by deleting entry Number 5 (which subdivided the parcel and closed the register) and reinstating entry numbers 1, 2, 3, and 4 thereof
  - v. An order of permanent injunction restraining the Defendants whether acting by themselves, their agents, servants, employees or any person claiming through them from entering into or in any manner whatsoever interfering with property known asNorth/maragoli/mbale/1231.
  - vi. Costs to the 1<sup>st</sup> Plaintiff.

Orders accordingly

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 21ST DAY OF JULY 2022.**



**E. ASATI**

**JUDGE.**

**In the presence of:**

Neville -Court Assistant

Ondego Advocate holding brief for Osango for the 1st Plaintiff and Wasilwa for the 2<sup>nd</sup> Plaintiff.

Mr. Kundu advocate for the Defendants.

**E. ASATI**

**JUDGE.**

