



**Kisilu & 2 others v Kivevo & 3 others (Environment & Land Case  
14 of 2019) [2023] KEELC 681 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 681 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 14 OF 2019**

**TW MURIGI, J**

**FEBRUARY 8, 2023**

**BETWEEN**

**AGNES KAVINDU KISILU ..... 1<sup>ST</sup> PLAINTIFF  
DOUGLAS KALUNGU MUNYAO ..... 2<sup>ND</sup> PLAINTIFF  
NYAMAI MUSEMBI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**STEPHEN KIVEVO ..... 1<sup>ST</sup> DEFENDANT  
COSMAS KIILU KIVEVO ..... 2<sup>ND</sup> DEFENDANT  
THE COUNTY LAND REGISTRAR, MAKUENI ..... 3<sup>RD</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 8<sup>th</sup> of March, 2019 the Plaintiffs pray for judgment against the Defendants for the following reliefs: -
  - a. A Declaration that land title Number Kiteta/Kakuswi/1091 measuring 5.3 Ha or thereabouts registered in the name of Kivevo Kiilu (deceased) is so registered in trust for the benefit of the Estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and that the said trust be terminated and the County Land Registrar, Makueni be compelled to sign the necessary papers to cause the reversal and/or transfer of the suit parcel in favor of the estates of late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and in default the same be executed by the Deputy Registrar of this Honourable Court.



- b. A Declaration in the alternative that the Plaintiffs are the rightful heirs of the estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and are the rightful owners of parcels of land Title Number Kiteta/Kakuswi/459 measuring 5.76 hectares or thereabouts and Kiteta/Kakuswi/1091 measuring 5.3 hectares or thereabouts having been purchased and taken into possession respectively by way of adverse possession, peacefully and enjoying a continuous uninterrupted occupation for more than 20 years.
  - c. An order directing the County Land Registrar, Makueni in any event to rectify the land register in respect of land Title numbers Kiteta/Kakuswi/459 and Kiteta/Kakuswi/1091 thereby cancel the name of Kivevo Kiilu (deceased) as proprietor thereof and revert the land back to the estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya.
  - d. Any other relief that this Honourable Court may deem fit and expedient to grant.
  - e. Costs of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide their joint Statement of Defence dated 14<sup>th</sup> of May, 2019 denied the Plaintiffs claim.
  3. The record does not show a Statement of Defence on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants even though a witness statement and a bundle of documents were filed on 30<sup>th</sup> September, 2019. Oral evidence was also adduced on their behalf.

#### **The Plaintiff's Case**

4. The Plaintiffs called a total of three witnesses to support their case.
5. PW1 Agnes Kavindu Kisilu, adopted her statement dated 08/03/2019 as her sworn evidence in chief and produced the list and bundle of documents dated 08/03/2019. It was her testimony that land Parcel No. Kiteta/Kakuswi/459 measuring 11.5 hectares belongs to her late father-in-law Kioko Katuvya together with his brothers, Munyao Katuvya and Musembi Katuvya as tenants in common in equal shares. She stated that the families of the three brothers are to date in occupation and use of the land which has remained undisturbed. She went on to state that the legal proprietors of land parcel No. Kiteta/Kakuswi/459 died on 8<sup>th</sup> July, 1996, 3<sup>rd</sup> November, 1997 and 15<sup>th</sup> of May, 1992 and were survived by the Plaintiffs. She further testified that in the year 2007, land parcel No. Kiteta/Kakuswi/459 was sub divided into two parcels and that Kivevo Kiilu, the father of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein was given one portion of the land.
6. She went on to state that the suit property was posthumously and irregularly hived from land parcel No. Kiteta/Kakuswi/459 and registered in the name of Kivevo Kiilu deceased.
7. It was her testimony that in 1984, a restriction was placed on land parcel No. Kiteta/Kakuswi/459. That the removal of the restriction in the year 2007 and the excision of title number Kiteta/Kakuswi/1091 was done without consulting the representatives of the Estate of the deceased proprietors. PW1 stated that as per the abstract of title, land parcel No. Kiteta/Kakuswi/459 is registered in the names of Kioko Katuvya, Musembi Katuvya and Munyao Katuvya. She went on to state that 5.3 hectares were hived from land Parcel No. Kiteta/Kakuswi/459 in order to create the suit property herein. She told the Court that she was aware that the late Kivevo Kiilu had a case before the Minister which related to land parcel No Kiteta/Kakuswi/459.



8. In cross-examination, PW1 stated that the first title was initially registered in three names. She further stated that the Minister's decision ordered subdivision of land parcel No 459 between Kivevo Kiilu on the one hand and Munyao, Musembi and Kioko Katuvya on the other hand. She further testified that she appealed against the Minister's decision in Machakos Court.
9. In further cross-examination, PW1 refuted that it was the Minister's decision that led to the subdivision of the land parcel No. 459. She denied being shown a copy of the Minister's decision before subdivision of the land was done.
10. In re-examination, PW1 stated that although the Minister's judgment was issued in 1985, the status of the land changed in the year 2007. She reiterated that she was not shown the order in respect of the Minister's decision sought to be enforced.
11. PW2, Douglas Kalungu Munyao, adopted his statement dated 08/03/2019 as his sworn evidence in chief. He stated that the suit property was hived from land Parcel No. Kiteta/Kakuswi/459 which is registered in the names of Kioko, Musembi and Munyao Katuvya. It was his testimony that their family was residing on land parcel No. 459 before they were chased away when the sub division was being carried out. He told the Court that despite a restriction being in place, the suit property was in the year 2007 posthumously and irregularly hived from Land parcel No Kiteta/Kakuswi/459. He added that they were not present when the subdivision of parcel No 459 was being carried out.
12. He further testified that the restriction placed on land parcel No Kiteta/Kakuswi/459 was removed in 2007 without the knowledge of the representatives of the Estate of the deceased proprietors. It was his further testimony that he was aware of the Minister's decision delivered in 1985. He prayed for the cancellation of the title to the suit property as the land belongs to the three brothers.
13. In cross-examination, PW2 stated that land parcel No. 459 belongs to the Katuvya brothers and that they also bought the land from Kivevo Kiilu. He conceded that he was aware of the Minister's decision which awarded one portion of the land No. 459 to Kivevo Kiilu and the other portion to the three brothers, though he was not aware why it was ordered that Kivevo Kiilu should get a portion of the land.
14. In further cross-examination, PW2 stated that although in the year 1985 he was twelve years old, he was aware that a case had been filed before the Minister. It was his testimony that the present suit is an appeal against the Minister's decision.
15. On re-examination PW2 testified that land parcel No Kiteta/Kakuswi/459 is registered in the names of three brothers and that they reside thereon.
16. PW3, Nyamai Musembi, adopted his statement dated 08/03/2019 as his sworn evidence in chief and relied on the list and bundle of documents dated 08/03/2019 in support of his evidence. He reiterated the evidence of PW1 and PW2 and went on to add that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the sons of Kivevo Kiilu. It was his testimony that land parcel No. 459 was 11.2 hectares while the suit property is a subdivision thereof.
17. He further testified that he was aware of the case before the Minister and the subsequent decision made in the year 1985 in which it was ordered that the land parcel No. 459 be subdivided into two equal portions.
18. It was his evidence that they were not informed about the subdivision of the land which was carried out twenty years after the Minister's decision. He went on to state that there was no order in respect of



the Minister's decision sought to be enforced. He maintains that the suit property should be returned to land Parcel No. 459 since the land was illegally subdivided.

19. In cross-examination, PW3 stated conceded that he was aware of the case before the Minister and the subsequent decision thereof. It was his evidence that the three brothers purchased the land from Kivevo Kiilu. He contended that the subdivision was unfair since the order to subdivide the suit property was not served upon the representatives of the estates of the deceased proprietors.
20. In further cross-examination, PW3 stated that although he did not attend the proceedings before the Minister, he was aware of the case and the decision thereof delivered in the year 1985. He stated that they took the decision to sue the 3<sup>rd</sup> and 4<sup>th</sup> Defendants because the subdivision carried out on land parcel No. 459 was illegal.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants Case**

21. DW1, Stephen Muia Kivevo, adopted his statement dated 08/06/2021 as his sworn evidence in chief. It was his evidence that the suit property is registered in the name of his late father Kivevo Kiilu.
22. It was DW1's testimony that there was a case involving Parcel No. 459 where Minister ordered the land to be subdivided into two equal portions. He went on to state that the Plaintiffs did not appeal against the Minister's decision. He further testified that the restriction placed on land parcel No 459 was removed after the case before the Minister was finalized. He refuted that the suit property was posthumously or irregularly hived from land parcel No. 459.
23. He further testified that the suit property was registered in the name of Kivevo Kiilu on 11/07/2007 after the Land Registrar legally removed the restriction placed on the title. He urged the Court to dismiss the Plaintiffs' suit with costs.
24. In cross-examination, DW1 testified that land parcel No Kiteta/Kakuswi/459 is registered in the names Kioko Katuvya, Munyao Katuvya and Musembi Katuvya.
25. He further testified that his grandparents had a case with the aforesaid three brothers back in 1984 and 1985 before the Minister whose decision was delivered on 20/12/1985. He further testified that by the time the green card for the suit property was opened on 06/07/1984, the Appeal before the Minister had not been finalized. He went on to state that the Plaintiffs were using the suit property illegally. He told the Court that they did not utilize the suit property because the case was still ongoing before the Minister.
26. In further cross-examination, DW1 stated that he was not aware of any appeal against the Minister's decision.
27. DW2, Justus Gideon Nthiwa, adopted his statement dated 08/06/2021 as his sworn evidence in chief and produced the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' list and bundle of documents dated 14/05/2019 which was marked as DEX Nos. 1 – 4 respectively. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are his nephews and added that the suit property is registered in the name of his late brother, Kivevo Kiilu.
28. It was his testimony that pursuant to the Minister decision on appeal, it was ordered that land parcel No 459 be sub divided into two equal portions. That upon subdivision, the Katuvya brothers got Parcel No. 459 while Kivevo Kiilu got Parcel No. Kiteta/Kakuswi/1091.
29. In cross-examination, DW2 restated that the Minister in his decision subdivided parcel No 459 into two equal halves with the Katuvyas' brothers getting Parcel No. 459 and Parcel No. 1091 going to Kivevo Kiilu.



30. He stated that initially land parcel No 459 belonged to his grandfather and was divided between his two sons Kiilu Mutua and Kitonga Ilenge. He told the Court that Kitonga Ilenge sold his share of land to the Katuvya brothers while his father Kiilu Mutua did not sell his share of land.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Defendants Case**

31. DW3, Samuel Maina, was the witness for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He adopted his statement dated 30/09/2021 as his sworn evidence in chief and produced the list and bundle of documents dated 07/09/2021. He told the Court that he is a Land Registrar based in Makueni County.
32. In cross-examination, DW3 stated that the subdivision of land parcel 459 was done pursuant to the Minister's decision on appeal. He further testified that the Minister's decision was not appealed against. It was his testimony that the acreage for land Parcel No. Kiteta/Kakuswi/459 is 5.76 hectares while the acreage for Parcel No. Kakuswi/Kiteta/1091 is 5.38 hectares.
33. In re-examination, DW3 testified the Minister's decision ordered for the removal of restriction placed on land parcel No 459. He further testified that the entries in green cards for Parcel No. 459 and the suit property were in order.
34. After the close of their respective cases, the parties filed their written submissions.

### **The Plaintiffs Submissions**

35. The Plaintiffs' submissions were filed in Court on 13<sup>th</sup> of May, 2022. Counsel for the Plaintiffs identified the following issues for the Court's determination: -
- i. Whether the judgment delivered on 20<sup>th</sup> December, 1985 could lawfully be implemented on 11<sup>th</sup> July, 2007.
  - ii. Whether the restriction placed on Title No. Kiteta/Kakuswi/459 was lawfully removed.
  - iii. Whether the creation of Title No. Kiteta/Kakuswi/1091 from Title No. Kiteta/Kakuswi/459 was fraudulent and or irregular
36. On the first issue, Counsel submitted that the judgment in the Minister's Appeal No. 63 of 1984, issued on 20<sup>th</sup> December, 1985, could not be implemented by virtue of the provisions of Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya. Counsel submitted that the Minister's judgment was implemented on 11<sup>th</sup> July, 2007, twenty-two years after the date of issue. Counsel argued that a judgment cannot be executed after the expiry of the statutory period of twelve years.
37. On the second issue, Counsel argued that on 6<sup>th</sup> July, 1984, a restriction was placed on the Title No 459 restricting registration of any dealings until the Appeal before the Minister was finalized. Counsel went on to submit that according to the abstract of title for land parcel No 459, Kivevo Kiilu was registered as proprietor of the suit property on 6<sup>th</sup> July, 1984 before Appeal to the Minister was finalized.
38. On the last issue, Counsel argued that the registration of Kivevo Kiilu as the proprietor of land Parcel No. Kiteta/Kakuswi/1091 before the Appeal to the Minister was finalized was fraudulent. That even if the registration was pursuant to the letter referenced CLR REF NO. CLR/R/69/4 VOL. XVII of 25<sup>th</sup> June, 2007, the same was unlawful as it was done after twenty-two years from the date of issue. Counsel contended that the registration of the suit property was irregular since it was done during the subsistence of a valid restriction.



### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants Submissions**

39. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submissions were filed in Court on 27<sup>th</sup> of April, 2022. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants identified the following issues for the Court's determination:-
- i. Whether Land Title Number Kiteta/Kakuswi/1091 registered in the name of Kivevo Kiilu (deceased) is registered in trust for the benefit of the estate of Munyao Katuvya, the late Kioko Katuvya and the late Musembi Katuvya.
  - ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the rightful heirs of land Title Kiteta/Kakuswi/1091 registered in the names of Kivevo Kiilu.
  - iii. Who bears the cost of the suit.
40. Counsel submitted that from the evidence on record, the suit property is registered in trust for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not for the Katuvyas' as argued by the Plaintiffs. Counsel further submitted that failure by the Plaintiffs to appeal against the Minister's decision was a clear indication that the subdivision and registration of the suit property in the name of Kivevo Kiilu was regular and lawful. Counsel urged the Court to dismiss the suit with costs.
41. To buttress his submissions, Counsel placed reliance on the following authorities: -
1. Christopher Iddi Moto & 15 Others Vs Chiriba Nyambu Baru & Another [2014] eKLR; and
  2. Paul Ngui Katilu Vs James Mwanzia Katilu [2019] eKLR.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Defendants Submissions**

42. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submissions were filed in Court on 23<sup>rd</sup> June, 2022. The Hon Attorney General raised the following issues for the Court's determination;
- i. Whether the Plaintiffs have the locus to institute this suit.
  - ii. Whether the removal of the restriction was done lawfully.
  - iii. Whether there was fraud on the part of the 3<sup>rd</sup> Defendant.
43. On the first issue, Counsel submitted that the suit is null and void since the Plaintiffs had no locus standi to institute the suit as they do not hold the grant of letters of administration of the Estates of the late Kioko Katuvya Mailu, Munyao Katuvya Mailu and Musembi Katuvya Mailu.
44. On the second issue, Counsel submitted that on 06/07/1984, the Chief Land Registrar placed a restriction on land parcel No 459 which prohibited registrations of any dealings on the title until the appeal before the Minister is finalized. Counsel went on to submit that that the restriction was lawfully removed by the Chief Land Registrar on 01/07/2007 as the Appeal to the Minister had been finalized. He argued that the 4<sup>th</sup> Defendant had an obligation to remove the restriction so as to implement the Minister's decision.
45. On the issue of whether there was fraud on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Counsel submitted that although the Plaintiffs had stated the particulars of fraud in their Complaint, they did not adduce any evidence in support of the particulars of fraud.
46. Counsel contended that the Plaintiffs had failed to prove their case against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants which subsequently ought to be dismissed with costs.



## Analysis And Determination

47. Having considered the pleadings, the evidence on record and the submissions by the parties herein, I find that the following issues arise for determination:-
- i. Whether the Plaintiffs have locus standi to institute this suit.
  - ii. Whether the Minister's judgment was lawfully implemented.
  - iii. Whether the restriction was lawfully removed.
  - iv. Whether land parcel No. Kiteta/Kakuswi/1091 was irregularly or fraudulently created.
  - v. Whether the Plaintiffs are entitled to the orders sought.

### Whether the plaintiffs have locus standi to institute this suit

48. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiffs have no locus standi to institute this suit as they do not hold grant of letters of administration of the Estates of Musembi Katuvya, Kioko Katuvya and Munyao Katuvya. Locus standi relates mainly to the legal capacity of a party.
49. In the case of Law Society of Kenya Vs Commissioner for lands & Others Civil Case No 464 of 2000, the Court held that:-

“Locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law.”

50. The Court of Appeal in Rajesh Pranjivan Chudasama Vs Sailesh Pranjivan Chudasama [2014] eKLR was of the following view: -

“A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:

... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

51. The Plaintiffs commenced this suit against the Defendants in their capacity as the Legal Representatives of the Estates of Kioko Katuvya Mailu deceased, Munyao Katuvya Mailu deceased and Musembi Katuvya Mailu deceased. In paragraph 4 of their joint Statement of Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants expressly admitted the description of the parties given by the Plaintiffs in paragraph 1, 2, 3, 4, 5, 6 and 7 of the Plaint. From the pleadings before the Court, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file any statement of Defence to rebut the description of the Plaintiffs in the Plaint.
52. From the pleadings and evidence before the Court, it is crystal clear that the Plaintiffs had filed a succession cause before the High Court at Makueni. The Plaintiffs produced a copy of the ruling in Makueni HC P& A No 218 of 2017.



53. In his statement, DW1 stated that the Court declined to grant the Plaintiffs application to include the suit property as part of the estate of the deceased. I have looked at the ruling delivered on 24<sup>th</sup> of January 2019. The Court in its ruling stated as follows:-

“Thus the court makes the orders a) LR No. Kiteta/Kakuswi/1091 does not form part and/or ought to form part of Estates of the deceased Kioko Katuvya Mailu, Musembi Katuvya Mailu and Munyao Katuvya Mailu.”

54. Although no grants of letters ad litem or certificates of confirmation of grant have been annexed to the supporting documents to verify that indeed the Plaintiffs have the legal capacity as per the provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2010, this Court finds and holds that the Plaintiffs have the requisite capacity to institute this suit on behalf of the Estate of Kioko Katuvya Mailu, Munyao Katuvya Mailu and Musembi Katuvya Mailu.

### **Whether the minister’s decision was lawfully implemented**

55. The Plaintiffs contended that the implementation of the Minister’s decision on 11<sup>th</sup> of July 2007 by the 3<sup>rd</sup> Defendant was unlawful since it was done 22 years after the decision was made. The Plaintiffs argued that the implementation of the Minister’s decision offends the provisions of Section 4(4) of the *Limitation of Actions Act* which provides that a judgment cannot be executed after the expiry of the statutory period of 12 years.

56. Section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of actions. Section 4(4) provides as follows:-

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods) the date of default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

57. It is clear that Section 4(4) of the *Limitation of Actions Act* governs the execution of judgment and decrees. A judgment must be executed within 12 years after which it will be statute barred. Black’s Law Dictionary, 9<sup>th</sup> Edition page 918 defines a judgment as follows;

A court’s final determination of the rights and obligations of the parties in a case.

58. An issue arises whether or not the above proviso applies to the decisions made by the Minister. Section 29 (1) of Cap. 284 stipulates as follows;

“(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 thereon as he thinks just and the order shall be final.

- (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.
- (3) When the appeals have been determined, the Director of Land Adjudication shall—
  - (a) alter the duplicate adjudication register to conform with the determinations; and
  - (b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

59. From a reading of Section 29(1) of the *Land Adjudication Act*, the Minister’s decision on appeal is not described as a judgment which can be enforced under Section 4(4) of the *Limitation of Actions Act*.
60. The statutory obligation to implement the Minister’s decision lay with the Director of Land Adjudication and the Chief Land Registrar. There are no statutory timelines for implementation of the Minister’s decision even though such decision should be implemented within a reasonable period. I therefore find that decision in question does not fall within the ambit of Section 4(4) of the *Limitation of Actions Act*.
61. This Court finds and holds that the Minister’s decision rendered on 20th of December 1985 was lawfully implemented.

#### **Whether the restriction was lawfully removed**

62. It was the Plaintiffs testimony that the restriction placed on land parcel No. 459 was unlawfully removed since it was done without their consultation. PW2 testified that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants removed the restriction without informing the representatives of the deceased proprietors. The Defendants on the other hand averred that the restriction was removed after the case before the Minister was finalized.
63. DW3 testified that on 6/07/1984, the Chief Land Registrar placed a restriction on land parcel No 459 restricting the registration of any dealings before the appeal is finalized. He stated that the restriction was lawfully removed by the Chief Land Registrar after the appeal before the Minister was finalized. That vide a letter RefNo. CLR REF No. CLR/R/69/4VOL.XVII(94) the Minister’s decision directed them to remove the restriction.
64. He argued that the 4<sup>th</sup> Defendant was obligated to remove the restriction so as to implement the Minister’s decision. DW3 produced the green card with respect to land parcel No Kiteta/Kakuswi/459 as defence exhibit 1. In the second entry of the green card, the restriction was placed on land parcel No 459 pursuant to the order issued by the Chief Land Registrar on 6<sup>th</sup> of July, 1984 which forbade registration of any dealings on the land until the appeal before the Minister is finalized. In the third entry, the restriction was removed vide the letter referenced CLR REF NO. CLR/R/69/4 VOL.XVII(94). DW3 testified that no appeal was filed against the decision made Minister’s in Appeal Case No. 63 of 1984.



65. According to entry No 2 of the green card, it is crystal clear that the restriction was to subsist until the appeal before the Minister was finalized. It is also clear that Chief Land Registrar removed the restriction after the appeal was finalized.
66. This Court finds and holds that the restriction on land parcel No Kiteta/Kakuswi/459 was regularly and lawfully removed after the appeal before the Minister was been finalized.

**Whether the sub division of parcel 459 to create parcel No. 1091 was irregular**

67. It was the Plaintiffs testimony that land parcel No Kiteta/Kakuswi/459 is registered in the name of Munyao Katuvya, Kioko Katuvya and Musembi Katuvya. In this regard, the Plaintiffs produced an abstract of title for title No 459 and a certificate of official search which confirms that land parcel No Kiteta/Kakuswi/459 is registered in the names of Kioko Katuvya  $\frac{1}{3}$  share. Munyao Katuvya  $\frac{1}{3}$  share and Musembi Katuvya  $\frac{1}{3}$ .
68. Their evidence was corroborated by DW1, DW2, DW3, the abstract of title and the green card. It is the Plaintiffs evidence that the sub division of land parcel No 459 was done posthumously and irregularly since the representatives of the deceased proprietors were not consulted on the subdivision. The Plaintiffs testified that initially land parcel No. 459 measured 11.3 hectares.
69. It was the Plaintiffs testimony that 5.3 hectares were hived from parcel 459 to create the suit property. The Defendants on the other hand stated that the sub division and removal of the restriction was done pursuant to the Ministers decision on Appeal. They maintained that the Plaintiffs were contented since they did not appeal against the Minister decision.
70. I have looked at the proceedings before the Minister in Appeal Case Number 63 of 1984 marked as Plaintiffs exhibit 1. In that case, Kivevo Kiilu was the Appellant while Kioko Katuvya, Kitonga Ilinge, Musembi Katuvya and Munyao Katuvya were the Respondents. The case was heard and determined on 20<sup>th</sup> of December, 1985. Order No. 3 of the Minister's decision delivered on 20<sup>th</sup> of December, 1985, states as follows:-
  - “ 3. District surveyor, district land adjudication officer and the chief for the area and his Mbai to sub-divide parcel No 459 into two equal halves and thereafter the new parcel to be given a new parcel No and registered in the name of Kivevo Kilu and Respondents No 1, 2, 3 and 4 to retain the old 459.”
71. The Plaintiffs conceded that they were aware of the case before the Minister and the subsequent decision thereof. The Plaintiffs contended that the sub division was done in their absence. PW1 refuted that the subdivision was done pursuant to the Ministers decision on Appeal. It was her testimony that she lodged an appeal against the Minister's decision in Machakos Court.
72. PW2 on the other hand stated that the present suit was filed as an appeal against the Minister's decision. The preamble to the [Land Adjudication Act](#) provides that it is an act of parliament to provide for the ascertainment and recording of rights and interests in community land and for purposes connected therewith and purposes incidental thereto. The Act has an elaborate dispute resolution mechanism. A party who is aggrieved by the Minister's decision can only challenge such determination by way of Judicial Review and not otherwise. The Plaintiffs have not demonstrated that they challenged the Minister's decision by way of judicial review. The Plaintiffs admitted that they were aware of the Minister's decision to have parcel No 459 subdivided into two equal halves.



73. It was the Plaintiffs testimony that they were aware of the Minister's decision that ordered the subdivision of parcel No. 459 into two equal halves between Katuvya brothers and the late Kivevo Kiilu. If at all they were aggrieved with the Minister's decision, they ought to have challenged the same by way of judicial review. That was never done. No evidence was adduced to the effect that the Plaintiffs instituted judicial review proceedings challenging the Minister's decision. The Plaintiffs cannot therefore turn around and allege that the subdivision was illegal and yet they did nothing about it. This Court finds and holds that the subdivision of land parcel No 459 done pursuant to the Minister's decision was lawful and regular.

#### **Whether land parcel No 1091 was irregularly or fraudulently created**

74. The Black's Law Dictionary, 9<sup>th</sup> Edition page 731 defines fraud as follows:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

75. It is trite law that allegations of fraud must be pleaded and strictly proved. In the case of Vijay Morjaria Vs Nansing Madhusing Darbar (2000) eKLR Tunoi JA (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and proved. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.”

76. The Plaintiffs contended that title No. Kiteta/Kakuswi/1091 was irregularly and fraudulently created as it was illegally excised from land parcel No 459. The Plaintiffs contended that the suit property was registered while a restriction on parcel No 459 was still in place.

77. The Plaintiffs averred the issuance of the title deed, transfer and registration of the suit property was done fraudulently and irregularly as the Minister's decision was delivered on 20/12/1985 while the title deed for the suit property was opened on 06/07/1984 long before the Minister's decision was rendered. The Plaintiff itemized the particulars of fraud in paragraph 19 of their Plaint.

78. In summary, the Plaintiffs averred that:-

1. The 4<sup>th</sup> Defendant unilaterally removed the restriction placed on land no 459 after more than 20 years after the minister's decision without according the legal representatives of the estate of...an opportunity of being heard.
2. The 3<sup>rd</sup> Defendant with impunity and intent to deprive the plaintiffs of their land no 459, caused a title deed to be posthumously issued on 11/07/2007 without summoning any person to verifying who was in occupation.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants with impunity and intent to deprive the plaintiffs of their property no 459 failed to disclose to the land registrar upon being issued with title no 1091 that their deceased father Kivevo Kilu and their late uncle Kitonga Ilenge had sold the entire parcel no 459 to the late Munya Katvya, late Musembei Katvya and the late Kioko Katuvya who were registered as the proprietors of 459.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants with intent to defraud the plaintiffs of land parcel 459 misrepresented to the land office that they were entitled to be issued with tile no 1091 measuring 5.c ha to be excised from 459 yet none of their families had for 30years lived on the land.



5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants failed to recognize that the Plaintiffs are the registered owners of the land.
6. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants with impunity and intent to deprive the plaintiffs land no 459 caused the irregular and wrongful transfer of land 1091 on 25<sup>th</sup> of June, 2007 and 11<sup>th</sup> July, 2007 to the late Kivevo long before the Ministers decision on 20/12/1985 without establishing who was in exclusive possession.
79. The 1<sup>st</sup> Defendant testified that the land initially belonged to his grandfather Ndei kitonga who had two sons namely Ilenge Ndei and Mutua Ndei. That Ilenge is the father to Kitonga Ilenge while Mutua is the father to Kiilu mutual, the father of Kivevo Kiilu. That the land was to be divided between Kiilu Mutua and Kitonga Ilenge. That Kitonga Ilenge who is their uncle sold his portion of land to the Katuvya brothers. That the land was No 459 before it was sub-divided.
80. He went on to state that they sued their uncle Kitonga Ilenge and the three Katuvya brothers because they wanted to take the whole land. It was his evidence that the land was sub-divided in 1984. That the Minister decided that 459 to go to the three brothers while the other portion was to be registered in the name of his elder brother Kivevo Kilu.
81. It was the 3<sup>rd</sup> Defendant's testimony that the registration of all the parcels in Kiteta Kakuswi Adjudication area was done 1984 and that it was not specific to land parcel No 1091. In this regard he produced the green cards in respect to land parcel No/ Kiteta/Kakuswi/459 and Kiteta/Kakuswi/1091 to corroborate his evidence. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants argued that the Plaintiffs had failed to demonstrate that the suit property was fraudulently registered in the name of Kivevo Kiilu.
82. The green card for land parcel No. Kiteta/Kakuswi/1091 indicates that the land was registered in the name of Kivevo Kiilu on 6<sup>th</sup> of July, 1984 while the title was issued on 11<sup>th</sup> of July, 2007.
83. DW3 went on to state that the title deed was issued on 11<sup>th</sup> of July, 2007 pursuant to the implementation of the Minister's decision on appeal. He stated that the allegations of fraud on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were baseless. He went on to state that they did not sub divide the land since the did not issue two new numbers. That they received a letter directing them to implement the decision.
84. Although the allegations of fraud were specifically pleaded, no evidence was adduced to prove the allegation to the required degree or at all. The Plaintiffs did not prove that the subdivision, acquisition and transfer of the suit land to the late Kivevo Kiilu was was done fraudulently as alleged. From the green card it is clear that pursuant to the Minister's decision on appeal, land parcel No. 459 was subdivided to create land parcel No 1091. This Court finds and holds that the sub-division and the subsequent creation of the suit property was done pursuant to the Minister's decision on appeal. There is no evidence that the Plaintiffs challenged the Minister's decision by way of judicial review. The decision has not been set aside or challenged and is therefore valid and binding between the parties.
85. I find that the creation of land parcel No 1091 was pursuant to the Minister's decision was not tainted with fraud or irregularities as alleged. This Court finds and holds that land parcel No 1091 was lawfully and regularly created from land parcel No 459.

### **Whether the plaintiffs are entitled to the orders sought**

86. The Plaintiffs have sought for a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold the suit property in trust for them or in the alternative they be declared as the owners of the suit property amongst other



orders. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that their late father is the absolute owner of the suit property.

87. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that the suit property is registered in trust for the Estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya.

88. According to Black's Law Dictionary 9<sup>th</sup> Edition, page 1647 a trust is defined as follows:-

The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interred held by one person(trustee) at the request of another (settler) for the benefit of a third party (beneficiary)". The plaintiffs had a duty to prove that the 1<sup>st</sup> and 2<sup>nd</sup> defendants holds the suit property in trust for them.

89. In the case of Salesio M Itonga Vs M'Ithara (2015) eKLR & 3 Others the court of appeal held that:-

"It is trite law that trust is a question of fact and has to be proved by evidence. Trust must be proved by credible evidence adduced by the person claiming that a trust exists."

90. In the case of Isaack M'Inanga Kieba Vs Isaaya Theuri M'intari and Another (2018) eKLR the supreme court identified the elements to qualify as a trustee as follows;

"Each case has to be determined on its own merits and quality of evidence...some of the elements that would qualify a claimant as a trustee were(a) the land in question was before registration, family, clan or group land, (b) The claimant belonged to such family, clan or group, (c) The relationship of the claimant to such family clan or group was not so remote or tenuous as to make his/her claim idle or adventurous(d) The claimant could have been entitled to be registered as an owner or other beneficiary of land but for some interning circumstances. (e) The claimant was directed against the registered proprietor who was a member of the family, clan or group."

91. The Plaintiffs failed to demonstrate that there was an existing trust between the late Kivevo Kiilu and the Estates of Kioko Katuvya Mailu, Munyao Katuvya Mailu and Musembi Katuvya Mailu or that the late Kivevo Kiilu was holding the suit property in trust for them.

92. Having found that the sub division and registration of the suit property was pursuant to the Minister's decision on appeal, and not by means of fraud as alleged, I find that the Plaintiffs are not entitled to the orders ought.

93. In the end, I find that the Plaintiffs have failed to prove their case on a balance of probabilities as required. Consequently, the Plaintiffs suit is dismissed with costs to the Defendants.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023.**

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi



