

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 31 OF 2017

ALOIS WAFULA CHAMI.....

PLAINTIFF

= VERSUS =

JULIA AKELLO CHAMI 1ST DEFENDANT

PATRICK OUMA CHAMI 2ND

DEFENDANT

J U D G M E N T

1. The authors of **WIKIPEDIA** have defined **GREED** as:

“an insatiable desire for material gain (be it food, money, land or animate/inanimate possessions) or social value such as status or power at the expense of others in the community.”

Maybe they had **ALOIS WAFULA** (the Plaintiff) in mind when they coined that definition. But it aptly defines him as will shortly become clear in this judgment.

2. By a plaint filed herein on 9th February 2017, the Plaintiff impleaded **JULIA AKELLO CHAMI** and **PATRICK OUMA**

CHAMI (the 1st and 2nd Defendants respectively) seeking the main order that the Defendants be evicted from the land parcel **NO BUKHAYO/BUGENGI/1** (the suit land) measuring 1.087 hectares (it is actually 1.807 hectares as per the copy of title deed). He also seeks an order for costs of the suit.

3. The gist of the Plaintiff's case is that he is the registered owner of the suit land which was originally registered in the name of his late father **YOHANA CHAMI MBOKO** (the deceased) and who had mortgaged it to the Agricultural Finance Corporation to secure a loan but which he failed to repay. That the Plaintiff offered to purchase the suit land from the deceased by repaying the loan. That the deceased then transferred the suit land to him and therefore the suit land ceased to be ancestral land after it was transferred to him.
4. That in or about 1979, he employed the Defendant's mother (he does not say which one) as a house-help to take care of the deceased who later died in 1985. That the said house-help then developed a relationship with a neighbour called **WESONGA MASINDE** with whom she

sired the Defendants herein. That he allowed the house-help to stay in the homestead even after his father had died so that she could take care of her young children even though they had been sired by a man outside his family. Then in 2016, the Plaintiff discovered that the Defendants had secretly placed a restriction on the suit land in 2014 claiming ownership of the same thus necessitating the filing of this suit.

5. The Plaintiff filed a statement dated 9th February 2017 in which he basically repeated the averments in his plaint. He adds that the deceased had actually taken a loan of Kshs.22,000 from the Agricultural Finance Corporation but defaulted in repayment. So the Plaintiff repaid the loan and in exchange, the deceased transferred the suit land to him which was later registered in his name.
6. The Plaintiff then employed the 1st Defendant as the deceased's house help at a salary of Kshs.400 per month. That after the demise of the deceased, the Plaintiff allowed the 1st Defendant to continue living on the suit land even though she had sired children with other man. That the Defendants have been cultivating a portion of the

suit land while he is away working in Nairobi. He was therefore surprised to discover that the Defendants have placed a restriction on the suit land claiming ownership of the same. It is for that reason that the Plaintiff has decided to withdraw the permission granted to the Defendants to stay on the suit land and now seeks their eviction therefrom.

7. The Plaintiff filed the following documents in support of his case:

1) Copy of the title deed for the land parcel **NO BUKHAYO/BUGENGI/1** registered in his name on 1st September 1995.

2) Copy of certificate of search for the land parcel **NO BUKHAYO/BUGENGI/1.**

8. The Defendants first filed a joint defence on 10th March 2017 and which was later re-amended on 27th January 2023 to include a counter-claim. They denied the Plaintiff's averments and added that the suit land belonged to the deceased who was their father and who had secured a loan of Kshs.200 but added further that he did not fail to

repay the loan to Agricultural Finance Corporation and put the Plaintiff to strict proof of that allegation.

9. The Defendants pleaded that in fact the suit land is ancestral land which was transferred to the Plaintiff unlawfully and irregularly taking advantage of the old age and poor health of the deceased as well as the 2nd Defendant's tender age and the illiteracy of the 1st Defendant. In any case, the purported transfer of the suit land to the Plaintiff is questionable and is not evidenced. The Defendants are wife and son of the deceased and have been in occupation of the suit land without any interruption for over 38 years. The Plaintiff cannot therefore be entitled to the whole suit land without taking into consideration the fact that a portion thereof had been acquired by virtue of the **Land Acquisition Act**. Any eviction of the Defendants from the suit land will be a violation of their rights.
10. In their counter-claim, the Defendants pleaded that the deceased was the husband to the 1st Defendant and father to the 2nd Defendant and was the registered proprietor of the suit land which was ancestral land. That the deceased

intended to pass the suit land to the sons of his 2nd wife and had transferred to the Plaintiff the land parcel **NO BUKHAYO/BUGENGI/12** which he lives on and cultivates exclusively while the Defendants live on the suit land as members of the deceased's family although it is registered in the Plaintiff's name by virtue of a customary trust.

11. The said customary trust has been particularized in paragraph 13(a) to (g) of the re-amended defence and counter-claim as follows:

- a) The land parcels **NO BUKHAYO/BUGENGI/1** and **BUKHAYO/BUGENGI/12** all form part of the ancestral land of the deceased.
- b) That the Plaintiff and the 1st Defendant are sons of the deceased while the 1st Defendant is his 2nd widow. (This is an error as will become clear from the statements of the Defendants, the 1st Defendant is the widow and the 2nd Defendant the son of the deceased).
- c) That the deceased allocated the land parcel **NO BUKHAYO/BUGENGI/12** to the Plaintiff as his eldest son and remained with the suit land for

the benefit of the younger children who comprised the 2nd Defendant.

- d) That the deceased passed over the ownership of the suit land to the Plaintiff as the eldest son to hold the same for the benefit of the 1st Defendant's house and her younger children.
- e) In the year of the transfer of the suit land to the Plaintiff, the 2nd Defendant was considered as small to qualify for direct registration in the eyes of the initial owner who bestowed greater family responsibilities onto the Plaintiff as his eldest son and who could take care of the interests of the rest of the family members including the younger children.
- f) To perform the role of trusteeship solely for the benefit of the younger sons, the deceased ensured that the Plaintiff had his own separate share so that he could hold the suit land only for the exclusive benefit of the younger sons.
- g) The Defendants have a homestead that was set up for them by the deceased on the suit land

where they have lived for the whole of their lives while cultivating and using it exclusively and continuously from the period of its registration to date and they have therefore acquired overriding rights thereon and cannot be evicted as sought by the Plaintiff.

That the deceased died on 13th October 1992 and was not alive on 7th July 1995 and could therefore not have transferred the suit land to the Plaintiff.

12. Vide their counter-claim therefore, the Defendants seek judgment against the Plaintiff as follows:

- 1) The Plaintiff's suit be dismissed with costs.
- 2) An order declaring that the Plaintiff holds the title to the suit land in trust for the Defendants by virtue of a customary trust and the doctrine of adverse possession.
- 3) An order directing the County Land Registrar to cancel the entries running from entry **NO 4** dated 1st September 1995 as entered on the register of the suit land and to restore the same parcel into the name of the deceased.

4) In the alternative, an order directing the Plaintiff to sign the application to the Land Control Board and Transfer of Land Forms to transfer the suit land to the Defendants and in default, the Deputy Registrar of this Court be empowered to do so on his behalf.

5) The Defendants be awarded costs.

13. The Defendants filed their statements and those of their witnesses.

14. In her statement dated 13th June 2017, the 1st Defendant states that the deceased was her husband and married her after the demise of his first wife **SOPHIA AUMA** who was the mother to the Plaintiff. That the 2nd Defendant is her son although she also had other children namely **EVERLINE CHAMI, ROSE CHAMI, AKINYI CHAMI, ALBER CHAMI, AUMA CHAMI, TAABU CHAMI** and **KNIGHT WILMINA**. That the deceased had two parcels of land one of which he gave the Plaintiff who however wants them to vacate the suit land where they live. She added that she does not know about the loan to the Agricultural Finance Corporation but that she lives in the home where

her deceased husband built and that her sons also lives on the same land.

15. The 2nd Defendant recorded two statements the first dated 13th June 2017 and the second one dated 22nd October 2024.
16. In his statement dated 13th June 2017, the 2nd Defendant states that the deceased was his father and the 1st Defendant is his mother. That he was born in 1977 being the second born out of nine children. That his step-mother **SOPHIA** and who was a co-wife to the 1st Defendant passed away before he was born. That prior to the demise of the deceased, they all lived on the suit land together with the Plaintiff. That after the demise of the deceased, the 1st Defendant was inherited by one **SAMSON WABWIRE** but they have continued to live on the suit land and which they plough. That although the Plaintiff was given other land, he has refused to move to it and continues to live on the suit land which was meant to be shared among the sons of the second wife. That the Plaintiff has declined to apply for succession and distribute the Estate of their deceased father claiming that he solely

owns the suit land and that the Defendants have no right to it. So he (2nd Defendant) placed a restriction on the suit land after discovering that on 7th July 1995, the Plaintiff had transferred it to himself without the knowledge of the family. That this suit is purposely meant to evict him and his mother from the suit land and he is ready to contest this case without fear and has witnesses ready to testify.

17. In his further statement dated 22nd October 2024 and which is more elaborate and detailed, he states that the deceased had two wives the first being the late **SOPHIA AUMA OBIRIKO** and the second being the 1st Defendant.
18. That with the first wife, the deceased had the following 4 children:

- 1) **TIMOTHY BULUMA CHAMI** (deceased)
- 2) **MATAYO WANYAMA CHAMI** (deceased)
- 3) **ALOIS WAFULA CHAMI** (the Plaintiff)
- 4) **HELLEN CHAMI**

And with the 1st Defendant, the deceased sired the following 8 children:

- 1) **PATRICK OUMA CHAMI** (1st Defendant)
- 2) **EVERLIN NABWIRE CHAMI**

- 3) **ROSELINE KADOGO CHAMI**
- 4) The late **WILLIAM KNIGHT CHAMI**
- 5) **BRENDA AKINYI CHAMI**
- 6) **ROSE TAABU CHAMI**
- 7) **MILLICENT AUMA CHAMI**
- 8) **ALBERT OUMA CHAMI**

That the Plaintiff who is his step brother had 3 wives namely:

- 1) The late **FELISTER MAKOKHA CHAMI**
- 2) The late **SCOLASTICA TAAKA WAFULA**
- 3) The late **MARY WAFULA**

The Plaintiff had a total of 24 children with the 3 wives whose names he has provided in paragraphs 10, 11 and 12 of his statement.

19. That prior to his demise, the deceased had distributed his land and the Plaintiff was given the land parcel **NO BUKHAYO/BUGENGI/12** to which he has not moved his family to date. That the Plaintiff illegally obtained the land parcel **NO BUKHAYO/BUGENGI/16478, 16479** and **16480** without following the succession process. That the land parcel **NO BUKHAYO/BUGENGI/16478** where the

Plaintiff lives belongs to the 1st Defendant and her children and this case shows how malicious and inhuman the Plaintiff is against his own blood. That on 24th January 2014, the 2nd Defendant placed a caution on the suit land and it is not clear how it was sub-divided to create the land parcel **NO BUKHAYO/BUGENGI/16478, 16479 and 16480**. The Court should therefore summon the Land Registrar Busia to explain how the illegal sub-division and transfer was done and those sub-divisions should have their titles cancelled.

20. The following documents are annexed to the said statements:

- 1) Copy of certificate of death for the deceased showing he died on 13th October 1992 at the age of 82 years.
- 2) Copy of the register for the land parcel **NO BUKHAYO/BUGENGI/1** issued on 20th November 2013.
- 3) Copy of the certificate of Official Search for the land parcel **NO BUKHAYO/BUGENGI/12** in the name of the Plaintiff.

- 4) Another copy of the register for the land parcel **NO BUKHAYO/BUGENGI/1** issued on 7th June 2024.

The Defendants also filed the statements of their witnesses **MAGDALENE STELLA ROMAYA (DW2)** and **MAXIMILLAH ADHIAMBO WAFULA (DW4)** in support of their cases.

21. In their statements both dated 22nd October 2024, the two witness basically rehash the contents of the 2nd Defendant's statement. **MAGDALENE SITELLA ROMAYA (DW2)** confirms that the Plaintiff is her step brother while **MAXIMILLAH ADHIAMBO WAFULA (DW4)** confirms that the Plaintiff is her biological father. They both disapprove the conduct of the Plaintiff with respect to the suit land and support the Defendants' case.
22. The Defendants also recorded statements of their other witnesses **THOMAS MATAYO WANYAMA** and **MATAYO WANYAMA CHAMI** who however did not testify during the hearing.
23. In addition to the documents annexed to the 2nd Defendant's statement, the Defendants also filed a list of

documents dated 13th June 2017 to which is annexed the following documents:

- 1) Copy of Adjudication Register for Busia Adjudication area.
- 2) Copy of application by the deceased for consent of the Land Control Board to transfer the suit land to the Plaintiff. It is not dated.
- 3) Copy of the letter of consent dated 15th April 1995 for the transfer of the suit land to the Plaintiff at a consideration of Kshs.18,000.
- 4) Transfer of Land Form.
- 5) Copy of the register for the suit land.
- 6) Copy of a letter dated 28th February 2017 from the Chief Busia West location and addressed To Whom It May Concern and setting out the names of the deceased's two wives and children.

24. The plenary hearing commenced before **KANIARU J** on 26th September 2018 when the Plaintiff testified and closed his case. He told the Court that the suit land is his property since 1995 when it was transferred to him by his

late father who died in 1996. That the deceased had taken a loan with the Agricultural Finance Corporation using the title to the suit land as collateral but was unable to repay so the Plaintiff paid the loan and the deceased transferred the suit land to him. He confirmed that the Defendants live on the suit land but he seeks their eviction therefrom. He produced as part of his evidence the title deed to the suit land and the certificate of Official Search.

25. Thereafter, the trial stalled and it was not until 5th November 2025 (7 years later) that the Defendants and their witnesses testified. They adopted as their testimony the contents of their statements as summarized above and also produced their documents filed herein as their documentary evidence. The delay in hearing the Defendants' case was due to the fact that they kept on changing counsel having parted ways firstly with the firm of **MASERA & MOGI ADVOCATES**, then with the firm of **J. P. MAKOKHA & COMPANY ADVOCATES** and finally with the firm of **WANYAMA & COMPANY ADVOCATES**. By the time the plenary hearing came to an end, the Defendants were acting in person.

26. The Plaintiff also had his share of change of counsel starting with **BALONGO & COMPANY ADVOCATES** then **ASHIOYA & COMPANY ADVOCATES** joined in before finally ending up with the firm of **B. M. OUMA & COMPANY ADVOCATES** but that was not before the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** briefly joined the fray. I think the parties stretched their rights to a hearing under **Article 50** of the **Constitution** to the limit. Infact I had to read the riot act to the parties on 15th July 2024 when I directed that the trial must come to an end.
27. Submissions were thereafter filed both by **MR OUMA** instructed by the firm of **B. M. OUMA & COMPANY ADVOCATES** for the Plaintiff and by the Defendants acting in person.
28. I have considered the evidence by the parties both oral and documentary as well as the submissions filed by **MR OUMA** for the Plaintiff and by the Defendants acting in person.
29. It is common ground that the Plaintiff has since 1st September 1995 been registered as the proprietor of the

suit land. He therefore enjoys all the rights and privileges that accompany that registration including the right to evict any trespassers on the suit land and which is the remedy he seeks against the Defendants. **Section 24(a)** and **25** of the **Land Registration Act** provide for the rights of a proprietor of registered land. They provide:

24: “Subject to this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ...”

25(1): “The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and

appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

It is the above provisions of the **Land Registration Act** which the Plaintiff is no doubt invoking in seeking this Court to order for the eviction of the Defendants from the suit land.

30. However, the Defendants on their part have pleaded in their counter claim that infact the Plaintiff holds the title to the suit land for their benefit under a customary trust. In so doing, the Defendants are invoking the proviso in

Section 25 (2) of the **Land Registration Act** which reads:

(2) “Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

The Defendants are also invoking, without necessarily saying so, the provision of **Section 28(b)** of the same **Act** which reads:

28: “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 subsist and affect the same, without their being noted on the register-

(a)

(b) Trusts including customary trust;”

While the Defendants’ case is that the deceased, who according to the register, was the first registered proprietor of the suit land on 13th August 1971, was also the husband to the 1st Defendant and father to the 2nd

Defendant, the Plaintiff has denied that averment. His case is that infact he had employed the 1st Defendant as a house-help to take care of the deceased. He also denied that the 2nd Defendant is his step brother born of the deceased's second wife being the 1st Defendant. When he was cross-examined by the 1st Defendant on 26th September 2018, he said:

“You were living on that land when my father was alive yes and I had employed you to look after my old parent. You have your own place where you can live. Your place is vacant. You also have the person who sired your children with. You can ask for land from him. You did not sire children with my father.”

And when he was cross-examined by the 2nd Defendant, he said:

“My father died in 1996. You were born on that land but by different people not my father. You live on that land with your family yes, but you do not belong there. That is my land you are not children of my late father. I am not aware

that your ID shows you are son of my late father.”

And when I cross-examined the Plaintiff on 15th July 2024 while trying to initiate some amicable settlement between the parties having noticed that they all share the name **“CHAMI”** he said:

“The 1st Defendant is not even my mother. She has many husbands and different children. She is not related to me.”

Very strong words indeed addressed to a woman who says she is your mother. And it reflects my description of the Plaintiff at the commencement of this judgment. A man who will go to great lengths to achieve his insatiable greed for land. Maybe he needs to be reminded of the saying that **“no man knows his father better than the mother.”** Or the saying that **“the mother always knows who the father of a child is”**. Even as the Plaintiff tries to deny the 1st Defendant’s assertion that she is infact his mother and the wife of the deceased, there is the evidence of **MAGDALENE SITELLA RAMOYA (DW2)** and **MAXIMILLAH ADHIAMBO WAFULA (DW4)** which

confirms the Defendants' testimony that they are a wife and son of the deceased. The Plaintiff did not suggest any reason why the two witnesses would want to give false testimony about the relationship between the Plaintiff, the deceased and the Defendants. This Court also observed the demeanour of the witnesses when they testified and I have no reason to doubt that they spoke the truth.

31. Finally, on that issue, there is the letter dated 28th February 2017 authored by the Chief of Busia West Location and addressed **"To Whom It May Concern"**. Due to its relevance to the issue of the relationship between the Plaintiff, the Defendants and the deceased, I will reproduce it in extenso:

"RE: YOHANA CHAMI AMBOKO - DECEASED 1992

I write to confirm that the above hailed from Esikulu Sub-location of Bukhayo West Location prior to his death in 1992. He was married to 2 wives:

1: SOPHIA AUMA OBIRIKO born 1910 and died 1973 leaving behind the following children;

(i) TIMOTHY BULUMA CHAMI - DECEASED

(ii) MATAYO WANYAMA CHAMI - ALIVE

(iii) HELEN CHAMI - ALIVE

(iv) ALOYS WAFULE CHAMI - ALIVE

2: JULIA AKELLO CHAMI born 1954 and is still alive and had the following children with the late husband;

(i) PATRICK OUMA CHAMI - ALIVE

(ii) EVERLINE NABWIRE CHAMI - ALIVE

(iii) WILMINA NIGHT CHAMI - ALIVE

(iv) ROSELINE KADOGO CHAMI - ALIVE

(v) BRENDA AKINYI CHAMI - ALIVE

(vi) ALBERT OUMA CHAMI - ALIVE

(vii) ROSELINE TAABU CHAMI - ALIVE

(viii) OUMA CHAMI - ALIVE

They have ever lived in the area parcel BUKHAKO BUGENGI/1 with their father and mothers since their births.

Thank you

CHRISPINUS O. MAUDA

SENIOR CHIEF

BUKHAYO WEST LOCATION

BUSIA COUNTY

Date: 28.2.2017”

The letter was produced without any contest and is authored by a public officer who no doubt knows the deceased's family well. There is nothing to suggest that the same is doctored. It must also be remembered that it is unlikely that the deceased would be living with the Defendants on the suit land unless he recognized them as his wife and son and indeed there is nothing to suggest that he had tried to evict them from the suit land during his life time. And even after his demise on 13th October 1992, it has taken the Plaintiff 25 years to try and evict the Defendants from the suit land yet there is documentary evidence that he was given his own land parcel **NO BUKHAYO/BUGENGI/12** by the deceased. Therefore, while the registration of the Plaintiff as the proprietor of the suit land is uncontestable, there is the provision of the land cited above that such registration does not relieve the Plaintiff of his duty as a trustee. That is what I shall now consider.

32. Counsel for the Plaintiff has submitted at length that the Defendants did not plead fraud as against the Plaintiff in the manner in which he obtained the title deed to the suit land. Having cited relevant authorities including the cases of **VIJAY MORJARIA -V- NANSING MADHUSING DABAR & ANOTHER 2000 eKLR** as well as **KINYANJUI KAMAU - V- GEORGE KAMAU NJOROGE 2015 eKLR**, counsel has submitted as follows:

“We submit in our view, the title of MR ALLOYS CHAMI was demonstrably infeasible. As already stated, beyond the sweeping claim by that the (sic) titles in favour of Plaintiff was obtained illegally and unlawfully, no particulars of fraud were pleaded against him and neither was any evidence led in support of those claims.”

That may be true. However, in paragraphs 13 and 14 of their re-amended defence and counter-claim, the Defendants have hinged their case to the suit land on trust. It is however not lost to this Court that whereas the Plaintiff claims to have been registered as the proprietor of

the suit land in 1995 the same having been transferred to him by the deceased, there is documentary evidence through the certificate of death issued on 15th March 2017 that the deceased infact died on 13th October 1992 aged 81 years. When he testified before **KANIARU J** on 26th September 2018, this is what the Plaintiff said:

“I am Alois Wafula Chami and I have come from Esikulu village, Esikulu sub-location Busia County. I am a peasant. Yes I filed this case. It concerns land parcel number L.R BUKHAYO/BUGENGI/1. It is my land. I became registered owner in 1995. It was transferred to me by my late father YOHANA CHAMI MBOKO. My father is late. He died in 1996. It was transferred to me when my father was alive.”

What the Plaintiff conveniently forgot to tell the Court when he testified before **KANIARU J** was that other than being a peasant from Esikulu village, he is also an incorrigible liar. Surely the deceased who passed away on 13th October 1992 could not have transferred the suit land to him in 1995. This is a point of fact which stares in the

face of this Court. However, that is not relevant for purposes of this judgment.

33. The Defendants, as I have already stated above, pleaded in paragraph 13 of their defence and counter-claim that the Plaintiff holds the title to the suit land for them under a customary trust. As I have already stated above, **Section 28(b)** of the **Land Registration Act** recognizes a customary trust as among those to which registered land is subject to. An extensive discussion on what amounts to a customary trust was made recently in the case of **KIEBIA -V- M'INTARY & ANOTHER PETITION NO 10 of 2015 [2018 KESC 22 KLR]** where the **SUPREME COURT** had the following to say at paragraph 52:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie -v- Kinuthia, that what is essential is the nature of the holding of land and intention of the parties. If the said holding is for the benefit of other members of the

family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- 1) The land in question was before registration family, clan or group land.**
- 2) The claimant belongs to such 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/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.”**

Guided by all the above, I have already discussed at length in the preceding paragraphs of this judgment that notwithstanding the Plaintiff's denial, the parties are family. They all share a relationship with the deceased. And although the Plaintiff tried to suggest in paragraphs 5 and 6 of his statement dated 9th February 2017 that the 1st Defendant was only a house-help whom he later employed to take care of the deceased, it has now transpired that that is far from the truth. There is the letter from the Chief confirming that the 1st and 2nd Defendants are a wife and son respectively of the deceased. Then there is the evidence of **MAGDALENE SITELLA ROMAYA (DW2)** the Plaintiff's step sister and the 1st Defendant is the step mother. **MAXIMILLAH ADHIAMBO WAFULA** is a daughter to the Plaintiff while the 1st and 2nd Defendants are her step-grandmother and step-father respectively. No matter how much the Plaintiff tried, it has been difficult to extricate himself from his filial relationship with the Defendants. He must live with it.

34. It is also clear from the evidence that the suit land was held by the deceased for the benefit of his family which

includes the Plaintiff and the Defendants. That explains why the Defendants have always lived on the suit land even after the demise of the deceased. If the 1st Defendant was only a house-help of the deceased, she would not be still living on the suit land long after his demise. And if the 2nd Defendant had been sired by other men, the deceased himself would have evicted him from the suit land. The truth is that the suit land has always been ancestral land intended for use by the family of the deceased. And the suit land was meant for use by the Defendants and that is why the Plaintiff was allocated his own land parcel **NO BUKHAYO/BUGENGI/12** as confirmed in the certificate of Official Search but to which he has refused to move. It could not have been the intention of the deceased that only the Plaintiff benefits from the suit land while the Defendants remain as squatters thereon. That is un-just enrichment which this Court, being a Court of equity, must frown.

35. I am further persuaded from the evidence herein that other than a customary trust, the Defendants are entitled to ownership of the suit land by way of a constructive

trust. Such a trust, as was stated in the case of **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER -V- SAID SAGGAR AHMED AL-HEIDY & OTHERS 2015 eKLR:**

“... 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. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.” Emphasis mine.

By use of the word **“impose”** or **“imposition,”** the Court must have meant forced or enforced. The term enforce is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as:

“To give force or effect to (a law etc) to compel obedience ...”

And enforcement is defined in the same **DICTIONARY** as:

“The act or process of compelling compliance with a law, mandate, command, decree or agreement”

A constructive trust therefore, in my view need not to be pleaded.

36. From my assessment of the evidence herein, I am persuaded that this is also a case where I can impose a constructive trust favour of the defendants. The plaintiff holds the title to the suit land in favour of the defendants. He is a trustee both under custom and constructive trust and he cannot therefore get orders to evict the defendants or any other persons claiming under them from the suit land.

37. Ultimately therefore and having considered all the evidence herein, this court makes the following dispositive orders in the determination of this suit:

1) The Plaintiff's suit is dismissed.

2) Judgment is entered for the defendants as against the plaintiff as sought in the counter-claim as follows:

a) The plaintiff holds the title to the land parcel NO BUKHAYO/BUGENGI/1 in trust for the Defendant and their families.

b) That trust is hereby determined.

c) The plaintiff shall within 30 days from the date of this judgment surrender to the Land Registrar the original title for the land parcel NO BUKHAYO/BUGENGI/1 and any subsequent sub-division emanating therefrom for cancellation and for the issuance of a new title deed to be registered in the names of the defendants to hold the same in trust

for themselves and for the children of the 1st defendant.

- d) In default of (c) above, the Land Registrar shall nonetheless cancel the register and title and the Deputy Registrar shall, upon requests sign all the necessary documents to facilitate the registration of the land parcel NO BUKHAYO/BUGENGI/1 as ordered above.
- e) As the parties are family, the order which commends itself to make on costs is that the parties shall meet their own costs.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

Judgment dated, signed and delivered by way of electronic mail on this 9th day of April 2026 and with notice to the parties.

Right of Appeal.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

ORIGINAL

Explanatory notes:

This judgment was due for delivery on 12th February 2026. However, following my transfer to Iten Court and which was due effective 15th January 2026, I had to prioritize my part heard cases and also delivery rulings and judgments. That contributed to the delay. The same is regretted.

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JUDGE

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