



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI.**

**LAND CASE NO: E008 OF 2023**

**TEDDY**

**DAVIS**

**NGALA.....PLAINTIFF**

**VERSUS**

**CHARO SHIDA KILUMO & 5**

**OTHERS.....DEFENDANTS**

**JUDGMENT**

**1.** The plaintiff, in his claim filed on February 23, 2023, sought the following reliefs against the defendants:

**a) Judgment is entered against the defendants.**

**b) A declaration that the sale agreement between the second, third, fourth, fifth, and sixth defendants' father, Mr. Stephen Edward Chai Ngala, and the first defendant, Mr. Charo Shida Kilumo, dated May 9, 2009, be set aside.**

- c) An interim injunction restraining the 1st Defendant, whether by himself or through employees, agents, or others, from selling, alienating, cultivating, or otherwise dealing with the suit land pending the hearing and determination of the suit. Thereafter, the injunction should be made permanent.**
- d) A declaration to set aside the vesting order dated the 10th day of 1995.**
- e) Costs of this suit.**
- f) Any other or additional relief that this Honorable Court considers appropriate and just to grant.**

**2.** The first defendant appeared and filed his Statement of Defense and Counterclaim against the plaintiffs, the second, third, fourth, fifth, and sixth defendants. The 1<sup>st</sup> defendant in his Counter-Claim against the plaintiff, 2<sup>nd</sup> ,3<sup>rd</sup> ,4<sup>th</sup> , 5<sup>th</sup> and 6<sup>th</sup> defendants sought the following reliefs;

- a) A declaration that the 1st defendant is the legal and rightful owner of the 7-acre portion of Title Plot No. 9, Group XIV, Tezo, measuring 16.94 acres, and the 6.5-acre portion of Title Plot No. 10, Group XIV, measuring 13.5 acres.**
- b) An Order of permanent Injunction restraining the Plaintiff, his servants, agents, and/or legal**

**representatives from trespassing, selling, leasing, transferring, charging, erecting permanent structures, or in any way dealing with the suit property, which consists of a 7-acre portion of Title Plot No. 9, Group XIV, Tezo, measuring 16.94 acres, and 6.5 acres within Title Plot No. 10, Group XIV, Tezo, measuring 13.5 acres.**

- c) An order compelling the 2nd, 3rd, 4th, 5th, and 6th defendants to transfer the portion of 7 acres of Title Plot No. 9, Group XIV, Tezo, and 6.5 acres of Title Plot No. 9, Group XIV, Tezo in favor of the 1st defendant herein. In default, the deputy registrar of this court shall be ordered to execute all necessary documents to effect the transfer of the suit property, consisting of 7 acres of Title No. 9, Group XIV, Tezo, and 6.5 acres of Plot No. 10, Group XIV, Tezo.**
  - d) Costs of this suit and Interest thereon at Court rates.**
  - e) Any other or further relief as this Honourable Court may deem fit and to grant in the circumstances.**
- 3.** The matter proceeded to a hearing on the merits as shown in the court proceedings.
- 4.** The records indicate that rather than moving forward with prosecuting the case, the plaintiff came up with a plan to sidetrack the hearing. Instead, he directed his attention to filing

complaints against the court staff and the court itself—these complaints are documented in the records. However, I believe discussing them here is not necessary.

**5.** Therefore, the plaintiff did not appear in court to pursue his case. Once the court was satisfied that the plaintiff had been properly served with a hearing notice for May 7, 2025, and the return of service had been filed, the court dismissed the plaintiff's case for lack of prosecution.

**6.** The 1st defendant then proceeded to prosecute his case against the plaintiff and the 2nd, 3rd, 4th, 5th, and 6th defendants.

**7.** At the conclusion of the case for the first defendant, the court directed the first defendant to submit written submissions. I acknowledge receipt of written submissions from Mr. Kinaro, learned counsel for the first defendant, with appreciation, as they significantly helped in resolving the issues raised in this matter.

**8.** Based on the evidence on record and the submissions, the issues I identify for this court's determination are whether the 1st defendant has proven his Counter-Claim against the plaintiff, the 2nd, 3rd, 4th, 5th, and 6th defendants, and

whether the same meet the required standard of proof on a balance of probabilities. Additionally, I consider whether the 1st defendant is entitled to the relief sought in the Counterclaim and who should bear the costs of this suit.

- 9.** The 1st defendant testified as DW1 and adopted his witness statements dated March 6, 2023, as his evidence-in-chief. DW1 also presented exhibits Nos. 1 to 4 as evidence, which are the documents listed in his list of documents dated March 6, 2023.
- 10.** The 1st Defendant also called Safari Charo, DW2, and Garama Baya Yaa, DW3, who all testified prior to the conclusion of the 1st defendant's case.
- 11.** The 2nd to 6th defendants, who are the children of the late Stephen Edward Chai Ngala, did not appear in court on May 7, 2025. After the court confirmed they were properly served with a hearing notice for that date, it closed their case and scheduled a mention date for filing written submissions on May 28, 2025.
- 12.** The 1st defendant adopted his witness statement dated March 6, 2023, as his primary evidence and submitted documents listed in his document list, also dated March 6, 2023, as the 1st defendant's exhibits No. 1 to 4 during the trial.

Both the oral testimony of the 1st defendant and the documentary evidence presented by him establish that the 1st defendant purchased 13.5 acres of land from Stephen Edward Chai Ngala (the father of the 2nd to 6th defendants) at a purchase price of Kshs 90,000 per acre, totaling Kshs 1,215,000 (Kenya Shillings One Million Two Hundred and Fifteen Thousand only). This purchase forms the basis of the 1st defendant's claim to the land. Deducting Kenya Shillings fifty-five thousand (55,000) for survey fees, the agreed amount payable to the vendor was Kenya Shillings 1,160,000, which was paid in accordance with the sale agreement dated May 9, 2009 -1st defendant's exhibit No 1.

**13.** The 1st defendant took possession of the suit property, which measures 13.5 acres, immediately after purchase and has been farming there ever since. Additionally, he leased some portions of the land to other individuals who also farm on the land and pay him rent. This continuous and exclusive use of the land forms the basis of the 1st defendant's counterclaim.

**14.** The 1st defendant has been in exclusive and peaceful possession and enjoyment of the 13.5 acres of land from May

9, 2009, to the present, without any interference from anyone, including the plaintiff herein.

**15.** The 1st defendant's ownership of the 13.5 acres of land was based on a sale conducted by Stephen Edward Chai Ngala (now deceased), who was the father of the 2nd to 6th defendants. The deceased remains the registered owner to date because the 2nd to 6th defendants have not inherited their late father's estate.

**16.** In submissions, Mr. Kinaro argues that by accepting the full purchase price from the 1st defendant and providing him with vacant possession of the 13.5 acres of land, the late Stephen Edward Chai Ngala established a constructive trust in favor of the 1st defendant, which does not need to be registered in the land register of the disputed property.

**17.** Counsel cites decisions in **Isack M'inanga Kiebia v Isaya Theuri M' Lintari & Another [2018] eKLR**, **Alianza v Saul [2022] KECA 583 KLR**, and **Jonathan Kaposhi v Colleta Mbatha Maweu & 4 others [2021] eKLR**. These decisions clarify the concept of trusts, including customary trusts, as overriding interests under section **28(b)** of the **Land**

**Registration Act** and do not require notation in the register. I have no doubts about the *rationes decidendi* in those decisions.

**18.** Mr. Kinaro proceeds to submit further that the absence of transfer of the 13.5 acres of land belonging to the 1st defendant, due to the death of the late Stephen Edward Chai Ngala, the registered proprietor, should not prevent the registration of the 1st defendant as the owner of the suit land. The 1st defendant lawfully acquired this property from the uncle of the plaintiff, who was also the father of the 2nd to 6th defendants. Before his death, the 1st defendant had been in actual and constructive possession of the 13.5 acres of the suit property from May 9, 2009, to the present.

**19.** In this regard, Mr. Kinaro relied on the decision of this Court **in Nzai & another (Suing as Administrators of the Estate of Kaingu Kombe Nzai) v Ngala [2025] KEELC 3760 (KLR)**, which upheld(sic) the defendant's Counter-Claim in a matter with similar facts as the present suit and Counter-Claim.

**20.** Mr. Kinaro contends that since the 1st defendant's claim went unanswered, he is entitled to the prayers sought in the counterclaim, citing decisions in **North End Trading Company Ltd (carrying on business under the registered**

**name of Kenya Refuse Handlers Ltd) v. City Council of Nairobi [2019] eKLR, Karuru Munyororo v Joseph Ndumia Murage & Another, Nyeri HCCC No. 95 of 1988, Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another [1979] eKLR, and CMC Aviation Ltd v. Crusair Ltd (No. 1) (1987) KLR 103.**

**21.** I agree with Mr. Kinaro that the 1st defendant's counterclaim went unanswered. I also agree that the 1st defendant acquired proprietary rights over the suit property through purchase. Additionally, I concur with all the decisions cited regarding trusts and the customary trust concept as an overriding interest generally.

**22.** However, what I disagree with is whether the 1st defendant's proprietary rights over the suit property, by virtue of purchase from a deceased person, can accrue minus succession or by suing the administrators of the estate of the deceased Stephen Edward Chai Ngala.

**23.** The 1st defendant sued the 2nd to 6th defendants as the sons of the late Edward Chai Ngala and the uncle of the plaintiff. I have seen nowhere that the 1st defendant claims these parties were sued as administrators of the estate of the

late Edward Chai Ngala, the person who signed the sale agreement, and in whose name the title to the property in dispute remains registered. The 1st defendant concedes that the title remains in the name of the deceased.

**24.** The correct approach would have been to sue those parties as the administrators of the deceased's estate, not as the sons and relations of the deceased. It is settled law that the estate of the deceased person is vested in the legal representative; see **Kothari v Quaresh [1967] EA 364** and **Trouistik Union International and another v Jane Mbeyu and another [1993] eKLR**. Under Section 3 of the Law of Succession Act, Cap 160, the term “personal representative” means the executor or administrator, as the case may be, of a deceased person.

**25.** Mr. Kinaro cited this court's decision in **Nzai & another (Suing as Administrators of the Estate of Kaingu Kombe Nzai) v Ngala [2025] KEELC 3760 (KLR)**, alleging that the personal representatives of a deceased person's estate, who serve as the executors or administrators, can be bypassed once a claimant proves either purchasers' rights or some form of trust. I do not believe this is the correct position. In this case,

as the title indicates, the plaintiffs sued the defendant in their capacity as the administrators of Kaingu Nzai's estate, not as sons or relatives. The court, at paragraph 9 of its decision, stated as follows:

***“The Defendant's testimony significantly asserts a purchaser's interest in the suit property, claiming he purchased the land from the deceased Kenga Kombe on July 17, 1997, and was put in possession. The succession conducted by the Plaintiffs over the deceased's property failed to acknowledge their overriding interest in the suit property by purchase.”***

**26.** Clearly, in that matter, the distribution of the estate was made without considering the purchasers' interests.

**27.** In paragraph 25 of its judgment, the court observed:

***“I fully concur with the Defendant's assertion that the Plaintiffs' father holds the six acres of land in constructive trust on behalf of the Defendant, as established in the case of Macharia Mwangi Maina & others v Davidson Mwangi Kagiri [2014] eKLR. In this case, the Court determined that the purchasers of the suit land, who had been placed in possession by the vendor, were safeguarded by Section 30(g) of the Registered Land Act. The vendor's actions created an***

***overriding interest in favor of the purchaser concerning the suit land. Furthermore, the vendor established an implied or constructive trust in favor of the purchaser. The purchaser's rights constituted equitable rights binding on the land, and the absence of any reference to the trust's existence in the register did not impede the enforceability of the trust. While the late Kaingu Kombe Nzai is officially recognized as the proprietor of the disputed land, this registration is contingent upon the interests of the Defendant, who was in possession of the six acres of land at the time of registration."***

**28.** Based on the foregoing, the counterclaim must fail because the estate of the late Stephen Edward Chai Ngala must be involved in the transfer of the 1st defendant's interest in the suit property through its personal representatives. It cannot be bypassed.

**29.** The 1<sup>st</sup> defendant's counterclaim is hereby dismissed.

**30.** Since the plaintiff and the 2nd to 6th defendants did not participate, there will be no order as to costs in both the main suit and the counterclaim.

**Dated, signed, and delivered electronically at Malindi on 22<sup>ND</sup> October, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr. Kinaro for the 1<sup>st</sup> Defendant.**

**Happy: Court Assistant**

**In the absence of:**

**The plaintiff and the 2<sup>nd</sup>-6<sup>th</sup> Defendants**