



Masinde v Wafula & 2 others (Sued as an Administrator of the Estate of Zebedayo Masinde Wakweika) (Environment & Land Case 144 of 2017) [2025] KEELC 4630 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 144 OF 2017**

**CK NZILI, J
JUNE 17, 2025**

BETWEEN

JULIUS MASINDE PLAINTIFF

AND

FRANCIS WAFULA 1ST DEFENDANT

JOHN SHIKUKU MASINDE 2ND DEFENDANT

AMOS WAKWEIKA MASINDE 3RD DEFENDANT

SUED AS AN ADMINISTRATOR OF THE ESTATE OF ZEBEDAYO MASINDE WAKWEIKA

JUDGMENT

1. The plaintiff through an amended plaint dated 11/10/2023 seeks:
 - (a) Declaration that he is the owner of 5 acres of land Title No. Trans Nzoia/Maridadi/2X9 (herein after the suit land).
 - (b) Declaration that the estate of the late Zebedayo Wakweika is entitled to only 5 acres of land Title No. Trans Nzoia/Maridadi/2X9.
 - (c) Permanent injunction restraining the defendants, their agents, servants, or anyone from interfering with his ownership, quiet use, possession, and or interest in a portion measuring 5 acres that he has been using, being half of land Title No. Trans Nzoia/Maridadi/2X9.
2. The plaintiff pleads that he purchased the suit land in 1977 through Njoloole Farmers Company, cleared the payments, and was issued with receipts. Further, the plaintiff avers that since his late father Zebedayo Masinde Wakweika was also a member of Njoloole Farmers Company Ltd, he also paid for



his 5 acres of the same land, and given that both came from the same place, they were given a portion measuring 10 acres which later became Trans Nzoia/Maridadi/2X9, as joint owner in equal shares, though the letter of allotment came under the name of his late father as holding in trust his half share of the said land.

3. The plaintiff avers that the two portions were delineated on the ground with a clear boundary subdividing the land into two equal portions, each measuring 5 acres and during the lifetime of his late father none of the defendants raised any complaint. The plaintiff avers that upon the death of his late father, in 2002, the 1st defendant with impunity, trespassed into his portion, removed the common boundary that had been in existence as alluded above, built a semi-permanent structure therein, and refused to vacate stating that the portion belonged to the estate of their deceased father.
4. The plaintiff avers that the 2nd and 3rd defendants as co-administrators with the 1st defendant of the late father's estate have never bothered to stop the 1st defendant from interfering with his interest on the said portion, yet they knew of his entitled of half of the 10 acres of land, whereas the estate is only entitled to the other half, now trespassed into by the 1st defendant.
5. By way of a joint statement of defense dated 27/11/2023, the defendants denied the claim by the plaintiff, averring that the entire land was acquired by their late father in 1984 measuring 3.6 Ha through a Settlement Fund Trustees (SFT) loan, and caused it to be registered in his name and after taking vacant possession of the same, he began exclusively cultivating it until his demise in 2003, hence at no time did he jointly own the land with the plaintiff as alleged or at all. The defendants aver that the suit land was only distributed by the late Zebedayo's clan on 26/1/2008 to his heirs, whereupon the plaintiff was allocated 2 acres, which he took over possession of in 2005, for purposes of farming only.
6. Equally, the defendants aver that the suit land is also a subject matter in Bungoma Succession Cause No 431 of 2016, where the defendants have petitioned for a grant of letters of administration concerning the estate of the late Zebedayo Masinde Wakweika.
7. Through a reply to the defense dated 7/12/2023, the plaintiff reiterated the contents of the amended plaint terming the amended plaint as suitable for dismissal.
8. At the trial, Julius Masinde testified as PW1. He relied on his witness statement dated 18/8/2017 as his evidence in chief. PW1 told the court that he owns a portion measuring 5 acres of land which he bought in 1977 through Njoloole Farmers' Co-operative Ltd, paid for the same as per the receipts before court, and took possession. Similarly, he said that his late father also bought 5 acres and since both came from the same place, the allotment letter for 10 acres was issued in the name of his father holding in trust his 5 acres, later given title No. Trans Nzoia/Maridadi/2X9, for each one had paid for 5 acres separately. PW1 told the court that between 1984 and 2007, there existed a boundary separating the two portions and it was only after he passed on in 2007, that the 1st defendant made entry into the suit land, removed the boundary, built a semi-permanent structure, and started cultivating alleging that the entire suit land belonged to the deceased's estate. He termed the interference as acts of trespass and interference with his quiet possession of the land.
9. PW1 told the court that the 1st defendant has his land No. Trans Nzoia/Maridadi/207, hence his acts are uncalled for. PW1 relied on bundle of receipts for payment from Njoloole Farmers' Co-operative Ltd dated 8/1/1977, 8/7/1978, 22/7/1978 and 6/12/1978 as P. Exhibit No. 1(a)-(e), letter from the Co-operative as PMFI-(2), letter dated 30/1/1984 (PMFI-(3), allotment letter dated 1/2/1984 as PMFI-(4), official search certificate for LR No. Trans Nzoia/Maridadi/2X9 dated 18/3/2011 as P. Exhibit No. (6), demand letter dated 24/2/2011 as P. Exhibit No. (6), original ID Card P. Exhibit No (8).



10. In cross-examination, PW1 told the court that the allotment letter showed 5 acres as what belonged to him, which is not part of the estate of the deceased father. PW1 said that the letter of allotment was not erroneously written, for while they were buying the land, they knew that it was 10 acres in size on the ground, which size is captured in P. Exhibit No. (6) and in the surveyor's report.
11. According to PW1, his late father was issued with another allotment letter with the correct acreage of 10 acres. PW1 said that he jointly paid money to the SFT, with his late father to acquire the land as per the receipts issued by Co-operative Ltd though P. Exhibit No. 1(a)-(e) does not indicate parcel number. PW1 told the court that even though an allotment letter was issued to his late father in 1984, he started occupying the land in 1996. Again, PW1 said that he filed the suit 12 years after the 1st defendant took possession of the land in 2007.
12. As to the demolition of the boundary, PW1 said that he had no evidence of that effect by way of photographs. PW1 confirmed however that he resides in the Suitland alongside all his family members.
13. PW1 said that there was a family meeting to distribute his late father's properties and they were able to distribute the one in Bungoma leaving the suit land. PW1 insisted that they were not using the suit land as a family during the lifetime of his late father and it was only he and his father who were on the land. PW1 said that since 2017, he has been using only 2 acres of the suit land. PW1 said that he has no allotment letter for the 5 acres that he bought through Njoloole Farmers Company Ltd to show his share. PW1 said that they were unable to agree on how to share the suit land since he told the family of his entitlement to half of the entire land given the payments he made to Njoloole Farmers Company Ltd to acquire it.
14. Asked a question by the court, PW1 said that he has been living in Bungoma with his family, on one of the 3 parcels of land belonging to his late father. PW1 says that once his 5 acres are confirmed, he shall still be entitled to a share of the estate of his late father in the other half of the land, as a beneficiary. PW1 confirmed that he filed an objection in the succession cause alongside his brothers. PW1 said that he only came to know about the allotment letter of 5 acres in 2017. According to him, his father died in 2003 and not in 2007.
15. Following the transfer of the presiding judge and directions given on 17/2/2025, the matter proceeded from where it had stopped, in line with Order 18 of the Civil Procedure Rule.
16. Francis Wafula testified as DW1. He relied on a witness statement dated 30/8/20217 as his evidence in chief. He told the court that he was the second born of the late Zebedayo Masinde Wakweika, who acquired the suit land in 1984 through Settlement Fund Trustees loan, was registered as owner, and farmed on the suit land until he passed on in 2003, leaving the land under his care. DW1 told the court that the clan met on 26/1/2008 and shared the estate among all the beneficiaries, including the suit land, in which the plaintiff was given 2 acres of land, which he objected to. DW1 denied the alleged co-ownership of the suit land with his late father, which was only raised at the clan meeting. Further, DW1 said that the area assistant chief had also handled the dispute and confirmed that the sole owner was the late father. DW1 said that the family has petitioned for letters of administration at Bungoma Law Courts which is still pending determination.
17. Similarly, DW1 relied on an SFT statement dated 27/6/2006 as D. Exhibit No. (1), demand notice dated 12/11/2006 as D. Exhibit No. (2), Minutes dated 26/1/2008 as D. Exhibit No. (3), letter dated 6/2/2013 as D. Exhibit No. (4), sketch map dated 26/1/2008 as D. Exhibit No. (5), a copy of the death certificate dated 6/4/2003 as D. Exhibit No. (6), copy of an application for the Letters of Administration as D. Exhibit No. (7), Grant dated 3/5/2019 as D. Exhibit No. (8), Certificate of Official Search dated 30/6/2022 as D. Exhibit No. (9), letter dated 20/7/1987 as D. Exhibit No. (10),



- official receipts for Kshs. 625/= dated 6/2/1984, 12/11/2002 and 9/1/2004 as DMFI-11(a), (b) and (c). Land note dated 6/2/2013 as D. Exhibit No. (12), Minutes for meeting held on 26/1/2008 as D. Exhibit No. (13), letter dated 6/2/2023 as D. Exhibit No. (14), letters dated 29/3/2016 and 15/3/2016 as D. Exhibit No. (15) and (16), Land sale agreement dated 5/3/2014 as D. Exhibit No. (17) and an acknowledgment letter dated 20/6/2014 as D. Exhibit No. (18).
18. In cross-examination, DW1 told the court that he had no allotment letter for plot No. 2X9 in the name of the deceased. Equally, he said that all the receipts produced before the court had no indication of the parcel numbers as well as the sizes. However, DW1 confirmed that the official search certificate indicates the land as 10 acres, as well as D. Exhibit No. (6). He denied that the plaintiff has been tilling the entire land since 2005. DW1 denied that the Maridadi Settlement Scheme had a restriction of only one share equivalent to 5 acres of land. DW1 confirmed that since 2005, the plaintiff has only been occupying 2 acres of land.
 19. John Nyongesa Masinde testified as DW2. He relied on a witness statement dated 30/11/2022 as his evidence in chief. He echoed the testimony of DW1.
 20. The plaintiff relies on written submissions dated 17/3/2025. It is submitted that although the letter of allotment was issued in the name of the late father, the land was held in trust since the plaintiff contributed to its acquisition as per the exhibits tendered in support of his claim. As to the defense, the plaintiff submitted that there was no evidence tendered to sustain the defense of exclusive purchase and sole ownership of the suit land by the late Zebedayo Masinde. The plaintiff faulted the documents produced by the defense for lack of specification of the plot size as 10 acres, apart from the allotment letter dated 1/2/1984 and D. Exhibit No. (16) showing that the deceased only purchased 5 acres. The plaintiff submitted that the failure to produce receipts marked for identification means that they remain inadmissible and irrelevant to the case.
 21. Equally, the plaintiff submitted that the failure to call an officer from the SFT to challenge the plaintiff's claim weakened the defense and left the plaintiff's claim and evidence uncontroverted. The plaintiff submitted that there was long-standing recognition of the plaintiff's ownership of the suit land to the extent of 5 acres as evidenced by the boundary dividing the two parcels of land which the defendants did not object to until 2003 as an attempt to unjustly enrich themselves. Reliance on the doctrine of trust was placed on *Isaac M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari & Another* [2018] eKLR, *Mbui Mukangu -vs- Gerald Mutwiri Mbui* [2004] eKLR, *Twalib Hatayan Twalib Hatayan & Another -vs- Said Saggar Ahed Al-Heidy & Others* [2015] eKLR, *Juletabi African Adventure Ltd & Another -vs- Christopher Michael Lockley* [2017] eKLR and *Kazungu Fondo Shutu & Another -vs- Jaspheet Noti Charo & Another* [2021] eKLR.
 22. On failure to challenge the plaintiff's exhibits, the plaintiff relied on *Esther Ndengi Njieu & Another -vs- Leonard Gatei Mbugua* [2020] eKLR. Regarding trespass, the plaintiff relied on *Sisto Wambugu -vs- Kamau Njuguna* [1983] eKLR.
 23. The defendants rely on written submissions dated 13/3/2025. It is submitted that the plaintiff failed to discharge the burden of proof of his case as required under Sections 107 and 109 of the [Evidence Act](#). Reliance was placed on *Mbuthia Macharia vs Anna Mutua Ndwiga & Another* [2017] eKLR, *Halsbury's Laws of England 4th Edition Vol. 17, paragraphs 13 and 14*. The defendants submitted that the plaintiff failed to produce original documents and relied on PMFI-(3) and (4) which were mere copies, whose authenticity and veracity were in question, and failed to call their maker to produce them. As to P. Exhibit No. 1(a), (b), (c), (d), and (e), the defendants submitted that Njoloole Farmers Co. Ltd and Settlement Fund Trustee (SFT) were two separate and distinct entities, which should have been summoned to verify whether the plaintiff paid any monies for the land.



24. As to possession and occupation of the land, the defendants submitted that the plaintiff produced no evidence to sustain the same, and was curious why he would seek eviction if he had been on the land throughout. The defendants submitted that PMFI-(2) was not produced by the maker and in any event, the maker had no powers to summon anybody to the County Land Adjudication and Settlement offices. The defendants submitted that these documents were expunged from the court record and that D. Exhibit No. (1), (2), (10), and (12) were clear indicators that the entire Suitland belonged to the deceased.
25. The defendants submitted that the failure to call more than two witnesses especially the rest of the defendants did not weaken their defense, otherwise they would have simply repeated the evidence of DW1 and DW2.
26. The issues calling for my determination are:
- (1) If the court has jurisdiction over the matter.
 - (2) If the plaintiff contributed towards the acquisition of 5 acres out of the acres forming part of land Title No. Trans Nzoia/Maridadi/2X9.
 - (3) If the registration of Title No. Trans Nzoia/Maridadi/2X9 in the name of the late Zebedayo Masinde Wakweika was subject to any trust in favor of the plaintiff.
 - (4) If the plaintiff's claim is properly before this court given the pending succession cause.
 - (5) If the 1st defendant has trespassed into the plaintiff's land.
 - (6) Whether the plaintiff is entitled to the reliefs sought.
 - (7) What is the order of costs?
27. A cause of action is defined as an act on the part of the defendant that gives the plaintiff a reason to lodge a complaint or claim. What the plaintiff has pleaded is that he is entitled to 5 acres out of Title No. Trans Nzoia/Maridadi/2X9, by having monetarily contributed to its acquisition alongside his late father. The plaintiff avers that until his late father passed on in 2003, the two portions forming part of the suit land were distinct and separated by a boundary which the 1st defendant destroyed after the father passed on, moved in, and erected semi-permanent structures and has since occupied it claiming the land to be part of the estate of the deceased which according to the defendants was shared out among the beneficiaries in 2008 by the clan with the plaintiff acquiring a share of 2 acres. The defendants plead that the subject matter is before the succession court at Bungoma Law Courts.
28. There is no dispute that the suit land is still registered in the name of the Settlement Fund Trustees, going by paragraph 5 of the amended plaint and 4A, of the amended joint statement of defense. D. Exhibit No. (9) is the official search certificate dated 30/6/2022 showing the proprietor of the land as the Settlement Fund Trustees. D. Exhibit No. (10) is a letter in which the 1st defendant has complained over the alleged intention to sell the land by the deceased. D. Exhibit No. 11(a)-(c) are receipts issued to the deceased by the Settlement Fund Trustees, while D. Exhibit No. (12) are demand letters for the loan arrears for failure to clear the loan, they were being threatened with repossession under the Agriculture Act (repealed).
29. D. Exhibit No. (13), according to the defendants are the minutes of which the land was shared by the clan. The plaintiff on his part relied on an official search certificate dated 18/3/2011 showing that the land came under the name of Settlement Fund Trustees on 11/11/1994. PMF1(2) was merely marked for identification. A letter of allotment dated 30/1/1984 from District Land Adjudication



and Settlement Officer was also marked as PMFI-(3). Equally, a letter dated 1/2/1984 was marked as PMFI-(4). From the plaintiff's evidence, there was no document produced to show that the land was ever allocated to him.

30. It is trite law that until an allottee clears the loan with the Settlement Fund Trustees, no proprietary rights in his favor exist capable of being passed to a third party. The interest of the Settlement Fund Trustees is that of a charge over the parcel of land that it owns. See *Edward Nyongesa Lusenaka & Another vs Nathan Wekesa Omocha* [1994] eKLR. It lends money for development to a person to whom it has allocated land and repayment of such money is secured by a charge upon the property. See *Boniface Oredo -vs- Wabomba Mukile*, CA Civ Appeal No 170 of 1989.
31. The official search certificate for the subject matter shows that as of 2022 the owner of the land was the Settlement Fund Trustees, who are not parties to this suit. Until loan payments are completed the allottee cannot be termed as a bona fide proprietor. See *Kenya Ihenya Co. Ltd & Another -vs- Njeri Kiriba* [2019] eKLR.
32. None of the parties to this suit have produced documents to the satisfaction of the court whether full payments were made by either of the claimants to the allocating authority and a discharge of charge and transfer signed and registered to pass the land to the deceased. A copy of the register and certificate of official search is the prima facie evidence of the status of the title to land.
33. From the copy of the search availed before the court, it is clear that up to the filing of this suit, the suit premises were registered in the name of the Settlement Fund Trustees and not the deceased. It cannot therefore be termed as free property of the deceased at the time he passed on, simply because he is alleged to have had beneficial interest to it. The defendants are equally aware of the position. Until the land under the Settlement Fund Trustees is regularized by repayment of the loan, issuance of discharge of charge, and a transfer duly signed and registered in the name of the chargee, one cannot legally in law claim to be the registered owner of the land and hence to purport to allege that it forms part of the deceased's estate.
34. In *Shikuku Mason Sitera & Another -vs- Ben Kumbuti Wagilwa* [2017] eKLR, a grant that had been confirmed was revoked on the ground of concealment of material facts from the court by including the parcel of land which was in the hands of third parties. In *Philemon L. Wambia -vs- Gaitano Lusitsa Mukofu & Others* [2019] eKLR, the court was dealing with Plot No. 395 Maridadi Settlement Scheme. The court cited *Benja Properties Ltd -vs- Syedna Mohamed Burhannudin Sahed and others* (2015) eKLR, that an allotment of an interest in land is a transaction attaching to and running with a specific parcel of land and in *Solomon Omwega Omache & Another -vs- Zakary O, Ayieko & Others* [2016] eKLR, that a court has to uphold the sanctity of the records at the lands office as to their integrity and accuracy. Further, the court cited *Stephen Mburu & Others -vs- Comet Merchants Ltd & Another* [2012] eKLR, that a letter of allotment is not a title to the property but often is a transient right of an offer to take the property.
35. In this suit, neither the plaintiff nor the deceased nor the defendants' are the registered owners of the suit land to be entitled to any protection of the law. The plaintiff has produced receipts from an entity that is not the registered owner of the suitland. The nexus between the said entity with the Settlement Fund Trustees, who are the registered owners of the land as of the filing of the suit is not clear. On the other hand, the deceased even if he had a letter of allotment for the land, judicial notice is taken from the defendants' further list of documents dated 30/1/2025, the County Land Adjudication and Settlement Officer Trans Nzoia, by a letter dated 2/7/2024 had confirmed that the allottee owed Land Settlement Fund (LSF) Kshs. 75,109/=, as per the bank statement dated 13/3/2021. It means therefore that the deceased did not perfect the charge dated 26/3/1984 attached to the further list of documents.



36. It cannot therefore be legally true for the defendants to allege that the suit land forms part of the estate of the deceased and hence, was subject to the pending succession cause at Bungoma Law Courts. Similarly, without perfecting the charge, the court finds no basis to declare, hold, and find that the deceased was a lawful allottee of the suit land either measuring 5 acres or 10 acres.
37. The jurisdiction to determine issues on land use, occupation, and title to land falls under this court. The jurisdiction of the family court is to establish the assets and liabilities of the estate and the beneficiaries and to share them among the beneficiaries. See *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] KEHC 8289 (KLR).
38. In this suit, the issue of ownership, possession, occupation, and whether the suit property is held in trust is pleaded by the parties. My finding therefore is, the court has the requisite jurisdiction to hear and determine the matter.
39. Trust is defined in *Black Laws Dictionary* 11th Edition, as a right enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title, a property interest held by one person (trustee), at the request of another (settlor), for the benefit of a third party (beneficiary).
40. In *Kazungu Fondo Shutu* (supra), the court observed that the law never implies and the court never presumes a trust unless on necessity, to give effect to the intention of the parties, which intention must be determined before a trust is implied. In *Juletabi African Adventure Ltd* (supra), the court cited *Twalib Hatayan Twalib Hatayan* (supra), that trust may imply, constructive trust or a resulting trust.
41. In *Tomno & Another -vs- Cheronno & Others ELC No. 144 and 152 of 2019 (Consolidated)* [2023] KEELC 761 [KLR] 23rd November 2023 (Judgment), the court observed that the 1st – 3rd defendants had not produced original receipts payments to the Settlement Fund Trustees, under their names unlike the plaintiff, save for a bank statement from Settlement Fund Trustees and a letter from the Director of Land Adjudication and Settlement, showing loan repayments owing on the plot. The court found that the plaintiff was holding the land in trust which the defendants had been occupying since 1964, and where the plaintiff was a mere employee.
42. In this suit, though the defendants have produced receipts and some letters, they failed to produce any charge,-discharge of charge, letter forwarding the discharge and transfer, receipt for full payment, certificate of official search showing the deceased owned the land, and a copy of a title deed or land records showing that the allocation of the land had been perfected. Even after the deceased passed on in 2003, there is no evidence that either the plaintiff or the defendants followed up the matter with the Settlement Fund Trustees to regularize the deceased account. Customary or constructive trust pleaded to by the plaintiff has to be supported by sufficient evidence as held in *Justus Maina Muruku -vs- Jane Waithira Mwangi* [2018] eKLR.
43. In *Kiebia* (supra), the court observed that customary court falls under Section 28 of the *Land Act*, the ingredients being:
- (1) That the land before registration was family, clan, or group land.
 - (2) The claimant belongs to the family, group, or clan.
 - (3) The claim is directed against a member of a family, clan, or group.
 - (4) The land could have been registered in the name of the claimant but for supervening circumstances.



44. In this suit, the suit land is not registered in the name of the deceased or the defendants but the Settlement Fund Trustees. In *Kennedy Nyamumbo Sese -vs- Settlement Fund Trustees & 2others* [2019] KECA 135 (KLR), the court observed that the claimant had failed to prove that he was the registered proprietor or lawful owner of the land as against the Settlement Fund Trustees to have a basis to sue, hence had no cause of action to enable him claim for declaratory orders and an injunction.
45. Applying the foregoing case law to this suit, the plaintiff has failed to sustain a claim on whether the suit property is held in trust by the 2nd and 3rd defendants and whether the 1st defendant has trespassed into it. Trespass refers to unjustified entry into private land belonging to another. The plaintiff has no ownership document to the half share of the title held by the Settlement Fund Trustees. He lacks payment documents directed to the holder of the title deed since 1994. The land is not in the name of the deceased to which the 2nd and 3rd defendants hold letters of administration. The land does not belong to the estate for the same to vest or devolve upon the 2nd and 3rd defendants to be liable for any suits on behalf of the estate. Documents marked for identification are neither produced before the court nor can they have relevancy in court. See *Ken Nyaga Mwige -vs- Austin Kiguta & others* (2015) eKLR.
46. The cause of action as pleaded by the plaintiff against the defendants therefore lacks basis both in fact and in law. Equally, the reliefs sought cannot be issued against non-registered owners of the suit land. Until the charge or letter of offer is perfected if it is still valid, none of the parties on the suit land or claiming it have a legal basis to enforce any right or interest on the land. The upshot is that I find the plaintiff's suit incompetent, discloses no cause of action against the defendants, and lacks merits. It is dismissed with no order as to costs, this being a suit between siblings.
47. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF JUNE 2025.

In the presence of:

Court Assistant - Dennis

Mr. Teti for the plaintiff present

Miss Mwemeke for the defendants

HON. C.K. NZILI

JUDGE, ELC KITALE.

