

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**  
**ELCC No. 375 OF 2017**

**JOHN AMUKHUBU NAKHUNGU ..... 1<sup>ST</sup>**  
**PLAINTIFF**  
**PATRICK PECHI NAKHUNGU ..... 2<sup>ND</sup>**  
**PLAINTIFF**  
**CHRISTINE APONDO ONDIECHE ..... 3<sup>RD</sup>**  
**PLAINTIFF**  
**CLEOPHAS OKONGA NAKHUNGU ..... 4<sup>TH</sup>**  
**PLAINTIFF**  
**BONFACE WETABA NAKHUNGU ..... 5<sup>TH</sup>**  
**PLAINTIFF**

**VERSUS**

**PROTUS OLUOCH MALALA ..... 1<sup>ST</sup>**  
**DEFENDANT**  
**JUSTINO OREMBO NAMUNWA ..... 2<sup>ND</sup>**  
**DEFENDANT**  
**EMMANUEL OMOTO NAMUNWA ..... 3<sup>RD</sup>**  
**DEFENDANT**  
**ERNEST SINGA NAMUNWA ..... 4<sup>TH</sup>**  
**DEFENDANT**  
**YUSUF ATENYA WANGA (Sued as administrator of the**  
**estate of RAMADHAN WANGA - DECEASED) ..... 5<sup>TH</sup>**  
**DEFENDANT**  
**DISTRICT LAND REGISTRAR - KAKAMEGA ..... 6<sup>TH</sup>**  
**DEFENDANT**  
**DISTRICT SURVEYOR - KAKAMEGA ..... 7<sup>TH</sup>**  
**DEFENDANT**  
**THE HONOURABLE ATTORNEY GENERAL ..... 8<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

1. Proceedings commenced in this matter on 17<sup>th</sup> December 2009 in the High Court at Kakamega when the Plaintiffs filed plaint dated the same date. The initial plaint was later replaced with amended plaint amended on 10<sup>th</sup> December 2012. Subsequently, the suit was transferred to this court.
2. The Plaintiffs averred in the amended plaint that they were joint registered proprietors of land parcel number South Wanga/Lureko/185 which measured 38.8 acres, that the First Defendant was the administrator of the estate of Christopher Namunwa Ondiechi (deceased) who until his death was the registered proprietor of land parcel number South Wanga/Lureko/184 while the Fifth Defendant was the administrator of the estate of Ramadhan Wanga (deceased) who was the registered proprietor of land parcel number South Wanga/Lureko/186 which until 22<sup>nd</sup> September 2008 measured 4 acres.
3. The Plaintiffs averred further that the First to the Fifth Defendants trespassed on land parcel number South Wanga/Lureko/185 as a result of which they filed Mumias Land Disputes Tribunal Claim No. 15 of 2007 whose verdict was adopted through Chief Magistrate's Court Misc. Award No. 96 of 2008. That before implementation of the award, the First to Fifth Defendants through fraud and collusion with the Sixth and Seventh Defendants altered the size of parcel number South Wanga/Lureko/186 to read 4.0 hectares instead of 4.0 acres. That on 15<sup>th</sup> April 2009, the Sixth and Seventh Defendants hived a huge portion of the Plaintiffs' land and

annexed it to parcels number South Wanga/Lureko/184 and 186.

4. Consequently, the Plaintiffs sought judgment against the Defendants jointly and severally for:

*(a) Cancellation of entry number 3 in the register in respect of Land Parcel No. S. WANGA/LUREKO/186 to reflect 4.0 acres and not 4.0Ha and Land Parcel No. SOUTH WANGA/LUREKO/185 be restored to 38.8 acres and the alteration made on the area map sheet 11 edition 5 be cancelled and the same be restored to reflect the position as per edition 4 and the survey carried out on 15<sup>th</sup> April, 2009 on Land Parcel No. S. WANGA/LUREKO/184, 185 and 186 be cancelled.*

*(b) An order of injunction restraining the 1<sup>st</sup> to the 5<sup>th</sup> defendants either by themselves, agents, servants, employees or anybody claiming through them from trespassing, laying claim, tiling, cultivating or in any way interfering with the plaintiffs' 38.8 acres of Land Parcel No. S. WANGA/LUREKO/185.*

*(c) An eviction order from Land Parcel No. S. WANGA/LUREKO/185.*

*(d) Costs of this suit.*

*(e) Any other relief this Honourable Court deems fit to grant.*

5. The First to Fourth Defendants filed statement of defence dated 16<sup>th</sup> February 2010. They denied the Plaintiffs' averments and prayed that the Plaintiffs' suit be dismissed with costs.
6. The Fifth Defendant filed statement of defence dated 18<sup>th</sup> January 2010. He denied the Plaintiffs' averments and stated that parcel number South Wanga/Lureko/186 was erroneously reflected as measuring 4.0 acres and that the correction to read 4.0 hectares was lawful and procedural. He prayed that the suit be dismissed with costs.
7. The First Plaintiff testified as PW1 and stated that the Plaintiffs were siblings and ere entitled to land parcel number South Wanga/Lureko/185 which was family land. He added that the parcel measured 38.8 acres and that the First to the Fifth Defendants interfered with the parcel. That they had Mumias Land Disputes Tribunal Claim No. 15 of 2007 which was decided in the year 2008 with an order that the Land Registrar and District Surveyor visit the site and establish boundaries. He added that Ramadhan Wanga (deceased) was the registered proprietor of land parcel number South Wanga/Lureko/186 which measured 4 acres as per title deed dated 30<sup>th</sup> August 1988 and certificate of official search dated 22<sup>nd</sup> September 2008.
8. PW1 further testified that the map was changed in the land registry without going to the ground with the result that parcel number South Wanga/Lureko/186 became 4.0 hectares after

part of South Wanga/Lureko/185 was added to it. That in the 4<sup>th</sup> edition of the map parcel number South Wanga/Lureko/185 extended from the road to River Nzoia while parcel number South Wanga/Lureko/186 did not reach the river. That in the 5<sup>th</sup> edition of the map parcel number South Wanga/Lureko/185 no longer reached the river and that the changes were done in the year 2008 after the decision of the tribunal.

9. Under cross examination and re-examination, PW1 stated that he was born in 1979 and that parcel number South Wanga/Lureko/185 was registered in 1967 and its boundaries established before his birth. That parcel number South Wanga/Lureko/186 was also registered in 1967 and its size indicated in the register as 4 hectares. He added that the parties to the suit were cousins and that the Plaintiffs inherited parcel number South Wanga/Lureko/185 from their father Benedicto through succession and that he sold the parcel and no longer lived there as of the date of his testimony. He also stated that what is left of parcel number South Wanga/Lureko/185 on the ground is 20 acres and that 18 acres have gone missing.

10. Musa Ndaliro Muchelule (PW2) testified that he knew the Plaintiffs and the First to Fifth Defendants and that parcel number South Wanga/Lureko/185 belonged to Benedicto Nakhungu Ondieche who leased 1 acre of it to him prior to his death. That he had possession from 1990 to 1993 when the Defendants took the portion which had been leased to him on

the lower part near River Nzoia and that he was given an alternative portion on the upper part.

11. David Masila Kimauro, the Deputy Land Registrar Kakamega County, testified as PW3. He produced certified copies of registers in respect of parcels number South Wanga/Lureko/185 whose size he stated is 38.8 acres, South Wanga/Lureko/186 whose size he stated was initially 4 acres but was later corrected to read 4.0 hectares and South Wanga/Lureko/184 whose size he stated is 30.0 acres. He added that according to records held at the registry, parcels number South Wanga/Lureko/185 and South Wanga/Lureko/184 were never resurveyed.

12. PW3 went on to testify that sometimes parcel sizes can be wrongly typed as acres instead of hectares and that whenever they go to the ground and find that the size of a parcel, for instance, measures 4 hectares as opposed to the 4 acres stated in the title, they make a correction. He stated that they did so in regard to parcel number South Wanga/Lureko/186 and added that according to records held at the registry, the correct size of South Wanga/Lureko/184 is 30.0 acres which is also the size of the said parcel on the ground.

13. Beatrice Lishenga Wamugi, a surveyor working in the office of District Surveyor Kakamega, testified as PW4. She stated that according to the 5<sup>th</sup> edition of the map, only parcel number South Wanga/Lureko/184 reached the river and that parcels number South Wanga/Lureko/185 and 186 did not reach the

river. She also stated that the 4<sup>th</sup> edition of the map that the Plaintiffs were relying on was not authentic. The Plaintiffs' case was then closed.

14. Emmanuel Omoto Namunwa (DW1) stated that the Third Plaintiff was his sister in law while the rest of the Plaintiffs were his cousins. That parcel number South Wanga/Lureko/184 belonged to Christopher Namunwa (deceased) who was his father and that he was born and brought up on the said parcel. He added that at one point the First Plaintiff claimed that Christopher Namunwa (deceased) had taken part of his land and that later the First Plaintiff filed Mumias Land Disputes Tribunal Claim No. 15 of 2007. That the tribunal ordered that the District Land Registrar and the District Surveyor visit the affected parcels for purposes of placing visible marks on the boundaries.

15. DW1 further stated that before the District Land Registrar and the District Surveyor visited, the First Plaintiff went to the land with the chief, police and unknown persons and started surveying it, fixing boundaries and fencing it. He further testified that parcel number South Wanga/Lureko/184 measures 30 acres and that the land which belonged to the Plaintiff's father did not reach River Nzoia. The First to the Fourth Defendants' case was then closed.

16. Yusuf Atenya Wanga (DW2) testified and produced copies of documents listed as item numbers 1 to 7 in his list of documents dated 30<sup>th</sup> March 2015. He stated that the Plaintiffs

were his cousins and that he was substituted following death of Ramadhan Wanga Ondieche who was the original Fifth Defendant. He stated that he was born in the year 1959 and that prior to adjudication process in Lureko area, Paul Ondieche who was his grandfather was the owner of land measuring approximately 80 acres and had four sons including Benedicto Nakhungu Ondieche and Ramadhan Wanga Ondieche. That in 1961 after his grandfather passed away, his father and uncles planted boundaries sharing the estate of his grandfather and that during adjudication in 1967, the boundaries were confirmed as they were on the ground.

17.DW2 further stated that his father and uncles lived harmoniously until the first three died and that in December 2007, they received summons to appear before the Mumias Land Disputes Tribunal in a case filed by the First Plaintiff herein. That the tribunal ordered that the District Land Registrar and District Surveyor visit parcels number South Wanga/Lureko/184, 185 and 186 and establish boundaries and that the decision of the tribunal was adopted through Chief Magistrate's Court Misc. Award No. 96 of 2008.

18.DW2 went on to state that the First Plaintiff herein engaged the services of a private surveyor and the chief who went to the ground and hived off 7 acres from DW2's father's parcel number South Wanga/Lureko/186 and added it to the First Plaintiff's South Wanga/Lureko/185. That the District Land Registrar and District Surveyor visited the parcels on 15<sup>th</sup> April 2009 and established that there was encroachment on parcel

number South Wanga/Lureko/186. He added that the First Plaintiff ignored the District Surveyor's report and continued to occupy the land and even sold portions of it three different buyers. DW2 further testified that the map that the Plaintiffs were relying on was not authentic, that the original boundaries remained intact since 1967 and that their parents did not have any disputes over the land.

19. Geoffrey Onyiko Edasi (DW3), a land surveyor working at the county survey office Kakamega stated that Beatrice Lishenga Wamugi (PW4) was his supervisor and that the county survey office Kakamega wrote a letter dated 19<sup>th</sup> September 2008 to the Land Registrar asking him to correct the acreage of parcel number South Wanga/Lureko/186 to read 4.0 hectares as opposed to 4.0 acres. He confirmed that the correct size of the said parcel is 4.0 hectares.

20. The Fifth Defendant's case was then closed and another date given for hearing of the Sixth to Eighth Defendants' case. The said Defendants did not attend court on the date appointed and their cases were thus closed.

21. Directions for filing and exchange of written submissions were thereafter given. The Plaintiffs filed submissions dated 10<sup>th</sup> December 2024, the First to Fourth Defendants filed submissions dated 24<sup>th</sup> February 2025 while the Fifth Defendant filed submissions dated 10<sup>th</sup> December 2024. The Sixth to Eighth Defendants did not file any submissions.

22. I have carefully considered the pleadings, the evidence and the submissions. The issues that arise for determination are whether fraud and collusion have been established and whether the reliefs sought should issue.

23. Both fraud and collusion are serious allegations with criminal ramifications. A party alleging fraud and its related aspect of collusion must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**.

24. The plaintiffs' case is that the First to Fifth Defendants through fraud and collusion with the rest of the Defendants hived off a huge portion of their parcel number South Wanga/Lureko/185 by altering the size of parcel number South Wanga/Lureko/186 to read 4.0 hectares instead of 4.0 acres. Their complaint is essentially that the Defendants took part of their parcel number South Wanga/Lureko/185 and added it to parcel number South Wanga/Lureko/186.

25. The Plaintiffs have built their case on their own observations as to where the boundaries were and on two maps that they produced: the 4<sup>th</sup> edition and the 5<sup>th</sup> edition. According to

them, the true extent and scope of parcel number South Wanga/Lureko/185 is as captured in the 4<sup>th</sup> edition of the map. They maintain that the parcel extended from the road to River Nzoia which they insist is the true size of their land. I note however that the Plaintiffs' own witness Beatrice Lishenga Wamugi, a surveyor working in the office of District Surveyor Kakamega who testified as PW4, disowned the said 4<sup>th</sup> edition of the map on which the Plaintiffs have built their case.

26. I further note that the Plaintiffs' other witness, the Deputy Land Registrar Kakamega County who testified as PW3 stated that the size of parcel number South Wanga/Lureko/186 was properly corrected to read 4.0 hectares. PW3's position is corroborated by the testimony of DW3, a land surveyor working at the county survey office Kakamega who testified that the correction was effected when his office wrote a letter dated 19<sup>th</sup> September 2008 to the Land Registrar asking him to correct the acreage of the said parcel to read 4.0 hectares as opposed to 4.0 acres.

27. The Plaintiffs contend that the correct size of their parcel number South Wanga/Lureko/185 should be 38.8 acres and that the size was reduced to 20 acres when the size of parcel number South Wanga/Lureko/186 was corrected to read 4.0 hectares. I have perused the certified copy of the register of South Wanga/Lureko/185 which the First Plaintiff produced as well as that which the Land Registrar produced. Both state that the size of the said parcel is 38.8 acres. The copy which the Land Registrar produced was certified as a true copy of the

original on 19<sup>th</sup> September 2022. It does not show any change in the size of the parcel and is conclusive that the size has remained static at 38.8 acres since 9<sup>th</sup> January 1967 when the register was opened.

28.I have analysed the Plaintiffs' claim that what is left of parcel number South Wanga/Lureko/185 on the ground is 20 acres and that 18 acres have gone missing. Mathematically, 4 hectares translates to 9.884 acres. Assuming that parcel number South Wanga/Lureko/186 gained any land due to the correction in its size, the net gain can only be 5.884 acres since the parcel, according to the Plaintiffs, measured 4 acres prior to the correction. The Plaintiffs claim that they lost 18 acres. The unanswered question is: where did the remaining 12.116 acres that the Plaintiffs claim that they lost go? The Plaintiffs have not answered that question.

29.The Plaintiffs have not proved any change in the size of parcel number South Wanga/Lureko/185. The mere fact that the size of parcel number South Wanga/Lureko/186 was corrected in its register is no proof or guarantee that the size of parcel number South Wanga/Lureko/185 was reduced. What the Plaintiffs have sought to do is to invite the court to infer fraud from the correction of the size of parcel number South Wanga/Lureko/186. It is not permissible to infer fraud. Having opted to make the grave allegations of fraud and collusion the foundation of their case, the Plaintiffs were duty bound to strictly establish those claims.

30. I find that the Plaintiffs have not proved fraud and collusion to the required standard. Equally, the allegations of trespass are not established. I find no merit in the Plaintiffs' case, and the reliefs which they seek cannot therefore issue.

31. In view of the foregoing discourse, I dismiss the Plaintiffs' case. Considering the family relationship between the parties, I make no order as to costs.

**Dated, signed, and delivered through Microsoft Teams, at Nyamira, this 29<sup>th</sup> day of October 2025.**

**D. O. OHUNGO  
JUDGE**

Delivered in open court in the presence of:

No appearance by the Plaintiffs

No appearance by the 1<sup>st</sup> to 4<sup>th</sup> Defendants

No appearance by the 5<sup>th</sup> Defendant

No appearance by for the 6<sup>th</sup> to 8<sup>th</sup> Defendants

Court Assistant: B Kerubo