



**Kathiari (Suing as a personal representative of Paul Itiame alias Paulo Itiame alias Paul M’Itiame – Deceased) v Mungiria & 6 others (Environment & Land Case 12 of 2010) [2023] KEELC 21495 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21495 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 12 OF 2010  
CK NZILI, J  
NOVEMBER 8, 2023**

**BETWEEN**

**JOHN KATHIARI (SUING AS A PERSONAL REPRESENTATIVE OF  
PAUL ITIAME ALIAS PAULO ITIAME ALIAS PAUL M’ITIAME –  
DECEASED) ..... PLAINTIFF**

**AND**

**THOMAS MUNGIRIA ..... 1<sup>ST</sup> DEFENDANT  
SAMUEL LIBURU ..... 2<sup>ND</sup> DEFENDANT  
KIRAGU KAMUIRU ..... 3<sup>RD</sup> DEFENDANT  
MWANGI MARATHI ..... 4<sup>TH</sup> DEFENDANT  
JOSEPH MUTUMA ..... 5<sup>TH</sup> DEFENDANT  
DISTRICT LAND AND SETTLEMENT OFFICER ..... 6<sup>TH</sup> DEFENDANT  
BERNARD MUTHOMI MEME ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a ruling delivered on 8.2.2023, the court struck out the amended plaintiff dated 8.12.2021, further amended plaintiff dated 28.8.2022, and by extension, the initial plaintiff dated 3.2.2010, on the basis that the original plaintiff was a nullity and therefore could not be cured by any form of amendments, since it had been filed by some deceased plaintiffs. This paved the way for the 4<sup>th</sup> defendant to prosecute his counterclaim.
2. The 4<sup>th</sup> defendant' hereinafter the plaintiff in his counterclaim amended on 28.2.2023, sued Thomas Mugira, Joseph Mutuma, the District Land and Settlement Officer, and Bernard Muthomi Meme,



who were the 1<sup>st</sup>, 12<sup>th</sup>, 13<sup>th</sup>, and 15<sup>th</sup> defendants in the initial suit as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the counterclaim. He averred that his late father, Paul Itiame, had filed a Committee Case No. 274 of 1975 through Objection No. 833 and had been awarded the parcels No's Tigania/Antuamburi/1507, 2167, 1452, 1582, 9802, 9842, 9798, 9804, 9803, 9805, 9801, 1157, 9841, 9799 and 1767, hereinafter the suit lands against Chebere Aruaki, then representing his clan but which unfortunately were recorded by the 2<sup>nd</sup> defendant to the counterclaim in favor of the 2<sup>nd</sup> and 15<sup>th</sup> defendants instead of the successful party in the objection.

3. The plaintiff averred that the 2<sup>nd</sup> defendant to the counterclaim was not a son of Paul Itiame and could only have been registered as the owner of the suit lands following the objection described above filed in 2009 to hold the suit parcels of land in trust for the family of Paul Itiame. Additionally, the plaintiff in the counterclaim averred that no other land adjudication dispute or objection was ever registered against Paul Itiame on the committee case no. 274 of 1975, so it was only fair that the suit parcels of land be registered in the names of the estate of Paul Itiame so that the beneficiaries can file a succession cause. Therefore, the plaintiff in the counterclaim prayed for:
  - a. A Declaration that the estate of Paul Itiame was the absolute owner of all the suit parcels of land awarded to him vide Committee Case No. 274 of 1975.
  - b. A declaration the registration of the suit lands to strangers was contrary to the decision in the committee case.
  - c. An order that the 2<sup>nd</sup> defendant to the counterclaim holds the suit lands awarded to him vide the 2009 objection proceedings in trust for the family of Paul Itiame and the same be transferred to the plaintiff, to hold in trust for the said family and lastly;
  - d. An order directing the transfer of all the suit lands in the names of 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants into the names of the late Paul Itiame or the estate.
4. The counterclaim was accompanied by a witness statement and list of documents dated 28.9.2022 as contained in the paginated bundle dated 24.4.2023.
5. By an amended reply to the 4<sup>th</sup> defendant's defense and counterclaim dated 14.4.2023, the 1<sup>st</sup> defendant to the counterclaim averred that the plaintiff in the counterclaim had no legal interest in the proceedings and in objection No. 274/1975, which had no nexus with the suit. He termed the counterclaim as idle, remote, speculative, a sham, hopeless, time-barred, a misnomer, misleading and farfetched.
6. Additionally, the 1<sup>st</sup> defendant to the counterclaim averred that Paul Itiame passed on on 24.9.2000, no claim survived against him, and that the plaintiff in the counterclaim had no legal capacity to sue both before the committee and in this court. The 1<sup>st</sup> defendant prayed that the counterclaim be dismissed or struck out and judgment entered for him regarding LR No. Tignaia/Antuamburi/9802, 9805, 9801, 9841, and the District Land Adjudication and Settlement Officer (DLASO) decision awarding the plaintiff in the counterclaim two acres be nullified.
7. From the record, it appears the honorable Attorney General entered an appearance in this suit by memorandum of appearance dated 28.7.2010. Even though the amended defense and counterclaim were served upon the 3<sup>rd</sup> and 4<sup>th</sup> defendants and a return was filed by Mwirigi Kaburu advocate on 14.3.2023, no defense was filed against it. The court, on 21.2.2023, issued directions that the amended defense and counterclaim be filed within 14 days while the defense to the counterclaim be filed 30 days after service with the amended defense and counterclaim. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants only filed a paginated bundle dated 16.5.2023 containing the witness statement of the 2<sup>nd</sup> defendant and a list



of documents. No amended defense to the counterclaim is therefore on record for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants.

8. At the trial, John Kathine M'Itimae testified as PW 1 and adopted his witness statement dated 28.9.2022 as his evidence in chief. He produced a copy of the death certificate for Paul M'Itiame as P. Exh No. (1), limited grant dated 10.9.2018 as P. Exh No. (2) chief's letter dated 7.2.2022 as P. Exh No. (3) Proceedings before Land Adjudication and Settlement Officer in Land case No. 274 of 1975 as P. Exh No. (4), summons to attend objection hearing dated 29.9.1975 as P. Exh No. (5). His evidence was that since 1975, no other objection, dispute, or case was filed over the suit parcels of land. Further, he said that Joseph Gituma purported to represent himself as a son of the late Paul Itiame in the DLASO case 2009, yet he was not his brother or a close relative. Therefore, he urged the court to reverse the entries to the adjudication record purportedly made out of such misrepresentation.
9. In cross-examination by Mr. Wambua, Advocate PW 1 told the court that he was born on 1.7.1975 and that the initial dispute's decision was rendered on 12.1.1984 in favor of his late father for Parcel No. 1157. PW 1 insisted that Joseph Mutuma, the defendant, could not represent his late father in the A/R objection 2009 and should not have been awarded the suit land. Cross-examined by Miss Mbaikyatta, DW 1 termed the limited grant produced as P. Exh No. (2) as valid and mandating him to file the instant suit.
10. Henry Miriti Lazaro testified through a Kimeru interpreter as PW 2 and adopted his witness statement dated 28.9.2022 as his evidence in chief. He stated that the late Paul Itiame gathered the suit land, which was not part of his ancestral land. PW 2 clarified that he participated in the 'Nthenge' oath-taking; therefore, he knew the extent and boundaries of the suit land since he was also from the neighborhood.
11. Stephen Kubai testified as PW 3 and adopted his witness statement dated 28.9.2022 as his evidence in chief. As a neighbor of the late Paul Itiame, PW 3 told the court that the parties to the objection case in 1975 undertook a 'Nthenge' oath, following which a Kithiri curse befell Athiaki after he declined to hand over the land to the late Paul Itiame.
12. Thomas Mugiria, the 1<sup>st</sup> defendant in the counterclaim, testified as DW 1 and adopted his witness statement dated 24.5.2018 and a further statement dated 22.8.2023 as his evidence in chief. He produced his documents in the list dated 24.5.2018, namely the proceedings in No. 833 of 1975 and objection proceedings in objection No. 827 as D. Exh No. (1), an undated letter as D. Exh No. (2), undated letter as D. Exh No. (3) an unreferenced application for transfer and approval as D. Exh No. (4), alienation of transfer to Munyi Marathi as D. Exh No. (5) alienation to transfer to Thomas Mugiira dated 11.3.1974 as D. Exh No. (6), letter dated 11.3.1974 as D. Exh No. (7), letter to the area chief dated 14.7.1990 as D. Exh No. (8), ruling dated 19.11.2009 in objection No. 1892, 1893, 1901, 1904 & 1894 as D. Exh No. (9), letter dated 16.2.1974 as D. Exh No. (10) and lastly, judgment dated 19.6.1966 as D. Exh No. (11).
13. DW 1 told the court that he bought his land from Peter Biritha. Regarding Objection Case No. 274 of 1975, his evidence was that the late Paul Itiame and Peter Birithu represented Bonchoro and the Akinna clans, while Nchebere represented the Antuamba clan. His view was that case No. 7 of 1975 and 99/1965 was between Paul Itiame and Peter Birithu, while the other was between Paul Itiame and Nchebere.
14. DW 1 told the court that Parcel No. 1157 belonged to Nchebere Aruaki while 1197 belonged to Peter Birithu, who sold him the land in 1974 and was successful in the objection proceedings.
15. Joseph Mutuma walked out of court at this juncture, so he did not cross-examine the witness.



16. In cross-examination by Mr. Kimanthi, learned litigation counsel for the Hon. Attorney General DW 1 told the court that the adjudication register was published before the title deed could be issued, where the plaintiff to the counterclaim had an opportunity to object before the title deeds came out.
17. In cross-examination by Mr. Mwirigi, advocate for the plaintiff to the counterclaim, DW 1 confirmed that all his exhibits originated from the land adjudication office, though none were certified. He produced no sale agreement for the land in 1974 except the transfer forms. He termed the objection proceedings in 2009 as an A/R objection whose processing he may not have known, whether all the parties were notified of or participated in the hearing and subsequent determination. Regarding whether the decision was appealed against, DW 1 told the court that under cap 283, the decision was final, necessitating his coming before the court. DW 1 confirmed that the transfer forms he relied upon were neither certified, stamped, nor signed by the Land Adjudication Officer.
18. DW 2 was Bernard Muthomi. He adopted his witness statement dated 9.7.2020 and further witness statement dated 18.8.2022 as his evidence in chief. He produced a sale agreement dated 13.2.2008 as D. Exh No. (12), a copy of the grant as D. Exh No. (13), letter of confirmation of grant as D. Exh No. (14), title deed dated 6.1.2017 as D. Exh No. (15) title deed dated 3.10.2019 as D. Exh No. (16) and a letter dated 2.10.2019 as D. Exh No. (17) and lastly, a confirmation of grant as D. Exh No. (18). In addition, he told the court that he bought his portion of land in 2008 from Pharis Mutwiri and Richard Gitonga but had no transfer form or confirmation letters owing that the sellers or Joseph Marangu were the actual owners of the portion in 2008. DW 2 confirmed that the plaintiff in the counterclaim had objected to the purported ownership of the land by Joseph Marangu, which he was unaware of since, by the time DW 2 acquired the land by way of transfer, no objection proceedings were pending. DW also 2 testified that he bought the land on 13.2.2008, while the objection award was made on 19.11.2009. he said that he was not involved in the objection proceedings and that he bought the land from the children of Japhet Marangu, who gave him a letter showing a confirmation of grant issued on 19.1.2004.
19. Erick Omondo Odemba, an Assistant Land Adjudication officer Tigania East, told the court that according to the adjudication record held in their offices, parcel No. 1507 belonged to Thomas Magiria, who acquired it through a transfer by way of objection No.3524. He told the court that the proprietor eventually transferred the whole account to Parcel No.6537. Regarding Parcel No. 1209, DW 3 indicated that it belonged to Licharu Kahiga but was later transferred to Parcel No. 1740 and eventually to Jacob Ntheu Lichuru by Objection No. 298.
20. Regarding Parcel No. 1157, DW 3 said it was in the name of Nchebere Aruaki, while Parcel No. 1787 was in the name of Bernard Muthomi Meme. Regarding Parcel No. 1662, DW 3 said it belonged to Nchebere Aruaki, while Parcel No. 1716 belonged to Boniface Muchui. Regarding parcel No. 1757, DW 3 said it belonged to Joseph Mutuma. He indicated that he could not trace Objection No's 1895, 1902, 1876, 1903, 1897, 1893, and 1892, nor the objection register for the same. He produced the record of the existing register as D. Exh No. (19).
21. In cross-examination, DW 3 told the court that objection proceedings related to the correcting names, subdivisions, transfer, and succession matters, and according to D. Exh No. 18, it indicated that Thomas Mugiria acquired five acres through a correction of names over the original number P/No. 1509. Even though the objection register was missing, DW 3 said his office was blameless, the land adjudication officer's decision was final under Cap 283, and the plaintiff had never filed a complaint against his office. The 1<sup>st</sup> defendant opted to walk out of court; his defense was closed.
22. The plaintiff, by written submissions dated 9.6.2023, took the view that in 2009, the 1<sup>st</sup> defendant filed objections No's 1895, 1902, 1110, 1876, 1903, 1897, 1893, and 1892 which were allowed by



- the 2<sup>nd</sup> defendant, and he was awarded two acres in Tigania/Antuamburi/19802, 9842, 9798, 9804, 9803, 9805, 9801 the whole of 1157, 9841, 9799 and the whole of 91767 as per P. Exh No. (9) which decision was final under the *Land Consolidation Act* as confirmed by DW 3. Reliance was placed on Joseph Kiruja Mainge vs. Rose Nambura & others (2021) eKLR citing with approval Julia Kaburia vs Kabeera & others Nyeri Civil Appeal No. 340 of 2002. The plaintiff submitted that D. Exh No. (9) was never quashed by way of judicial review. However, when the 1<sup>st</sup> defendant filed the objection, he was neither a son of the late Paul Itiame nor was he authorized to do so, according to the chief's letter on the beneficiaries to the estate of Paul Itiame. Therefore, the plaintiff submitted that Joseph Mutuma was a mere trustee for and on behalf of the plaintiff's family; otherwise, he passed himself as a son. Reliance was placed on Peter Ndungu Njenga vs Sophia Watiri Ndugu (2000) eKLR Kiebia vs M'Lintari (2018) eKLR, on the presumption of trust. The plaintiff submitted that his evidence was not challenged by way of testimony by the 1<sup>st</sup> defendant and hence remained unchallenged.
23. Further, the plaintiff submitted that the decision in land Case No. 274 of 1975 seemed to be contravened by the A/R objection in 2009, and therefore, land held by the 1<sup>st</sup> defendant and other defendants were subject to the trust, and as such, all their land titles should be canceled to revert to the names of the plaintiff in trust for the estate of the deceased.
  24. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants, by written submissions dated 12.7.2023, isolated two issues. On whether the reliefs sought in a main suit could be issued, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the same could not be issued since, under Cap 284, a Minister's appeal ought to have been filed within 60 days from the decision date. Therefore, in this suit, the plaintiffs in the main suit failed to adhere to Section 29 of the *Land Adjudication Act* in exhausting the internal dispute mechanism. As held in Geoffrey's Muthinja Kabiru & others v Samuel Munga Henry & 1756 others [2015] eKLR, Philemon Donny Opar v Orange Democracy Movement & 2 others [2013] eKLR Mohamed Ahmed Khaled (chairman) & others v Director of Land Adjudication and others [2013] eKLR, the defendants termed this suit is premature and that the plaintiffs could not escape that constitutional route.
  25. As to the aspect of fraud and collusion, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that no iota of evidence was produced to prove fraud on the part of the 2<sup>nd</sup> defendant as held in Vijay Morjaria v Nansingh Madhusing Darbar & another (2000) eKLR citing with approval Demutilla Nanyama Purmo v Salim Mohamed Salim [2021] eKLR & in Kinyanjui kamau v George Kamau [2015] eKLR.
  26. On the prayers in the further amended plaint seeking to declare the proceedings before the 2<sup>nd</sup> defendant a nullity and bad in law, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that an administrative action is challenged by way of Judicial Review under Order 53 of the Civil Procedure Rules or a petition under Article 22 of *the Constitution*, but not through a civil suit as held in Sherman Institution of Africa Ltd & another vs. Attorney General and another (2015) eKLR.
  27. Regarding the 4<sup>th</sup> defendant counterclaim, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the reliance on a limited grant ad litem held by the 4<sup>th</sup> defendant did not extend to defending or prosecuting this suit on behalf of the estate of Paul Itiame hence, he could not sue or be sued in this matter. On the timelines, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that a certified copy of the committee's decision in committee case No. 274 of 1975 was not produced to prove that the 4<sup>th</sup> defendant's father had acquired the land.
  28. It was submitted that under Section 27 (3) of cap 284, an adjudication register has to be prepared and finalized, and under Section 25, the same was displayed for inspection within 60 days, and whoever was aggrieved had 60 days to raise issues. To this end, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the 4<sup>th</sup> defendant had an opportunity to do so but slept on his rights for 47 years; therefore, since equity



- helped the vigilant, the suit before the court was brought too late and against the Cap 284 which was an abuse of the court process brought by an indolent litigant.
29. The 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants, by written submissions dated 27.6.2023, submitted that a counterclaim draws its life from the originating process, and if the originating process was a nullity ab initio, so would be the counterclaim as held in *Evangeline Nkatha Mugambi vs Festus Muriungi Kinoti* (2022) eKLR, and *Aberuagbe & another vs Oyekan & ORS* (2018) LPELR 43669 (C.A).
  30. It was submitted that the grant issued to the plaintiff was limited to judicial review, and by design, he deliberately waited for 12 years to lapse, abandoned the pursuit of judicial review, and instead filed the counterclaim before the court, which was later amended to remove the deceased plaintiffs in the main suit.
  31. Additionally, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted the counterclaim was both statute-barred and unmaintainable since the land Case No. 274/1975 was determined on 12.1.1984 as indicated in the exhibits produced as D. Exh No. 1 – 11.
  32. The 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that after Peter Biritu acquired Parcel No. 1197, he disposed of his land in the 1970s to them; therefore, section 3 (3) of the *Law of Contract Act* did not apply to the sale agreement. Regarding DW 2, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that he bought Parcel No. 1787 as per D. Exh No's. 12 – 18 and acquired a title deed.
  33. After identifying five issues for determination, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that the plaintiff's counterclaim was statute-barred as per Section 35 of the *Limitation of Actions Act* since no leave was sought to recover the land after the expiry of 12 years. On capacity to sue, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that the declaratory reliefs sought in the counterclaim relate to registered land, yet the limited grant used to file the suit did not permit such reliefs. Reliance was placed on the *Re-Estate of Henry Kithia Mutari (deceased)* [2021] eKLR and *Benjamin Mwanzia Wambua v Stephen Kimeu Kimanga* [2020] eKLR. Concerning the court's jurisdiction to grant the orders sought, the 1<sup>st</sup>–4<sup>th</sup> and 8<sup>th</sup> defendants submitted that the issues raised in the counterclaim were better handled through judicial review than in an ordinary suit. Reliance was placed on *Leonard Kamenchu Kairima v Elijah Maitai Ichicha & others* [2021] eKLR, *Petro Somoni Motoki vs Jeremiah Matoke Nyangwara & others* [2021] eKLR.
  34. Whether the 5<sup>th</sup> defendant obtained the land through misrepresentation, it was submitted that the 5<sup>th</sup> defendant did not oppose or dispute the claim. That being the case, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that the 6<sup>th</sup> defendant acted in the faith or honest and reasonable but mistaken belief that the 5<sup>th</sup> defendant was a son of the deceased and awarded him the whole of *Tigania/Antuamburi/1767, 1157* and all the subdivision sought in the counterclaim which unjustly deprived their 2 acres each and the whole of *Tigania/Antuamburi/1767* which this court should nullify on account of misrepresentation.
  35. On the reliefs sought against non-parties to the counterclaim, the 1<sup>st</sup> – 4<sup>th</sup> and 8<sup>th</sup> defendants submitted that *Gachuhi (Kamwangi) (deceased)*, *Lichoro Kaigai (deceased)*, *Kamau Githongo (deceased)*, *Stephen M'Amuru (deceased)*, *John Thikanyi (deceased)* and *Japhet Marangu (deceased)* were all not substituted hence the 4<sup>th</sup> defendant lacked locus standi to lay claim on their land. Reliance was placed on *Hawo Shanko v Muhamad Uta Shanko* [2018] eKLR, *Muna & 5 others v Boscardin & 5 others* [2022] KEELC 3133 (KLR) (3<sup>rd</sup> June 2022 (ruling)), *Japhet Nzila Muangi v Hamisi Juma Matee* [2022] eKLR and *Joyce Wanjiru Macharia vs Peter Methu Ngahu* [2020] eKLR.
  36. The court has carefully reviewed the pleadings, evidence tendered, and written submissions. The issues calling for determination are:



- i. If the striking out of the main suit on account of nullity left the counterclaim breathless.
  - ii. Who are the proper parties to the suit herein?
  - iii. If the defendants filed a proper defense to the counterclaim.
  - iv. If the plaintiff in the counterclaim can sue the defendants for the counterclaim.
  - v. If the claim by the plaintiff to the counterclaim is statute-barred.
  - vi. If the plaintiff has proved his counter claim to the required standards to be entitled to the relief sought.
  - vii. What is the order as to costs?
37. As indicated in this judgment by a ruling dated 8.2.2023, the plaintiffs' suit was declared null and struck out with costs, and the 4<sup>th</sup> defendant was at liberty to prosecute his counterclaim dated 6.9.2022. The 4<sup>th</sup> defendant had joined the suit following an order made on 12.7.2022.
  38. In the said counterclaim, the defendants were 15 in number, whereas in the main suit, they were four after the plaintiff to the counterclaim sought to join as a 4<sup>th</sup> defendant with Joseph Mutuma, the District Land Adjudication Officer, and the Hon. AG being 1<sup>st</sup> – 3<sup>rd</sup> defendants. In the body of the counterclaim, the 4<sup>th</sup> defendant had described himself as suing as the permanent representative of Paul Itiame alias Paul Itiame alias Paul M'Itiame (deceased). The counterclaim was accompanied by a list of documents dated 28.9.2022, among them a death certificate letters of administration issued to the plaintiff in Chief Magistrates Court Meru Misc Succession Cause No. 104 of 2018 under Section 54 of *Law of Succession Act* (Cap 160), to file a suit inter-alia for mandamus, trust and to pursue the land cases in Antuamburi Adjudication Section over Parcel No. 1209, 626, 1716, 1662, 1787, 2167, 1157, 1453, 1582 and 1767 situated in Akaiga Section.
  39. Following the ruling on 8.2.2023 and with leave of court, the 4<sup>th</sup> defendant amended the counterclaim on 28.2.2023 and removed the 2<sup>nd</sup> – 6<sup>th</sup>, 8<sup>th</sup>, and 11<sup>th</sup> defendants from the counterclaim. Therefore, only seven defendants remained in his counterclaim, namely Thomas Mungiria, Samuel Liburu, Kiragu Kamuru, Mwangi Marathi, Joseph Mutuma, District land Adjudication and Settlement Officer, and Bernard Muthomi as 1<sup>st</sup> – 7<sup>th</sup> defendants, respectively. These were the only parties who should have appeared in subsequent pleadings by the defendants and not any other since the initial suit had been struck out.
  40. The plaintiff in the original suit nevertheless filed a preliminary objection dated 3.4.2023 claiming that the counterclaim was time-barred under Sections 7 & 35 of the *Limitation of Actions Act*, bad in law, incompetent, defective, misplaced, misguided, misconceived, untenable, and presumptuous.
  41. Additionally, an amended reply to the 4<sup>th</sup> defendant's defense and counterclaim was filed on 17.5.2023 on the morning of the hearing dated 14.4.2023 by the firm of Maitai Rimita and Co. Advocates, claiming to represent the plaintiffs. The reply did not follow the title of the counterclaim, as required under Order 7 Rule (3) of the Civil Procedure Rules. It also misdescribed the parties and reiterated the contents of a non-existent plaint. In other words, the pleading was at variance with the amended counterclaim to the extent that the said law firm was not clear on exactly which parties it was representing in the amended counterclaim. Such pleading remained incurably defective, though admitted as per a consent signed by the parties and filed on 17.5.2023. Had parties taken time to look at the changes, they would not have continued with the lack of clarity over the exact parties to the counterclaim during the hearing and in their written submissions.



42. It is trite law that parties are bound by their pleadings, and through such pleadings, parties set the agenda for trial before the court. Therefore, parties must plead to what is before a court and address themselves as set out in the pleadings. A party cannot frame a different parties far from what the claimant has joined them as parties to the suit. In this suit, once the initial plaint was struck out, the counterclaim, which, as indicated above, was amended to reflect the parties who remained. Therefore, parties thereafter had to stick to that format and the title of the counterclaim. Leave was granted to amend the pleadings appropriately.
43. Going by order of things, the reply to the 4<sup>th</sup> defendant's defense and counterclaim dated 14.4.2023 and filed on 17.5.2023 did not indicate who among the parties to the amended counterclaim, the law firm of Maitai Rimita & Co. Advocates was representing since the plaintiffs in the initial plaint went with the struck-out suit.
44. It cannot be true that the original plaintiffs existed in the counterclaim. The pleading uses the word "plaintiffs" and misled the court and the other parties. The law firm could only have been representing the 1<sup>st</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, and 15<sup>th</sup> defendants to the counterclaim, but unfortunately, the pleading does not state so. Similarly, the learned state counsel could only have been representing the 13<sup>th</sup> defendant the district land and settlement officer to the counterclaim. Unfortunately, even though the contents of paragraphs 12, 13, 14, 15, and 16 and the reliefs sought regarding how the suit parcels of land were registered, the DLASO failed to plead the issues and offer any plausible defense on record.
45. In trite law, evidence and written submissions cannot amount to and replace pleadings. See Mwangi sStephen Murithi vs Daniel T. Arap Moi (2014) eKLR. The plaintiff to the counterclaim had raised severe allegations on how the late Paul Itiame was awarded the parcels of land in the initial committee award but was instead registered in the defendants' names to the counterclaim by the DLASO. The plaintiff to the counterclaim averred that the late Paul Itiame was the only proper and legal owner of the suit land, and any subsequent registration and issuance of title deeds to the defendants could only be subject to trust for the family.
46. Such pleading required an amended defense to the counterclaim by all the defendants. Instead of doing so, paragraphs 2, 3, 4, 5, 6, 7, and 8 of the pleadings dated 14.4.2023 speaks to a non-existent plaint. Paragraph 9 reiterates the contents of a plaint that the courts struck out. Paragraphs 10, 11, 12, 14, 15, 16, 17, 18 & 19 refer to the defendants as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to the counterclaim. The defendants had raised an issue that the plaintiff to the counterclaim could not sue for the claim did not survive the deceased; it was statute barred hopeless, a sham and a delaying tactic.
47. The claim by the plaintiff to the counterclaim was based on illegalities and or irregularities that occurred during the land adjudication process, where an award already made was re-opened in 2009 and undertaken without the presence of a deceased recorded owner and or his legal representatives. The 12<sup>th</sup> defendant, who undertook the alleged objection in 2009 and from which the rest of the defendants other than the DLASO derived their title deeds, did not file any pleadings to deny lack of capacity to handle the objection for and on behalf of a deceased party. The plaintiff to the counterclaim pleaded that the 12<sup>th</sup> defendant had no legal basis to represent the family of the late Paul Itiame.
48. In the absence of any pleading, my finding is that the 8<sup>th</sup> defendant had no defense to the counterclaim. Similarly, the 5<sup>th</sup> defendant failed to plead whether it had jurisdiction to re-hear the objection in 2009 and whether there was a valid party representing the estate of the late Paul Itiame at the time.
49. On whether the counterclaim was statute-barred, time limitation does not apply to claims based on trust as per Section 20 (2) of the *Limitation of Actions Act*. In Macharia Kihari v Ngigi Kihari Civil Appeal No. 170 of 1993, the court observed that under customary law, even after the right of action



- has accrued, is held in trust for limitation of time does not apply to it. Similarly, in *Stephens and others v Stephens & others v Stephen* and another Court of Appeal No. 18 of 1987, the court held that the period of limitation under cap 22 did not apply to actions by a beneficiary under a trust to recover land from the trustee who has converted trust property to be his.
50. As to whether the cause of action after the death of Paul Itiame subsisted to be taken up by the plaintiff in the counterclaim, in *Karl Wehner Claasen v Commissioner of Lands & 4 others* [2019] eKLR, the court observed that under Section 2 (1) of the [Law Reform Act](#), all causes of action subsisting against or vested in a deceased shall survive against or as the case may be for the benefit of his estate other than those of personal nature. Further, the court observed that under Section 82 of the [Law of Succession Act](#) cap 160, a personal representative has powers to enforce by suit or otherwise all causes of action which under any law survive the deceased or arise out of his death for the estate. The court held that a cause of action was a combination of facts entitling one to obtain a remedy and included a right of a person violated or threatened with violation, while a choice in action would include a right to bring proceedings in court for recovery of a sum of money or pecuniary damages for infliction of a wrong.
  51. In this suit, the set of facts as pleaded by the plaintiff is that the deceased had accrued interests over the land when he passed on 24.9.2000 He averred that he was bringing the suit to safeguard or enforce the interests of the deceased estate after obtaining letters of administration as a legal representative. It was averred that the 5<sup>th</sup> defendant, without letters of administration, obtained an award on 19.11.2009, which resulted in the recording of the suit lands in his name, and subsequently, title deeds(s) were issued to the defendants to the counterclaim, which should be subject to a trust for and on behalf of the estate of the deceased; otherwise, the estate was wrongly deprived of the suit parcels by the District Land Adjudication and Settlement officer.
  52. It is trite law that trust can be created under customary law, and the surrounding registration must be looked at to determine whether a trust was envisaged. See *Peter Gitonga vs Francis Maingi M'Ikiara Meru HCC No. 146 of 2000*. The plaintiff raised the issue of illegalities and irregularities in the manner an objection was raised in 2009 and undertaken by the 12<sup>th</sup> defendant, who could not represent the deceased estate.
  53. Under Section 26 (a) of the [Limitation of Actions Act](#) (Cap 22) an action based on fraud, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could, with reasonable diligence, have discovered it. Section 7 thereof provides to a suit for recovery of land must be lodged before expiry of 12 years. The award in favor of the 5<sup>th</sup> defendant was made on 19.12.2009; 12 years shall expire on 19.12.2023. Therefore, the counterclaim was filed within time. Therefore, it cannot be statute-barred.
  54. As to whether the plaintiff can institute the counterclaim, the P. Exh No. (2) is a valid grant issued to the plaintiff under Sections 54 and 55 and 14<sup>th</sup> Schedule of the [Law of Succession Act](#). The same is subject to the limitation imposed in Section 79 of the Act. Rule 73 of the Probate and Administration Rules gives the court inherent powers to make orders in the interest of justice and prevent abuse, or protect from waste, or preserve the estate of the deceased. Under Section 45 of the Act, no person shall for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person unless through a grant of representation under the Act. The letters of administration grants a party locus standi to represent a deceased's estate before a court of law. The grant before the court gave the plaintiff powers to institute a suit on account of trust for the estate's beneficiaries. In the *County Government of Nyeri and another vs Cecilia Wangechi Ndungu* [2015] eKLR, the court observed that interpretation of any document involves identifying the intentions, looking at the precise words used, the factual context, and the aim or purpose. A grant of letters of administration may be



- limited to a purpose, as held in *Morjaria vs Abdalla* [1984] KLR 490. In this counterclaim, the plaintiff has the requisite capacity to sue. None of the defendants produced any rival documents before the court showing the plaintiff's lack of capacity to represent the estate.
55. Additionally, the 5<sup>th</sup> defendant failed to deny the facts as he pleaded by the plaintiff that he could not represent the estate of the late Paul Itiame during the land adjudication process, who was dead by 2009 when the award was issued. See *Republic vs D.C Machakos Exparte Kakui Mutiso Nairobi HC Judicial Review Misc. Application 304 of 2013*. See *Republic v Land Adjudication Officer Tukurungu Adjudication Section Elgeyo Markwet exparte Biyaa Clan* [2021] eKLR. Whereas under the [Land Adjudication Act](#), the law talks of representatives under customary law, the 12<sup>th</sup> defendant did not plead or testify that he had the capacity under African customary law to represent the family of the late Paul Itiame in 2009. See *Nkoyai v DLASO Karama Adjudication Section KEECL* [2014] KLR (18<sup>th</sup> May 2022) (Judgment).
56. The next question is whether the counterclaim could stand after the main suit was struck out. A counterclaim is governed by Order 7, Rules 3 & 8 of the Civil Procedure Rules. It is a standalone suit. In *Manju Naul v George Macheho Mungai & others* [2017] eKLR, the court said a counterclaim contains assertions that the defendant could have made by starting a suit if the plaintiff had not already begun a suit, which is governed by the same rules as the same claims made by the plaintiff save that it would be part of the answer that the defendant produced in response to the plaintiff's claim which was an independent cause of action. In the ruling striking out the main suit, the basis was that some of the plaintiffs were deceased. It was not on account of jurisdiction for the defendants in the counterclaim to submit that the counterclaim was a nullity. See *Johnstone Barasa Makokha v Daniel Akwalu* [2014] eKLR and *Willy Kiprop Kimaiyo vs Musa Kipchirchir Arussi* [2016] eKLR.
57. Order 7 Rule 8 of the Civil Procedure Rules gives the defendant permission to raise a counterclaim against the plaintiff and any other person. This is what the plaintiff did, and he amended his defense and the counterclaim. Order 7 Rule 3 Civil Procedure Rules provides that a counterclaim shall have the same effect as a cross-suit, to enable the court to pronounce a final judgment in the same suit. It avoids a multiplicity of suits. The defendants in this suit, other than through written submissions did not plead issues of deceased parties or lack of capacity to be sued in the defense of the counterclaim. No evidence was tendered to that effect. See *Muema vs Kyangangu* (2019) eKLR. Submissions however forceful cannot amount to evidence. *Mwangi Stephen Murithi* (supra).
58. On whether the court has jurisdiction to grant the reliefs sought and, by extension, if the court has jurisdiction to entertain the claim under the [Land Adjudication Act](#), the defendants submitted that the plaintiff should have exhausted the internal dispute mechanism under Cap 283 through judicial review. As indicated above, parties are bound by their pleadings. The plaintiff had pleaded irregularities in the manner that a fresh objection was entertained by DLASO in 2009 and the subsequent hearing of the objection in the absence of a bonafide representative of the deceased (recorded owner). Similarly, the plaintiff had pleaded the doctrine of trust.
59. In *Tobias Achola Osindi and others v Cyprianus Otieno Ogalo and others* [2013] eKLR, the court observed that its role in the land adjudication process was supervisory in nature including the interpretation and determination of any point or issue of law that may have arisen in the course of the adjudication process, but could not usurp the functions and powers of the Land Adjudication Officers or bodies set up under the Act, to assist in the ascertainment of the said rights and interests in land. Matters regarding customary trust and whether there were illegalities or irregularities during the adjudication process are matters falling within the jurisdiction of this court.



60. Concerning whether the plaintiff to the counterclaim has proved his claim to the required standards, it is trite law that he who alleges must prove. The plaintiff to the counterclaim targeted his claim against the person who purported to represent him, his late father, during the hearing and determination of the objection and the state organs that proceeded to hear and determine the matter in the absence of his late father. Evidence was tendered on when the deceased passed on and lacked the capacity by Joseph Mutuma to represent the estate. The defendants did not challenge the averments and testimony in support of that claim.
61. The parameters to found a trust were set out by the court in Isaack Kiebia vs M'Lintari (supra) that the land in question was before registration family, clan or group land, the claimant belongs to such family, clan or group, the relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his claim ideal or adventurous and lastly, that the claim was directed against the registered proprietor who was a member of the family, clan or group.
62. In the pleading before the court the plaintiff to the counterclaim traces his nexus with the land to land case No 274 of 1975 filed by the Paul Itiame, in which objection number 833 was allowed and was not appealed against till 2009, when the 1<sup>st</sup> defendant to the counterclaim filed objection numbers 1895, 1902, 1110, 1876, 1903, 1897 & 1892 leading to issuance of title number Tigania/Antuamburi/9802, 9842, 9798, 9804, 9803, 9805, 9801, 1157, 9841, 9799 and 91767. The plaintiff to the counterclaim pleaded and testified that D. Exh No. (9) was never reviewed or appealed against and hence remained final, as testified by Eric Omondi Ondemba under Section 19 of the [Land Consolidation Act](#).
63. The 1<sup>st</sup> defendant to the counterclaim has not denied that D. Exh No. (9) described him as a son of Paul Itiame. He has not denied his trusteeship in that exhibit. He passed himself as the son of a deceased, who as held in Dominic Musei Ikombo vs Kyule Makau (2019) eKLR a family representative during land adjudication, need not possess letters of administration. The rest of the defendants to the counterclaim have not denied that the 1<sup>st</sup> defendant appeared as such and was registered as the owner of the parcels in a fiduciary capacity.
64. To my mind, the evidence tendered by the plaintiff to the counterclaim points out the circumstances in which the 1<sup>st</sup> defendant appeared in the objection and was subsequently registered as a land owner. The 1<sup>st</sup> defendant has not challenged that capacity by tendering evidence to support any rival position. Similarly, the rest of the defendants to the counterclaim have offered no evidence to challenge the intention to found a trust.
65. The upshot is that I find the plaintiff in to the counterclaim has established and proved his claim to the required standards. The court proceeds to declare LR no's Tigania Antuamburi/9802, 9842, 9798, 9804, 9803, 9805, 9801, 1157, 9841, 9799, and 91767 as held in the name of Joseph Mutuma, in trust for the estate of the late Paul Itiame. The titles are hereby cancelled and the District Land Registrar directed to enter the name of the late Paul Itiame as the bonafide owner.
66. Costs to the plaintiff in the counterclaim to be met by the defendants to the counterclaim.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 8TH DAY OF NOVEMBER 2023**

**In presence of**

**C.A Kananu/Mukami**

**Karanja for the plaintiff**

**Mwendwa for the 1<sup>st</sup>, 4th & 8th defendants in the counterclaim**



**Miss Maina for Mbaikyatta for 2nd & 3rd defendants in the counterclaim**

**HON. CK NZILI**

**ELC JUDGE**

