

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT HOMABAY**

**ELC 20 OF 2020**

**JOHN**

**ODAGO**

**OMUNGU.....PLAINTIFF**

**VERSUS**

**AMOS JAOKO OKONGO.....1<sup>ST</sup>  
DEFENDANT**

**NYATIENO OWINO AUGUSTINE (Sued as the  
Legal Representative of the Estate of  
MARITA SABINA OWATO.....2<sup>ND</sup>  
DEFENDANT**

**FRED MOPHAT ONYANGO.....3<sup>RD</sup>  
DEFENDANT**

**KENNEDY OTIENO OWINO.....4<sup>TH</sup>  
DEFENDANT**

**JOHNSON NYAKUNDI NYAKUNDI  
KENNEDY OTIENO OWINO (Sued as the Legal  
Representative of the Estate of CONSOLATA  
ALANDO (Deceased).....5<sup>TH</sup>  
DEFENDANT**

**DANIEL OLOO OWINO.....6<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

**1.** The Plaintiff sued the Defendants vide a plaint dated 23<sup>rd</sup> June, 2020 seeking the following reliefs:

**a) A declaration that:**

- i. L.R.NO. KANYAMWA/KOCHIENG/KOMUNGU/  
KAKAETA/1078 (now sub divided into LR  
NO'S.**

**KANYAMWA/KOCHIENG/KOMUNGU/KAKAET  
A/1378 and 1379).**

**ii. LR.NO.KANYAMWA/KOCHIENG/KOMUNGU/  
KAKAETA/1079 (now sub divided into LR  
NO'S.**

**KANYAMWA/KOCHIENG/KOMUNGU/KAKAET  
A/1591 and 1592).**

**iii. LR.NO.KANYAMWA/KOCHIENG/KOMUNGU/  
KAKAETA/1080 in the name of CONSOLATA  
ALANDO, now Deceased.**

**iv. LR.NO.KANYAMWA/KOCHIENG/KOMUNGU/  
KAKAETA/1081 in the name of the 6<sup>th</sup>  
Defendant, are held on Trust for and on  
behalf of the Plaintiff.**

**b)An Order revoking and/or nullifying/Cancelling the  
Titles in respect of LR. NOS.  
KANYAMWA/KOCHIENG/KOMUNGU/ KAKETA/1078  
(now sub-divided into 1378 and 1379), 1079 (now  
sub-divided into 1591 and 1592), 1080 and  
1081 in the names of the Defendants and**

**restoration of the Titles thereof, in favour of the Plaintiff.**

**c) An Order directing the Defendants to transfer the entire and/or the whole of KANYAMWA/KOCHIENG/KOMUNGU/ KAKAETA/1078 (now sub-divided into 1378 and 1379), 1079 (now sub-divided into 1591 and 1592), 1080 and 1081 in favour of the Plaintiff.**

**d) In default, the Deputy Registrar of this Honourable Court be ordered and/or liberty to sign the relevant Transfer Instruments, Consent(s) and attendant Documents to facilitate compliance with Orders in (c) above.**

**e) An Order of Eviction against the Defendants, their Agents and/or Servants from LR NO'S. KANYAMWA/KOCHIENG/KOMUNGU/KAKAETA/1078 (now sub-divided into 1378 and 1379), 1079 (now sub-divided into 1591 and 1592), 1080 and 1081.**

**f) A permanent Injunction restraining the Defendants by themselves, agents, servants and/or anyone**



4. They averred that the Minister's decision from the Appeal was not capable of being implemented by the Lands Office and that the suit was statute barred.

## 5. EVIDENCE

6. To support his claim, the Plaintiff called two witnesses. Testifying as **PW1**, he testified that he is the owner of plot No. 962/Komungia/Kaletta having acquired the same in 1975. He testified that plot No. 960 belonged to Peter Owino Adhiambo.

7. **PW1** relied on his bundle of documents dated 23<sup>rd</sup> June, 2020 which documents were marked as PMFI 4, 5, 17, 18, 19, 20, 21, 22, 26, 27, 28 and 29. He produced PExhbits 1, 2, 3, 6 to 16, 23, 24, 25, 30 to 37. It was his testimony that the adjudication process could not be implemented. He also testified that he had filed the suit quite late.

8. Upon cross examination by Kisera for the Defendants, he confirmed that he had been assigned Plot 962 while Peter Owino was assigned Plot 960. He added that he had filed an objection in relation to a portion of Plot 960. He also stated that he was supposed to get the entire Plot 960.

9. He further stated that the verdict of the objection proceedings was never implemented. He stated that he could

settle on Plot No. 960 and Plot Nos 1080, 1078, 1081 as provided in the sketch.

**10.** He confirmed that PExh 8 showed Mary Owino as the proprietor of L.R No Kanyamwa/Kochieng/Komungu/Kakaeta/1078. He denied the entry under S/No. 4 in the Adjudication Record.

**11.** PW1 admitted that he did not know the total acreage of Plot No. 960. He also admitted that he had not sued any public officer with regard to adjudication and registration of the suit parcel.

**12.** Upon re-examination, he stated that his objection was with regard to Plot 960. He stated that his dispute was with regard to the suit land in question.

**13. PW2,** Kipkuto Toromo, a land adjudication and settlement officer, Homabay County testified that his duty was to hear and determine land objection cases and solving disputes that involved land adjudicated in Homabay.

**14.** He testified that he received an objection proceeding which involved Parcel No. 960 and 962. He testified that the outcome of the decision was that the said parcels belonged to the Plaintiff.

- 15.** He further testified that the District Commissioner, South Nyanza District determined the appeal on behalf of the Minister on 24<sup>th</sup> February, 1986. He testified that the Land Adjudication Officer Migori was to implement the decision by the objection committee which was that part of land parcel no. 960 was to be combined with 962.
- 16.** It was his testimony that PExh 4 and 5 had not been implemented due to failure to determine the boundary. He testified that he did not know whether there was a visit by the District Surveyor. He added that he was not aware that the same was challenged.
- 17.** Upon cross examination, he confirmed that he did not have the original file of the documents. He also confirmed that he could not certify a document without reference to its source.
- 18.** He admitted that he had no correspondence between their Migori office and theirs in respect to the said matter. He added that the objection was limited to parcel number 962 and that the Plaintiff had not been awarded the entire two parcels.

- 19.** PW2 stated that he only had adjudication record for land parcels Nos. 1078, 1079, 1080 and 1081 which were created from parcel No. 960. He admitted that he did not have the record in court.
- 20.** He admitted that he could not confirm the size of the said parcel. He also admitted that he was not in a position to demarcate the parcels of land based on PExh5.
- 21.** Upon re-examination, he stated that the adjudication records on parcels located in Homabay were initially in Migori but were later transferred to Homabay Land Adjudication Office. He added that PExh4 affected parcel 960 only. He stated that it was not possible to implement the decision in PExh5.
- 22.** That marked the close of the Plaintiff's case.
- 23.** **DW1**, the 1<sup>st</sup> Defendant produced his witness statement dated 2<sup>nd</sup> November, 2020 which was adopted as his evidence in chief. He also relied on his list of documents dated 2<sup>nd</sup> November, 2020 which documents were produced as D Exhts 1 to 9.
- 24.** He testified that LR No. Komungu/Kakaeta 960 was owned by his father, Peter Owino Odhiambo (deceased). He further

testified that the Plaintiff was the registered owner of L.R No Komungu/Kakaeta/9612. He further testified that the proceedings never showed the size of land apportioned to the Plaintiff.

**25.** He testified that he has never occupied the said portion of the suit land and that the decision of the appeal was never implemented. He went on to testify that L.R No. 1078 was registered in the name of Mary Owino his step mother and that 1079 was registered in the name of Justina wife to the late Owino.

**26.** It was his testimony that LR Nos 1080 and 1081 originated from the suit parcel. He testified that they were not trustees of the suit land.

**27.** Upon cross examination, he stated that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants were his brothers. He also stated that Peter Owino Adhiambo (deceased) was his father who owned the suit land while the Plaintiff owned 962.

**28.** He confirmed that the Plaintiff had filed an objection where he was awarded a portion of the suit land but not the entire suit parcel. He confirmed that his late father had not preferred an appeal.

**29.** DW1 stated that the land had been divided into four portions as the appeal was still pending. He went on to state that Mary Owino was awarded 1078, Akoth Owino was given 1079 and 1081 awarded to Daniel Aloo Owino. He stated that the District Land Surveyor never combined L.R Nos. 1078,1079,1080 and 1081 as directed in the letter dated 8<sup>th</sup> February, 1987 (DExh6).

**30.** He stated that LR 1078 had been subdivided into 1378 and 1379 and was occupied by the 2<sup>nd</sup> Defendant.

**31.** On re-examination DW1 reiterated that DExh3 confirmed that the Plaintiff had been awarded a portion of the suit land which was not specific. He added that the Defendant was not responsible for registration of titles to land.

**32.** At this juncture the Defendants' closed their case. The parties filed written submissions.

### **PLAINTIFF'S SUBMISSIONS**

**33.** Counsel for the Plaintiff vide his submissions dated 11<sup>th</sup> March, 2025 identified two issues for determination. The first issue was whether the Plaintiff has proved his case to the required standard. He first dealt with the issue of whether the suit was statute barred as alleged by the Defendants.

**34.** It was his submission that the resultant titles registered in the Defendants' names was done on the existence of constructive trust. He relied on the case of **Evalyn Wairimu Kamau & 3 Others V Shadrack Kamau Kiromo [2017] eKLR** and submits that the issue of trust cannot be statute barred.

**35.** He further submits that the Defendants had not formally lodged a Preliminary Objection. He adds that trust is an issue of facts and not law thus the same is misplaced. It was his submission that Peter Owino Adhiambo (deceased) subdivided Plot 962 on the face of an existing order in Appeal No. 504 of 1985 thus unlawful. He relied on a number of cases including **Arthi Highway Developers Limited V West End Butchery Limited, Kenya Medical Association Cooperative Society Ltd and Yamin Construction Co. Ltd & Gachoni Enterprises (Civil Appeal 246 of 2013) [2015] KECA 816 (KLR)**

**36.** He went on to submit that the Plaintiff did numerous correspondences to the Minister and the Adjudication Officer Migori as evidenced in PExh 16-22 but they failed to act. He adds that they failed to implement the Minister's decision

resulting in the Plaintiff being deprived of his rights over the suit parcels.

**37.** Counsel submits that the subdivisions of the original Plot 960 registered under the names of Maria Owato, Justina Akoth Owino, Consolata Owino and Daniel Oloo Owino were unlawfully acquired. He relied on the case of **Gikandu V Kanga'ata (Environment and Land Appeal E024 of 2022) [2023] KEELC 22421 (KLR)**

**38.** He submits that the said persons proceeded to further sub-divide the property and later had the same registered in the Defendants' names. He submits that the Defendants and the prior persons held the title in trust of the Plaintiff.

**39.** He cited the case of **James Muniu Mucheru V National Bank of Kenya Limited [2019] eKLR** and **Section 107 of the Evidence Act.**

**40.** The second issue is whether the sub-division of the resultant titles into the names of the Defendants connoted Constructive Trust. He submits that there exists a constructive trust implying the registration of the suit properties in the Defendants' names thus the basis for rectification of the registers. He argues that the registration

was done on the face of the Minister's decision which had directed that the said plots be consolidated and amalgamated with Plot 962 which belonged to the Plaintiff.

**41.** He thus submits that there exists a basis for holding that the Defendants hold the suit properties in trust. He relied on the case of **Twalib Hatayan & Another V Said Saggar Ahmed Al-Heidy & Others [2015] eKLR** and **Shah & 7 Others V Mombasa Bricks & Tiles Limited & 5 Others (Petition 18 (E020 of 2022) [2023] KESC 106 (KLR))**.

**42.** In conclusion, he submits that the Plaintiff has proved his case to the required standard in terms of the existence of constructive trust and breach of the same.

### **DEFENDANT'S SUBMISSIONS**

**43.** Learned counsel for the Defendants submitted that the Plaintiff anchored his case on misrepresentation and misconception of the adjudication decisions. He adds that the entire proceedings and finding both at the Board and the Appeal to Minister confirmed that the Plaintiff claimed an unascertained portion of Plot 960 and not the entire plot.

**44.** He submits that it is not in dispute that the Plaintiff has never been in possession of the suit land. He adds that the

size of Plot 960 remained unknown hence the quagmire the adjudication officer was faced with as they attempted to implement the said decision.

**45.** The first issue was whether the Plaintiff has proved his case to the standard required by the law. He submits that trust was not specified in the pleadings as to whether it was customary or constructive. He adds that parties are bound by their pleadings thus it was a requirement to plead trust in the Plaintiff.

**46.** It was his submission that the Plaintiff's suit was mischievous and misconceived. He submits that no trust would arise in a case where the Plaintiff has been in possession of the suit parcel. He submits that the Defendants produced adjudication records and extract of register which showed that the same are first registration with no relationship to Plot 960.

**47.** He went on to submit that the Plaintiff and Defendants are not related hence customary trust cannot arise. It was his submission that the Board decision was rendered on 13<sup>th</sup> February, 1979 while the suit was filed 41 years later on 7<sup>th</sup> July, 2020. He adds that the appeal decision was rendered on

4<sup>th</sup> February, 1986 being 34 years to the time this suit was filed.

**48.** Counsel argued that the Plaintiff failed to file Judicial Review Proceedings within 6 months in line with **Section 8 and 9 of the Law Reform Act** and **Order 53 of the Civil Procedure Rules** so as to give effect to the said decisions.

**49.** It was his submission that the Plaintiff neither sued the Land Registrar nor pleaded fraud on the part of the Land Registrar and Defendants. He adds that no leave had been sought to file this suit out of time hence the suit remains fatally defective in law.

**50.** He submits that it would be without basis to revoke title L.R Kanyamawa/Kochieng/Komungu/Kakaeta/1078, 1079, 1080 and 1081. He adds that there existed a map that showed Plot 960 existed distinctively from the other suit plots.

**51.** The second issue was whether the Plaintiff was entitled to the remedies in the plaint. Counsel submits in the negative since the suit is fatally defective hence should be dismissed with costs.

### **ANALYSIS AND DETERMINATION**

**52.** Having carefully considered the pleadings, evidence, and rival submissions by both parties, the following issues arise for determination:

***a) Whether the suit is statute barred***

***b) Whether the Defendants held the suit property in trust for the Plaintiff***

***c) Whether the Plaintiff is entitled to the reliefs sought.***

***d) Who should bear the costs of the suit?***

**53.** This Court now proceeds to determine the issues sequentially.

**a) Whether the suit is statute barred**

**54.** It is not in dispute that the Plaintiffs' claim is generally founded on trust. The Plaintiff claims that the suit land was registered and held in trust for him and that the trust should be given effect by a relief now which cancels the registration in the names of the current proprietors and transferring that ownership to him.

**55. Section 28** of the **Land Registration Act** provides that:

**“Unless the contrary is expressed in the register, all registered land shall be subject to**

**the following overriding interests as may for the time being exist and affect the same, without their being noted on the register—**

**(a) ...**

**(b) trusts including customary trusts”**

**56. In the case of *Musekenya V Kortom (Environment and Land Appeal E006 of 2023) [2025] KEELC 3709 (KLR)***

the court held as follows:

**25. Having found that the pleadings and evidence in the matter pointed on a prima facie basis to the creation of constructive Trust, it follows that the cause of action by the Plaintiff, is an action by a beneficiary under a Trust [herein a constructive trust] to recover Trust property from a trustee and the same is exempted under Section 20[1] [b] of the Limitation of Actions Act.**

**26. It follows therefrom that the suit was not time barred under Section 7 of the Limitation of Actions Act as it was exempted under Section 20 [1] [b] of the said Act, and the**

**Learned Magistrate fell in error to strike out the same...”**

**57.** Based on the above, it is this court’s view that a claim based on trust cannot be defeated on grounds of time limitation since trust has no limitation of time provided for.

**b) Whether the Defendants held the suit property in trust for the Plaintiff.**

**58.** It was the Plaintiff’s claim that the Defendants caused a subdivision of the original Plot No. 960 Komungu/Kakaeta Adjudication Section contrary to the objection cause no 34 of 1979. Further, that the Defendants caused the said plots to be registered in their names despite the decision in the objection cause to the effect that a portion of the suit property was to be given to the Plaintiff.

**59.** It is not in dispute that the Appeal by the Plaintiff to the Minister was never executed for the sole reason, as claimed, that the land part of which the Defendant was to give the Plaintiff had a boundary which could not be ascertained.

**60.** It is also not in dispute that the Plaintiff, claimant in the Appeal, never went back or applied to the Minister to clarify the issue or for the Minister to give further directions on the

same or what size of the land he was to get. It means that he was satisfied with the Minister's decision. Otherwise he should have gone for a review. He cannot purport to use that which he calls or brands vagueness or lack of clarity to open the decision of the Minister anew in this forum or any other now and more so after a long time. In any event, if the decision was unclear or vague at the time as to how much of the suit property the Plaintiff was to get from the suit land, it does not become clearer in this suit from a point of nowhere, other than by conjecture.

**61.** Further, the Plaintiff never filed any application for a review or any Judicial Review Application basing it on the reason that he may have been aggrieved by the Minister's decision of 4th February, 1986. From the evidence, it is clear that this suit was filed 35 years after the Minister's order. It cannot be gainsaid that after the Minister's judgment delivered on 4<sup>th</sup> February, 1986 was never reviewed or appealed.

**62.** Again, starting from the timelines within which court decisions are executed, **Order 22, Rule 18** of the **Civil Procedure Rules** provides that:

**“where a decree is more than one (1) year old, and no steps have been taken to execute the same within that period, a decree holder must first, before execution, issue a notice to the judgment debtor to show cause why the decree should not be executed against him.”**

**63.** If the process would have moved the way executions do under the Civil Procedure Act and Rules, the same having not been executed in twelve months from the decision would have required that the Plaintiff first take out a notice to show cause why execution should not issue, before taking the next step.

**64.** Alternatively, he could have forgone the rights he acquired thereunder at the expiry of twelve years from the date of the decision since the Minister’s orders were final. But as to the former view about as Notice to Show Cause, it is not applicable because the Minister’s decision was not a court decision subject to the civil procedure Rules. However, regarding the latter view, the application of provisions of the Limitation of Actions Act comes into view.

**65.** In light of the above, it is this court's view that the Minister's order remains the final order. It ought to have been implemented as soon as it was made or its finality was known and settled by the parties: it appears they did not. In my humble view, Section 4(4) of the Limitation of Actions Act should be read and applied purposively, constructively and by use the Mischief Rule as much as to the decision of the Minister as it does to court decisions because once the same is adopted by courts it becomes an order of the court as much as any decision argued before the court in determined. The provision is that;

*"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."*

**66.** What was the mischief to be cured by the said provision?

It is that a party who benefits from a decision, whether a judgment or decree, or a decision, should not sit on it for over twelve years and expect it to be useful any longer. Similarly, where in such a decision as the Minister's of 4<sup>th</sup> February 1986 gave a right of ownership to the party who succeeded before him, it was incumbent on him to move the court for adoption of the same and if he did so, time would shift from running from the date of the decision to that of adoption by the court. Since the Plaintiff did not move the Court, time for reliance on that decision begun to run from the date of the decision. Thus, by the 4<sup>th</sup> February 1998 or whichever later date it is proven that he never acted on it and twelve years ended by then, it sealed the fate of the plaintiff in reliance on the decision. The decision of the Minister cannot be a forever open one. It becomes, and the instant one became, stale just as court decisions do after some time if they are not implemented. The Plaintiff cannot rely on it as to create any further legal right or trust in his favour after such a long time beyond twelve years of inaction.

**67.** Of creation of trusts, in the case of **Kazungu Fondo Shutu V Japhet Noti Charo (2021) eKLR**, the Court of Appeal stated as follows:

**“The concept of trust must however, be proved. This Court in the case of Mumo v Makau [2002] 1 EA.170, held that “trust is a question of fact to be proved by evidence.....” See also Kanyi Muthiora V Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982.”**

**68.** In the case of **Twalib Hatayan Twalib Hatayan & Anor V Said Saggar Ahmed Al-Heidy & Others [2015] eKLR** the court stated as follows: -

**“Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” ..... A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained...**

**A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee...”**

**69.** It is this court’s view that there was no evidence led to show that the Defendants were involved in any way, manner, shape or form with the Adjudication and Demarcation process leading to registration of the suit land’s registration apart from being occupants of the area then under adjudication, and subject to the processes thereto as any other ordinary citizen. It is no doubt that this was purely a government process done by the Land and Adjudication Settlement Department not within the Defendants’ purview and control.

**70.** PW2, the land adjudication and settlement officer, Homabay County upon cross examination confirmed that the objection was limited to parcel no 962 and that the Plaintiff had not been awarded the two parcels being 960 and 962. He also confirmed that he did not have the adjudication record for parcel no. 960 or 962.

**71.** In any event the Plaintiff never took possession of the suit land or any part thereof from the time it was decided by the Minister that he was to be given a portion thereof. It means that even by virtue of **Section 7** of the **Limitation of Actions Act** he could not recover possession of the said parcel or part thereof from the Defendants after the end of twelve years. Thus, even the issue or claim of trust does not lie in his favour in the circumstances.

**72.** Put differently and precisely, it is not in contention that the Plaintiff was not in actual possession of the suit property so that a constructive trust could arise. In the circumstances, it is this court's view that constructive trust could not arise hence the Plaintiff failed to prove that the Defendants held the suit land in his trust.

**73.** It is this court's view that the evidentiary burden lay upon the Plaintiff to prove the creation of a trust by an act of wrongdoing on the part of the Defendants. However, it is my opinion that with regard to the adjudication process and registration of the suit parcels in the Defendants' name, there was no direct link to warrant any wrong doing upon the Defendants. The process was carried out aboveboard at the

time, and when the issue arose, the procedure of the party who challenged it was in accordance with the law. Following it, the Minister gave a decision by which part of the property was to be given to the claimant as analyzed above in paragraphs 63 and 64.

**74.** The upshot of the foregoing is that the Plaintiff failed to prove his case on a balance of probabilities.

**b) Whether the Plaintiff is entitled to the reliefs sought.**

**75.** Having established that the Plaintiff failed to prove his case to the required standard, it therefore follows that he is not entitled to the prayers sought in his Plaint dated 23<sup>rd</sup> June, 2020.

**76.** Consequently, the Plaintiff's case is hereby dismissed. Since the parties are related, this Court uses its discretion to order that each party bears its own costs of the suit.

**77.** Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 19<sup>th</sup> day of January, 2026.

Hon. Dr. iur Nyagaka

Judge

From 1:13 PM in the presence of,

Court Assistant: Lola

Mr. Mulisa Advocate for the Plaintiff

Mr. Kisera Advocate for the Defendants