

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**  
**ELC NO 143 OF 2014**

**RT. REV. DR. ZAKAYO ITEBA EPUSI .....**

**PLAINTIFF**

**= VERSUS =**

**JUSTUS EYTANG ORODI alias ETYANG OKACHO ...**

**DEFENDANT**

**J U D G M E N T**

1. **“Let sleeping dogs lie”**. This basically means to ignore a problem because trying to deal with it could cause an even more difficult situation. Don't rock the boat. The above synonym came to mind as I heard this dispute between **RT REV DR ZAKAYO ITEBA IPUSI** (the Plaintiff) and **JUSTUS ETYANG ORODI** alias **ETYANG OKACHO** (the Defendant) over the ownership of the land parcels **NO NORTH TESO/KOCHOLIA/1949** and **1950** (the suit land) and which are resultant sub-divisions of the original land parcel **NO NORTH TESO/KOCHOLIA/139**. I say so because, while the Plaintiff seeks an order for the eviction of the Defendant from the suit land for being a trespasser, he does not identify on which of the two portions the trespass is being committed.

2. The Plaintiff also acknowledges that the Defendant has always lived on the part of the suit land but again, he does not identify which portion. On the other hand, the Defendant in his counter-claim seeks vacant possession of the original land parcel **NO SOUTH TESO/KOCHOLIA/139** and cancellation of the titles created therefrom which of course will mean that even he will continue living on the land without a valid title deed. That is why as I draft this judgment, I am agonizing on whether I should just make a disposal order directing the parties to continue living and co-existing on the suit land. But that will just be postponing a problem for the future generations yet, under **Section 18(iv)** of the **Environment and Land Court Act**, among the principles that should guide this Court is

**(iv) “The principle of intergenerational and intragenerational equity”.**

3. The duty of a Court of law is to provide solutions to real disputes. Therefore, and notwithstanding the convoluted issues herein, I must not **“let sleeping dogs lie”** which is the easier option. I will craft a disposal order which hopefully

will bring an end to this dispute for the benefit of the parties present and future generations.

4. By a plaint dated 17<sup>th</sup> April 2014 and filed herein on the same day, the Plaintiff seeks judgment against the Defendant in the following terms with regard to the suit land:

**1) An Order for the eviction of the Defendant, his agents and servants from the land parcels NO NORTH TESO/KOCHOLIA/1949 and 1950 plus an order of permanent injunction restraining the Defendant, his agents and servants from interfering with the said land.**

**2) Costs of this suit.**

5. The gist of the Plaintiff's claim is that the suit land is a resultant sub-division of the original land parcel **NO NORTH TESO/KOCHOLIA/139** which belonged to the late **YOKOSOFATI OTWANE** father to one **MARGARET ETYANG** aka **MARGARET ETYANG ETE**. That prior to his demise, the said **YOKOSAFATI OTWANE** had transferred the original land parcel **NO NORTH TESO/KOCHOLIA/139** to his daughter **MARGARET ETYANG ETE** (herein **MARGARET ETYANG**) who subsequently sub-divided it to create the suit

land. The suit land was thereafter sold to the Plaintiff first vide a sale agreement dated 1<sup>st</sup> May 1998 and subsequently vide another sale agreement dated 13<sup>th</sup> March 1999. The Plaintiff paid the full purchase price and obtained the titles thereto. He then fenced the suit land in 2006 but the Defendant has since pulled it down.

6. In 2007, there was a boundary dispute between the Defendant on one side and one **MARGARET NANGUYE IKONG'O**, her sister **DEMITILA IKAANI** and one **OKACHO ORODI** on the other side. The dispute was heard by the then Dispute Tribunal at **AMAGORO** which awarded the Defendant the land. The award by the Tribunal was adopted as a judgment of the **BUSIA COURT**. However, **MARGARET NANGUYE IKONG'O** (it is not clear if this is the same **MARGARET ETYANG**) appealed that decision to the Appeals Committee which was disbanded before hearing the appeal. The Plaintiff adds that although he is the registered proprietor of the suit land, he was not enjoined in the proceedings. On 25<sup>th</sup> June 2014, the Plaintiff and **MARGARET ETYANG** were summoned by the Land Registrar Busia who informed them that surveyors would be

visiting the suit land to implement the Court order. That necessitated the filing of this suit.

7. In support of his claim, the Plaintiff filed a statement dated 24<sup>th</sup> April 2017 and a further statement dated 4<sup>th</sup> April 2024.
8. His statement dated 24<sup>th</sup> April 2017 is basically a rehash of what is contained in his plaint. It summarizes how on the morning of 25<sup>th</sup> April 1998 **MARGARET ETYANG** and **DEMITILA BARASA** informed him that their father **YOKOSOFATI OTWANE** wanted to sell his land parcel **NO NORTH TESO/KOCHOLIA/139** which had already been registered in the name of **MARGARET ETYANG**. He expressed interest in purchasing the land and it was also agreed that he would pay for it in instalments. The relevant consent of the Land Control Board was obtained and the suit land was transferred to **MARGARET ETYANG** following a sub-division who then sold it to the Plaintiff who was subsequently issued with the title deeds.
9. Thereafter, the Defendant started complaining and reported the Plaintiff to the Assistant Chief who referred the issue to the Chief and subsequently the District Officer who informed the Defendant that he is a squatter occupying land which is

not his. The case was later heard by the Land Disputes Tribunal in the absence of the Plaintiff who was out of the country and during his life time and which she subsequently sub-divided to create the suit land which she sold to the Plaintiff. That the sale transactions were above board and were never challenged and therefore the suit land vests in the Plaintiff yet the Defendant has encroached thereon and is claiming ownership. That the Defendant had his own land which was taken over by his brother **ASA NYONGESA ORODI**. The Defendant is not a son of **YOKOSOFATI OTWANE** nor his dependant and therefore he has no reasonable claim to the suit land. Therefore, the Plaintiff is entitled to the orders which he seeks in the plaint.

10. The Plaintiff filed a list of documents dated 17<sup>th</sup> April 2014 and 24<sup>th</sup> April 2017 as well as a supplementary statement dated 4<sup>th</sup> April 2024.
11. The documents **NO 1** to **4** on the list of documents dated 17<sup>th</sup> July 2014 were expunged from the record during the hearing on 26<sup>th</sup> April 2023. That only left the following documents from that list which were produced by the Plaintiff during the plenary hearing:

- 1) Expunged.
- 2) Expunged.
- 3) Expunged.
- 4) Expunged
- 5) Application to the Land Control Board dated 2<sup>nd</sup> December 1985 for the transfer of the land parcel **NO NORTH TESO/KOCHOLIA/139** from **YOKOSOFATI OTWANE** to **MARGARET ETYANG ETE** by way of a gift.
- 6) Receipt dated 3<sup>rd</sup> December 2012.
- 7) Letter of Consent dated 5<sup>th</sup> December 1985.
- 8) Receipt for transfer dated 7<sup>th</sup> March 1986.
- 9) Land Sale agreement dated 1<sup>st</sup> May 1988.
- 10) Land sale agreement dated 13<sup>th</sup> June 1986.
- 11) Land Sale agreement dated 13<sup>th</sup> March 1999.
- 12) Land Sale agreement dated 24<sup>th</sup> September 1999.
- 13) Land boundary dispute report dated 7<sup>th</sup> November 1999.
- 14) Title deeds for the land parcels **NO NORTH TESO/KOCHOLIA/1949** and **1950**.

15) Certificates of Official Search for the land parcels  
**NO NORTH TESO/KOCHOLIA/1949** and **1950**.

16) Letter dated 3<sup>rd</sup> August 2007 from the Provisional  
Commissioner Kakamega addressed to the Principal  
Magistrate Busia.

17) Letter dated 13<sup>th</sup> June 2014 from **IMWENE P.A.**  
**ADVOCATE** addressed to the District Land  
Registrar Busia.

18) Letter from the Land Registrar Busia dated 25<sup>th</sup> June  
2014 and addressed to the Plaintiff and  
**MARGARET ETYANG.**

The Plaintiff filed a further list of documents dated 24<sup>th</sup> April  
2017 containing the following:

- 1) Copies of land sale agreements between the  
Plaintiff and **MARGARET ETYANG.**
- 2) Copies of title deeds for the land parcels **NO**  
**NORTH TESO/KOCHOLIA 1949** and **1950.**
- 3) Photographs.

The Plaintiff also filed a list of documents dated 8<sup>th</sup>  
September 2021 containing a copy of the Register for the  
land parcel **NO NORTH TESO/KOCHOLIA/139** and another

list of documents dated 4<sup>th</sup> October 2022 to which is annexed a copy of the ruling delivered in **BUSIA ELC CIVIL APPEAL NO 4 of 2019 - MARGARET NANGUYE IKONG - V- JUSTUS ETYANG ORODI & LAND REGISTRAR BUSIA.**

12. The Defendant filed a defence and counter-claim in which he denied the averments by the Plaintiff and pleaded, inter alia, that the transfer of the suit land to the Plaintiff was recalled and cancelled by the Land Registrar. Further, that all disputes with respect to the suit land were determined in his favour and the award adopted as an order of the Court and no appeal is pending against the decision of the Land Disputes Tribunal.
13. In his counter-claim, the Defendant pleaded that he was adopted by **YOKOSOFATI OTWANE** and inherited the land parcel **NO NORTH TESO/KOCHOLIA/1939** (it is actually **NO NORTH TESO/KOCHOLIA/139**) where he has lived since 1967 to-date. He is therefore the sole proprietor of the said land parcel **NO NORTH TESO/KOCHOLIA/139** and that the sub-division thereof to create the suit land was fraudulent and that there is an order and decree of the Land Registrar to recall and cancel any transfer on the mother title. That

the Plaintiff has refused to give him vacant possession of the suit land which he fraudulently transferred to himself. That a Preliminary Objection would be raised that this suit is res judicata since the matter in dispute was determined in **BUSIA CHIEF MAGISTRATE'S COURT LAND CASE NO 10 of 2007.**

14. The Defendant pleaded in his counter-claim that on diverse dates in January 2009, the Plaintiff through his agents destroyed his cassava and mangoes resulting in crop loss valued as follows:

- |                         |                 |
|-------------------------|-----------------|
| 1) Cassava              | - 1,200         |
| 2) Land Preparation     | - 100           |
| 3) Planting Material    | - 100           |
| 4) Transport Costs      | - 100           |
| 5) Planting and Weeding | - 100           |
| 6) Value of Mangoes     | - <u>16,000</u> |

Total Kshs.17,800.00

15. The Defendant therefore prays for judgment against the Plaintiff by way of counter-claim as follows:

- a) The Plaintiff's suit be dismissed with costs.
- b) The Defendant be granted vacant possession of the land parcel **NO NORTH TESO/KOCHOLIA/139** and

cancellation of any titles created from the mother title.

- c) Kshs.17,800
- d) Costs of the suit and counter-claim.
- e) Interest at Court rates

16. The Defendant filed his statement in which he averred that **YOKOSOFATI OTWANE** was his uncle and since he had no sons, he adopted him but had two daughters namely **MARGARET ETYANG** and **DEMITILA ETE**. That his uncle gave him a portion of the land parcel **NO NORTH TESO/KOCHOLIA/139** where he has lived since 1967 and even buried his son **GODRICK EKIRAPA** without any dispute. Every one considers him to be the son of **YOKOSOFATI OTWANE** and even when **MARGARET ETYANG'S** marriage failed and she returned to her parents homestead, she was not gifted with any land nor was she considered for inheritance against Teso Customary law.

17. That when **YOKOSOFATI OTWANE** fell ill, **MARGARET ETYANG** took advantage and started transferring the land parcel **NO NORTH TESO/KOCHOLIA/139** into her names and even took him to the Land Registrar to append his

signature on the transfer. She never tried to share the land with **DEMITILA** who declined as she was married elsewhere and it was against Teso customary law. **MARGARET ETYANG** then sold the land parcel **NO NORTH TESO/KOCHOLIA/139** to the Plaintiff who sub-divided it to create the suit land. That neither the Defendant nor the family members consented to the transfer of the suit land to the Plaintiff and which took place when there was an ongoing dispute at the Land Disputes Tribunal which was determined in favour of the Defendant. The award of the Land Disputes Tribunal was adopted by the Magistrate's Court in favour of the Defendant and the Land Registrar was directed to recall and cancel the title deeds to the suit land and register the same in the name of the Defendant. However, each time the Land Registrar and County Surveyor visit the suit land to effect the Court order, the Plaintiff disregards the orders and is still in possession of the suit land yet all the issues were settled by the Land Disputes Tribunal.

18. The Defendant filed the statement of his witness **DEMITILA IKAAN BARASA** dated 2<sup>nd</sup> June 2023 in which she described

the Defendant as her brother and the adopted son of her late father **JOSOKOFATI OTWANE** since 1966/1967. That her late father had only two daughters being herself and **MARGARET ETYANG** and owned the land parcel **NO NORTH TESO/KOCHOLIA/139** part of which he had allocated to the Defendant where he built his home when he became of majority. The land had been inherited by their grandfather from their great grandfathers and was therefore ancestral land.

19. Since she was married, she was surprised when she visited home and was informed that her sister **MARGARET ETYANG** had fraudulently transferred the land into her name and later sold it to the Plaintiff. She denied having been a witness to the sale agreements or any documents adding that the transfer was done without the consent of her late father or herself and she was surprised to see the suit land fenced including the Defendant's homestead.
20. The Defendant filed a suit at the Land Disputes Tribunal which ruled in his favour but the decision was quashed by the High Court on the ground that the Land Disputes Tribunal had no jurisdiction to nullify the Plaintiff's title. This

Court should therefore dismiss the Plaintiff's case and make an order that the suit land be registered in the Defendant's name with her having a life interest therein as his sister. If there was any exchange of money, which is disputed, the issue should be resolved between the Plaintiff and **MARGARET ETYANG** because the suit land was ancestral land. That evicting the Defendant who has interred bodies therein would be prejudicial to him because by the time the Plaintiff purchased the suit land, the Defendant was in occupation. The Plaintiff's suit should be dismissed.

21. The Defendant filed the following lists of documents dated 15<sup>th</sup> July 2018, 22<sup>nd</sup> May 2023 and 2<sup>nd</sup> June 2023 to which were annexed the following documents:

**15<sup>th</sup> July 2018:**

- 1) Letter dated 25<sup>th</sup> June 2014 from the Land Registrar Busia addressed to the Plaintiff and **MARGARET ETYANG**.
- 2) Letter from the Agricultural Officer Amagoro dated 12<sup>th</sup> February 2009 and addressed to whom it may concern.
- 3) Decree issued in **BUSIA PRINCIPAL MAGISTRATE'S COURT** land dispute **NO 10** of **2007** between the

Defendant and **MARGARET NANGUYE IKONG**  
adopting the Tribunal's award.

- 4) Defendant's statement.
- 5) Letter from the Provincial Commissioner Kakamega dated 3<sup>rd</sup> August 2007 addressed to the Principal Magistrate's Court Busia.
- 6) Letter dated 31<sup>st</sup> to the District Officer Amagoro by the Defendant.
- 7) Copy of the proceedings of the Amagoro Land Disputes Tribunal case **NO 10** of **2006** between the Defendant (as claimant) and **MARGARET ETYANG** (as objector).

**22<sup>nd</sup> May 2023:**

- 1) Boundary disputes minutes dated 7<sup>th</sup> November 1999.
- 2) Letter from Amagoro location Chief dated 16<sup>th</sup> March 2023 and addressed to whom it may concern.
- 3) Certificate of death for **YOKOSOFATI OTWANE** showing date of death as 16<sup>th</sup> March 2020.

The Plaintiff filed on 3<sup>rd</sup> September 2021, reply to defence and a defence to the counter-claim dated 8<sup>th</sup> September 2021 and denied the Defendant's averments in paragraphs 18, 19, 20, 21, 22, 23 and 24 adding that by the time he

purchased the suit land, it was vacant. He repeated that the original land parcel **NO NORTH TESO/KOCHOLIA/139** was registered in the name of **YOKOSOFATI OTWANE** who on 5<sup>th</sup> December 1985 obtained the relevant consent to transfer it to **MARGARET ETYANG** which title was subsequently closed and the suit land was transferred to the Plaintiff above board and without any fraud. He put the Defendant to strict proof of his counter-claim and pleaded that the same be dismissed with costs and that his plaint be allowed.

22. The hearing commenced on 26<sup>th</sup> April 2023 and ended on 18<sup>th</sup> February 2025 when the Defendant closed his case.
23. The parties testified and adopted as their evidence the contents of their statements which I have summarized above. They also called their witnesses who also adopted as their evidence the contents of their statements summarized above. They also produced as their documentary evidence the documents annexed to their respective lists of documents filed herein.
24. Submissions were thereafter filed both by **MR MURUNGA** instructed by the firm of **CHENGASIA MURUNGA & COMPANY ADVOCATES** for the Plaintiff and by **MS**

**CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the Defendant.

25. I have considered the evidence by the parties and their witnesses as well as the submissions by counsel.
26. Before I delve into the merits or otherwise of the parties respective cases, I need to confirm, for the avoidance of any doubt, that although the Defendant had filed a Notice of Preliminary Objection dated 15<sup>th</sup> February 2018 contemporaneously with his defence and counter-claim in which he pleaded that the issues in this suit are res judicata having been determined in **BUSIA CHIEF MAGISTRATE'S COURT LAND CASE NO 10** of 2007, I have checked the record and confirmed that **KANIARU J** considered the Preliminary Objection and dismissed it vide his ruling delivered on 11<sup>th</sup> September 2019. No appeal was filed against that ruling. Therefore, the plea of res judicata is no longer a matter for my consideration in this judgment.
27. I have identified the following issues for my determination in this matter:

**1) Whether the Plaintiff is entitled to an order for the eviction of the Defendant, his agents**

and servants from the suit land and also an order permanently injunctioning them from interfering with the said land.

- 2) Whether the Defendant is entitled to an order of vacant possession of the suit land and the cancellation of the titles.
- 3) Whether the Defendant is entitled to an order of special damages of Kshs.17,800.
- 4) Who shall meet the costs of the suit.

I shall consider the claims by the parties in that sequence:

**THE PLAINTIFF'S CLAIM:**

28. The Plaintiff seeks the eviction of the Defendant, his agents, servants and all those claiming under him from the suit land as well as an order of permanent injunction restraining them from interfering with the suit land.
29. It is common ground that the Plaintiff has since 16<sup>th</sup> November 1999 been the registered proprietor of the land parcel **NO NORTH TESO/KOCHOLIA/1949** and since 10<sup>th</sup> July 1998 the registered proprietor of the land parcel **NO NORTH TESO/KOCHOLIA/1950**. He holds the title deeds to

the suit land which, in accordance with the provisions of **Section 24(a)** of the **Land Registration Act**, vests in him **“the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”**. Those rights and privileges no doubt, include being able to evict trespassers and other persons who are illegally occupying the suit land and also permanently injunctioning them from interfering with his occupation and possession of the same. However, it is also clear from the provision of **Section 25(2)** of the same **Act** that the rights of a proprietor shall not relieve him **“from any duty or obligation to which the person is subject to as a trustee.”** It is common ground that by the time the Plaintiff purchased the suit land from **MARGARET ETYANG**, the Defendant was already in occupation of the same. When he was cross-examined by **MS CHUNGE** during the plenary hearing on 26<sup>th</sup> April 2023, he said:

**“When I purchased the two parcels of land NO NORTH TESO/KOCHOLIA/1949 and 1950, I was aware that the Defendant was utilizing the same. He was utilizing the parcel NO NORTH**

**TESO/KOCHOLIA/1950. He had a house on it. The original land was NO NORTH TESO/KOCHOLIA/139 and it belonged to JOSPHAT OTWANI ETE who was the uncle to the Defendant before it was subdivided to create parcels NO NORTH TESO/KOCHOLIA/1949 and 1950. I do not recall how long the Defendant has been living on that land. I am aware that the Defendant has another parcel of land but I do not know the number of that land. I am aware that the Defendant has buried his son on portion NO NORTH TESO/KOCHOLIA/1949. When I was buying the land, I did not ask the Defendant to leave the land.”**

When his witness **MARGARET ETYANG (PW2)** was cross-examined by **MS CHUNGE**, she too confirmed that the Defendant occupies the suit land she said:

**“The Defendant and his family live on the land to-date.”**

In his statement dated 15<sup>th</sup> July 2018 and which he adopted as his evidence during the plenary hearing, the Defendant states in paragraph 3 that:

**“My uncle gave me a piece of land to settle out of his family’s portion being land parcel NO NORTH TESO/KOCHOLIA/139 where I have lived from 1967 to-date. I even buried my son the late GODRICK EKIRAPA on the parcel of land in the 1980’s and there were no disputes on the burial place since everyone in the family considered me as the son of the deceased YOKOSOFATI OTWANE ETE.”**

The Plaintiff’s evidence is that he purchased the two portions of the suit land in 1998 and 1999 which is also confirmed by the copies of the title deeds. By that time, the Defendant who had been living on the suit land since 1967 had been in occupation and possession thereof for over 30 years. And by the time the Plaintiff filed this suit in 2014, the Defendant had been in occupation and possession thereof for 47 years having even buried his son thereon. The Plaintiff admitted in cross-examination that although he was aware of the

Defendant's occupation and possession of the suit land, he did nothing about it. **Section 7** of the **Limitation of Actions Act** provides that:

**7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

30. Even if time is computed from 1999 or 1998 when the Plaintiff purchased the suit land, it is obvious that by the time the Plaintiff obtained the title deeds to the suit land, the Defendant has been in occupation and possession of the same way over the 12 years limitation period within which he should have filed this suit to claim any eviction or injunctive orders against the Defendant with respect to the suit land. The Plaintiff's claim, in so far as it relates to the portion of the suit land which the Defendant occupies, is clearly statute barred. The Defendant himself did not state what acreage of the suit land he occupies. However, in paragraph 15 of his statement, the Plaintiff states:

**15: “That I have been utilizing the land comprised in L.R NO N. TESO/KOCHOLIA/1949 and 1950 since 1999 to date save for a portion of land measuring approximately a quarter ( $\frac{1}{4}$ ) an acre comprised in LR NO N. TESO/KOCHOLIA/1950 where the Defendant resides.”**

In paragraph 3 of his statement, the Defendant himself states:

**3: “My uncle gave me a piece of land to settle.”**

31. Given those circumstances, this Court must go by the Plaintiff’s testimony that the Defendant only occupies one quarter ( $\frac{1}{4}$ ) acre of the suit land and not the whole of it. The Plaintiff’s claim to that portion of the suit land measuring one quarter ( $\frac{1}{4}$ ) of an acre is therefore statute barred and not the whole of the suit land. Therefore, the Defendant cannot be evicted from that one quarter ( $\frac{1}{4}$ ) acre out of the suit nor injunctioned therefrom. However, he can be evicted from the remainder of the suit land and injunctioned therefrom if indeed he is occupying it. I shall be making appropriate orders shortly with respect to the Plaintiff’s claim.

## **THE DEFENDANT'S COUNTER-CLAIM**

32. The Defendant has pleaded in paragraph 21 of his defence and counter-claim that:

**21: “The Plaintiff herein has declined and/or refused to give the Defendant herein vacant possession of land parcel NO NORTH TESO/KOCHOLIA/1949 and NORTH TESO/KOCHOLIA/1950 the said parcels of land having been found to have been fraudulently transferred to the Plaintiff.”**

33. Of course, whatever findings the Land Disputes Tribunal had made with respect to the registration of the suit land in the Plaintiff's name cannot aid the Defendant. Those proceedings and the resultant award were found by **KANIARU J** vide his ruling on 11<sup>th</sup> September 2019 to have been made out of jurisdiction. It therefore behoved the Defendant, in this suit, to specifically plead and prove any allegations of fraud in the manner in which the Plaintiff obtained his title to the suit land if he desired this Court to cancel them and give them possession thereof as pleaded in

paragraph 24(a) of his counter-claim. This is because, as provided in **Section 26(1) (a)** of the **Land Registration Act**, a certificate of title to land is prima facie evidence that the person named as the proprietor thereof **“is the absolute and indefeasible owner”** subject of cause to any encumbrances, easements, restrictions and conditions endorsed therein and the same cannot be challenged except:

- (a) **“On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- (b) **where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Defendant has not, in his counter-claim, specifically pleaded any allegations of fraud nor proved the same. In the case of **VIJAY MORJARIA -V- NANSING MADHSING DARBAR & ANOTHER 2000 eKLR TUNOI JA** stated thus:

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the**

**pleadings. The acts alleged to be fraudulent must, of course, be set out and it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”**

34. See also the case of **KINYANJUI KAMAU -V- GEORGE KAMAU 2015 eKLR** and also **NDOLO -V- NDOLO 2008 IKLR (G&F) 742**. Other than the fact that the allegations of fraud were not pleaded, there was no iota of evidence adduced by the Defendant **“that he is the sole proprietor of land parcel NO NORTH TESO/KOCHOLIA/1939 (sic)”** as pleaded in paragraph 20 of his defence and counter-claim. The documentary evidence provided show that the land parcel **NO NORTH TESO/KOCHOLIA/139** (not **1939** as pleaded by the Defendant) was always the property of **YOKOSOFATI OTWANI** and he transferred it to **MARGARET ETYANG** during his life time who then sub-divided it to create the suit land which she then transferred to the Plaintiff for valuable consideration. Clearly therefore, the

Defendant cannot claim ownership of the suit land nor cancellation of the title or any portion thereof on the basis that the Plaintiff obtained title to the same by way of fraud.

35. Having said so, is the Defendant nonetheless entitled to any portion of the suit land by virtue of a trust? In my view, the evidence in this case suggest so. It is of cause settled law that a party claiming any property by way of a trust must plead as much **MBOTHU -V- WAITIMU 1986 KLR 171**. It is also well settled however, that in appropriate cases, that a Court can determine any issue which has not been pleaded. In the case of **ODD JOBS -V- MUBIA 1970 EA 476**, it was held that a Court may base it's decision on an un-pleaded issue if it appears from the cause taken at the trial that the issue has been left for the Court to decide. That decision by the then Court of Appeal for East Africa has been followed by our Court of Appeal in many cases including in **ALIAZA -V- SAUL 2022 KECA 583**.

36. In this case, one of the issues which came out clearly was that the Defendant was a member of the family of **YOKOSOFATI OTWANE** the proprietor of the original land parcel **NO NORTH TESO/KOCHOLIA/139** who had no son

but had adopted him as his son. That is really a matter of public knowledge because, in his letter dated 16<sup>th</sup> March 2023 and addressed to whom it may concern and which is among the documents filed herein, the Chief **AMAGORO LOCATION** identifies the Defendant, **MARGARET ETYANG** and **DEMITILA IKAAN** as the children of **YOKOSOFATI OTWANE**. In the said letter under the reference **YOKOSOFATI OTWANE ETE ID NO 2064521 (DECEASED)** the Chief states as follows in paragraph two:

**“The purpose of this letter is to clearly and lawfully confirm that the deceased was a father to three children, one male and two female children, this are (sic) eligible rightful beneficiaries of all estates and other assets of the deceased. But all these to be done typically in TRUST and CARE of entire nuclear surviving family members. Bellow (sic) are ultimate children as follows:**

- 1) Oketch Etyang Orodi - ID NO 2064409.**
- 2) Demitila Ikaan - ID NO 4215250.**
- 3) Margaret Etyang Etee - ID NO 0549107.”**

The Plaintiff in paragraph 5 of his plaint has pleaded thus:

**5: “The Defendant has his inheritance from his father’s land in the neighbourhood, to (sic) he is supposed to move to but he has refused.”**

However, the Plaintiff himself conceded in his viva voce evidence which I have already cited above, that when he purchased the suit land, the Defendant was already in occupation of a portion thereof. He also confirmed that, the Defendant was occupying a portion measuring approximately  $\frac{1}{4}$  acre, there is no evidence that during his life time, **YOKOSOFATI OTWANE** had ever tried to evict the Defendant from the suit land. And the fact that the Plaintiff has waited until the filing of this suit to seek an order of eviction of the Defendant from the suit land means that he recognized that the Defendant’s interest therein arising from being a member of the family of **YOKOSOFATI OTWANE** the owner of the original land parcel **NO NORTH TESO/KOCHOLIA/139**. Therefore, the issue as to whether or not the Defendant is entitled to a portion of the suit land by virtue of being a member of the family of the late

**YOKOSOFATI OTWANE** is a matter which has been left for this Court to determine. I must therefore do so by considering whether the Defendant's claim can be anchored on a customary trust.

37. A trust, as defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** is:

**"The right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title."**

And as was held by the **SUPREME COURT** in the case of **ISACK M'INANGA KIEBIA -V- ISAAYA THEURI M'LINTARI & ANOTHER 2018 eKLR**, the issues which the Court has to consider in determining whether a customary trust has been established include:

- 1) The land in question was family, clan or group land.
- 2) The claimant belongs to the family, clan or group.
- 3) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his or her claim idle or adventurous.

- 4) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- 5) The claim is directed against the registered proprietor who is a member of the family, clan or group.

The Defendant's witness **DEMITILA IKAAN BARASA (DW2)** confirmed in paragraph 19 of her statement thus:

**19: "That the initial title comprised in the suit land was inherited by our grandfather from our great grandfathers being family/ancestral land from the Ikarwok clan of the Teso tribe."**

38. Earlier on in the said statement dated 2<sup>nd</sup> June 2023, she confirmed that the Defendant had been adopted by the late **JOSOKOFATI OTWANE** as his son and was allocated part of the suit land where he built his home (paragraph 15). It is from this portion of the suit land which the Plaintiff seeks to evict the Defendant and permanently injunct him from interfering yet he found the Defendant in occupation of the same. The Defendant cannot be deemed to be a trespasser

on the portion of the suit land which he occupies. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect it for 12 years after purchasing it - **MWEU -V- KIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 KLR 430.**

In this case, the Plaintiff not only knew about the Defendant's occupation of a portion of the suit land but further, he tacitly recognized the Defendant's interests in the said portion and therefore held the title in trust for the Defendant.

39. Although the Defendant seeks by way of his counter-claim, possession of the original land parcel **NO NORTH TESO/KOCHOLIA/139** and cancellation of the title to the suit land as well as the sum of Kshs.17,800 being the value of his damaged crop, he has not stated whether in fact he occupies the whole of the suit land. In paragraph 21 of his defence and counter-claim, he had pleaded that the Plaintiff **"has declined"**, and/or refused to give the Defendant herein vacant possession of the land parcel **NO NORTH TESO/KOCHOLIA/1949** and **NORTH TESO/KOCHOLIA/1950**. That is a clear admission that the

Defendant only occupies a portion of the suit land and since the Plaintiff has identified that portion as measuring ( $\frac{1}{4}$ ) quarter of an acre without rebuttal, the Court will go by the Plaintiff's computation. That is why at the commencement of this judgment I debated on whether I should **"let sleeping dogs lie"**. I decree that each party continues occupying whatever portion of the suit land they are occupying. However, in order to bring this dispute to an end, I must make disposal orders awarding each of the parties a specific acreage of the suit land. When he was cross-examined by **MS CHUNGE** on 26<sup>th</sup> April 2023, the Plaintiff said:

**"When I purchased the two parcels of land NO NORTH TESO/KOCHOLIA/1949 and 1950, I was aware that the Defendant was utilizing the same. He was utilizing the portion NO NORTH TESO/KOCHOLIA/1950. He had a house on it."**

That can only mean that the ( $\frac{1}{4}$ ) quarter acre of land which the Defendant is entitled to can only be hived from the parcel **NO NORTH TESO/KOCHOLIA/1950** since he has himself not identified which of the two parcels which make up the suit land he occupies.

40. With regard to the claim of Kshs.17,800 being the value of the damaged crop, the letter from the **DISTRICT AGRICULTURAL OFFICER AMAGORO** dated 12<sup>th</sup> February 2009 is headed:

**RE: CROP DAMAGE ASSESSMENT JUSTUS OKACHO**

However, it does not state whether the damage crops were on the parcel **NO NORTH TESO/KOCHOLIA/1949** or **1950**. However, the report identifies the owner of the damaged crop as '**JUSTUS OKACHO**' who am satisfied, is the Defendant herein. It is un-likely that the Plaintiff would have damaged his own crop. This Court is therefore satisfied that the value of the damaged crop has been specifically pleaded and proved to be Kshs.17,800 and, most importantly, that the crop must have been on the portion of the land parcel **NO NORTH TESO/KOCHOLIA/1950** which the Court has now found to be the portion occupied by the Defendant. The title deed to the land parcel **NO NORTH TESO/KOCHOLIA/1950** shows that it measures 0.80 Hectares i.e. 1.97 Acres. The Defendant is therefore entitled to a portion thereof measuring ( $\frac{1}{4}$ ) quarter of an acre.

41. With regard to costs, this Court finds that the most prudent order to make in the circumstances is for each party to meet their own costs as each has partly succeeded.
42. Ultimately therefore and having considered the evidence by all the parties herein, this Court makes the following disposal orders:

**1) The title to the land parcel NO NORTH TESO/KOCHOLIA/1949 shall remain in the name of the Plaintiff.**

**2) The Plaintiff holds a portion measuring  $\frac{1}{4}$  quarter an acre out of the land parcel NO NORTH TESO KOCHOLIA/1950 in trust for the Defendant.**

**3) The Plaintiff shall within 30 days of this judgment surrender to the Land Registrar Busia the original title deed for the land parcel NO NORTH TESO/KOCHOLIA/1950 and execute all the relevant documents to facilitate the sub-division of the said title to register a portion measuring ( $\frac{1}{4}$ ) quarter of**

**an acre in the name of the Defendant and the balance in the name of the Plaintiff.**

- 4) In default of (3) above, the Deputy Registrar of this Court shall execute all the relevant documents on behalf of the Plaintiff and the Land Registrar Busia and County Surveyor Busia shall proceed accordingly notwithstanding the absence of the original title deed to the land parcel NO NORTH TESO/KOCHOLIA/1950.**
- 5) The Defendant shall meet the costs of the sub-division and registration.**
- 6) Thereafter, the Defendant, his agents, servants, family and all those claiming under him shall be permanently enjoined from interfering with the portion registered in the name of the Plaintiff and similarly, the Plaintiff shall be permanently enjoined by himself, his servants, agents and all those claiming under him from interfering with the**

portion registered in the name of the Defendant.

- 7) The Defendant shall be granted vacant possession of the ( $\frac{1}{4}$ ) quarter acre out of the land parcel NO NORTH TESO/KOCHOLIA/1950 registered in his name.
- 8) In sub-dividing the land parcel NO NORTH TESO/KOCHOLIA/1950, the Land Registrar and County Surveyor Busia shall ensure that as much as possible, that portion falls within what the Defendant currently occupies.
- 9) The Plaintiff shall pay the Defendant the sum of Kshs.17,800 being the value of the damaged crops together with interest from the date of filing this suit.
- 10) The parties shall each meet their own costs of the suit and counter-claim.

**BOAZ N. OLAO  
JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**

**Judgment dated, signed and delivered by way of electronic mail on this 26<sup>th</sup> day of February 2026 with notice to the parties.**

**Right of appeal.**

**BOAZ N. OLAO  
JUDGE  
26<sup>TH</sup> FEBRUARY 2026**

Explanatory notes:

This judgment was due for delivery on 11<sup>th</sup> October 2025. However, following my transfer to Iten Court w.e.f 15<sup>th</sup> January 2026, I had to prioritize my part heard cases. This has contributed towards the delay in delivering this judgment. The same is registered.

**BOAZ N. OLAO  
JUDGE  
26<sup>TH</sup> FEBRUARY 2026**