



**Adorot & another v Seme & another (Environment & Land Case 37 of 2018 & 38 of 2019 (Consolidated)) [2024] KEELC 1209 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1209 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 37 OF 2018 & 38 OF 2019 (CONSOLIDATED)  
BN OLAO, J  
MARCH 6, 2024**

**BETWEEN**

**ALBERT EUNYUSATA ADOROT ..... PLAINTIFF**

**AND**

**SARAH AMULENI SEME ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 38 OF 2019**

**BETWEEN**

**SARAH AMULENI SEME (SUING ON BEHALF OF SAMUEL ADOROT SEME) ..... PLAINTIFF**

**AND**

**ALBERT EUNYUSAIT ADOROT ..... DEFENDANT**

**JUDGMENT**

1. As will soon become clear in this judgment, Albert Eunyasata Adorot still lives in the very dark ages. This has negatively deemed his view of women whom he appears to consider as second class and therefore not entitled to equal property rights with men. This has been made clear from the testimony of his own sister Mary Consolata Aupai (DW2) who in paragraph 7 of her statement dated 19<sup>th</sup> October 2021, she stated thus:

7: “That however upon the death of my father, my brother invaded my step sister’s land and started to put it into use claiming that married women cannot inherit land.” Emphasis mine.



The Plaintiff's other sister Emmaculate Iidi Ekeya (DW3) echoed the same words in paragraph 7 of her statement also dated 19<sup>th</sup> October 2021.

2. If that is Albert Eunyata Adoroto's notion of justice, then I must tell him that it is clearly retrogressive, discriminatory and repugnant. If that practice was in vogue when he was growing up, it is no longer the in thing. And if he has not been listening to his sisters, it is not too late to start today. That practise is not allowable both under our National and International Laws including our retired Constitution. Perhaps the words of WAKI J.A. in the case of Mary Rono -v- Jane Rono & William Rono C.a. Civil Appeal No 66 of 2002 [2005 eKLR] will help in opening his eyes. The judge said:

“Is International law relevant for consideration in this matter? As a member of the International Community, Kenya subscribes to International customary laws and has ratified various International covenants and treaties. In particular, it subscribes to the International Bill of Rights which is the Universal Declaration of Human Rights (1948) and two international human rights covenants: the covenant on Civil and Political rights (both adopted by the UN General Assembly in 1966). In 1984, it ratified, without reservations, the Conventions, the Convention on the Elimination of All Forms of Discrimination Against Women...”

Under *the Constitution* 2010, it is provided under Article 40(1) that:

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

- a. Of any description and
- b. In any part of Kenya.”

Article 10(2)(b) of the 2010 Constitution which echoes our National values and principles provides that they include:

“human dignity, equity social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”

3. Following orders by Omollo J consolidating the above two cases, BUSIA ELC NO 37 of 2018 (the proceedings of 4<sup>th</sup> December 2019 wrongly capture it as NO 38 of 2018 which could only be through inadvertence) became the lead file and therefore the plaintiff while the plaintiff in Busia Elc No 38 of 2019 became the counter-claim. This judgment is therefore in respect to the consolidated suits.
4. I must also point out that the Plaintiff in Busia Elc Case NO 37 of 2018 is referred to as Albert Eunyusata Adoroto While In Busia Elc Case No 38 of 2019 where he is the Defendant he is named Albert Enyusait Adorot. For purposes of this judgment, I shall refer to him as Albert Eunyusata Adoroto because that is how he has signed his pleadings.
5. By an amended plaintiff dated 14<sup>th</sup> April 2020 and filed on 16<sup>th</sup> April 2021, Albert Eunyusata Adoroto (the Plaintiff herein) sought judgment against SARAH Amuleni Seme (the Defendant herein) in the following terms with respect to the land parcel NO South Teso/Apokor/2368 (the suit land):
  1. An order directing the County Land Registrar to cancel entry No. 2 dated 26<sup>th</sup> August 1998 appearing on the register of land parcel NO South Teso/Apokor/2368.
  2. A declaration that the 1<sup>st</sup> Defendant SARAH Amuleni Seme is registered vide form R.L. 19 to hold parcel NO South Teso/Apokor/2368 in trust for the Plaintiff.



3. Costs of the suit.
6. The Plaintiff's case is that at all material times, his father owned the ancestral land parcel NO South Teso/Apokor/163 on which the 1<sup>st</sup> Defendant and other children were raised to adulthood. That during his life time, his deceased father shared out his land among his sons and one daughter thereby creating land parcels NO South Teso/Apokor/2000 to 2007. That his deceased father awarded him the land parcel NO South Teso/Apokor/2003 and retained the land parcel NO South Teso/Apokor/2368 as his homestead but made arrangements to transfer the homestead to him. That his deceased father gave the Defendant and her mother the land parcel NO South Teso/Apokor/2369 which they however sold for Kshs.175,000 which they deposited in the 1<sup>st</sup> Defendant's account at Kenya Commercial Bank Busia Branch.
7. The Plaintiff has for the whole of his life stayed on the suit land where he has erected permanent houses. However the Defendant secretly and fraudulently transferred the suit land from the name of the Plaintiff's deceased father into the joint ownership of herself and the Plaintiff's deceased father.
8. The particulars of fraud are pleaded in paragraphs 8(a) to 8(i) as follows:
  - a. Forging the deceased's signature.
  - b. Forging the application to the Land Control Board.
  - c. Forging the letter of consent from the Land Control Board.
  - d. Forging the transfer Form.
  - e. Using the Land Control Board Register NO 138 of 1998 which was meant for another person to transfer the ownership of the suit land from the name of the deceased into the joint ownership of the deceased and the Defendant.
  - f. Making alterations in the application for the land parcel NO South Teso/Apokor/2517 by inserting therein the land parcel NO South Teso/Apokor/2368 in order to mislead the Land Registry staff.
  - g. Fraudulently converting the Amukura Land Control Board letter of consent for the transfer of the land parcel NO South Teso/Apokor/2517 and inserting parcel NO South Teso/Apokor/2368 to pass as a genuine letter of consent for the suit land.
  - h. Effecting the transfer of the suit land without the genuine application and letter of consent.
  - i. Relying on the illegal Land Control Board application and letters of consent for register NO 138 of 1998 which entry is not supported by genuine minutes of the Land Control Board.

It is the Plaintiff's case that his deceased father had retained the suit land for himself and the Plaintiff who had chosen to remain and look for him. That the deceased therefore created a constructive trust in favour of the Plaintiff. The Defendant therefore holds the title to the suit land as legal representative to the Estate of Samuel Adorot Seme meaning that the share of the deceased is yet to be distributed and the Plaintiff is entitled to a share thereof.

9. The Plaintiff therefore itemized the particular of trust as follows:
  - a. The Plaintiff's deceased father owned the land parcel NO South Teso/Apokor/163 which was ancestral land.
  - b. The deceased shared out land to all his sons and daughter and retained the suit land.



- c. The deceased chose to stay with the Plaintiff as his caretaker who would eventually inherit the suit land.
- d. The deceased set aside the land parcel NO South Teso/Apokor/2369 for the Defendant's benefit which was sold and the proceeds were given to the Defendant.
- e. The Defendant irregularly caused the suit land to be transferred to herself and the deceased using forged and irregular documents.

The Plaintiff was the only witness in support of his case.

10. He filed a statement dated 4<sup>th</sup> October 2021 which is basically a summary of his plaint. He confirms that his late father Samuel Adorot Seme owned ancestral land NO South Teso/Apokor/163 which he sub-divided to create several parcels and gave parcel NO South Teso/Apokor/2369 to the Defendant but it was sold to one EDward Buluma and the proceeds were deposited in the Defendants account at the Kenya Commercial Bank. That parcel NO South Teso/Apokor/2368 was left for his father and his wives Felesia Akasiba Adorot and Everline Imongin Adorot. That he has erected his house on the suit land on the direction of his deceased father where he would like to live owing to the high cost and inconvenience of putting up a new home. That the Defendant secretly filed for succession and fraudulently transferred the suit land from their deceased father into the joint name of herself and their deceased father. That the Defendant cannot now evict him from the suit land because she owes him a fiduciary duty.
11. The Plaintiff also filed the following documents in support of his case as per the list of documents dated 8<sup>th</sup> May 2018:
  1. Death certificate for Samuel Adorot Seme showing date of death as 7<sup>th</sup> October 1999.
  2. Mutation Form for land parcel NO South Teso/Apokor/163.
  3. Application for consent of the Land Control Board by Samuel Adorot Seme for transfer of the land parcel NO South Teso/Apokor/2003 to Albert Enyusata.
  4. Mutation Form for the land parcel NO South Teso/Apokor/2000.
  5. Copy of register for land parcel NO South Teso/Apokor/2368 (not 2000).
  6. Application for consent (suspect).

I must at this stage register my displeasure in the manner in which the documents were listed. For instance, as per the list, there is a Grant listed as No. 2. No Grant was filed. No certified copy of register for the land parcel NO South Teso/Apokor/2003 was filed yet it is listed as NO 6. Counsel and their clients must ensure that the list of documents filed corresponds to the documents actually filed.

12. The Plaintiff also annexed to his statement dated 4<sup>th</sup> October 2021 the following documents:
  1. Mutation Form for the land parcel NO South Teso/Apokor/163.
  2. Mutation Form for the land parcel NO South Teso/Apokor/2000.
  3. Register for the land parcel NO South Teso/Apokor/2368.
  4. Register for the land parcel NO South Teso/Apokor/2369.
  5. Register for the land parcel NO South Teso/Apokor/2517.



6. Application for consent of Land Control Board by SAMUEL ADOROT SEME to transfer land parcel NO South Teso/Apokor/2368 to Sarah Amuleni Seme.
7. Letter of consent to transfer land parcel NO South Teso/Apokor/2368 from Samuel Adorot Seme to Samuel Adorot Seme and Sarah A. Seme.
8. Minutes of the Amukura Land Control Board meeting held on 9<sup>th</sup> July 1998.  

Again I must remind counsel and parties that under Order 3 Rule 2 of the Civil Procedure Rules, the documentary evidence is usually filed together with the plaint. If there is need to file further documents, that should be done through a supplementary list of documents. Nonetheless, in view of the provisions of Article 159 2(d) of *the Constitution* and Section 19(1) of the *Environment and Land Court Act*, the Court will consider the documents annexed to the Plaintiff's statement dated 4<sup>th</sup> October 2021 as properly filed.
13. In response to the amended plaint, the Defendant filed a defence dated 23<sup>rd</sup> August 2019 and a further defence dated 27<sup>th</sup> October 2021.
14. She pleaded that the land parcel NO South Teso/Apokor/163 was sub-divided in 1995 and distributed as follows:
  - a. South Teso/Apokor/2000 (4.62Ha) - retained by Samuel Adoroto.
  - b. South Teso/Apokor/2001 (8.89 Ha) - Dominic Odhiambo
  - c. South Teso/Apokor/2002 (6.5Ha) - Ronald Opare.
  - d. South Teso/Apokor/2003 (8.81Ha) - Albert Adoroto.
  - e. South Teso/Apokor/2004 (11.4Ha) - Benard Adoroto.
  - f. South Teso/Apokor/2005 (10.22Ha) - Christian Ongaria.
  - g. South Teso/Apokor/2006 (9.02Ha) - Techla Atoo.
  - h. South Teso/Apokor/2007 (2.40Ha) - Catholic Church.

That the Plaintiff was awarded land parcel NO South Teso/Apokor/2003 and could not have been given the land parcel NO South Teso/Apokor/2368 as it was non-existent at the time and arose following the sub-division of the land parcel NO South Teso/Apokor/2000 which had been retained and registered in the name of their father Samwel Adorot. The other sub-division that arose out of the land parcel NO South Teso/Apokor/2000 was the land parcel NO South Teso/Apokor/2369 which was sold by Samwel Adorot to raise money for his treatment while the land parcel NO South Teso/Apokor/2368 which is the suit land was retained and registered in the name of Samwel Adorot and herself.
15. The Defendant denied the Plaintiff's allegation of fraud or that she had sold the land parcel NO South Teso/Apokor/2369 for Kshs.175,000 which was deposited in her account at the Kenya Commercial Bank or that the Plaintiff has stayed and erected permanent houses on the suit land.
16. The Defendant also denied the allegations that she holds the suit land in trust for the Plaintiff adding that the suit land belongs to her and the Plaintiff got his share of the ancestral land.
17. The Defendant relied on her statement dated 21<sup>st</sup> May 2019 and filed in BUSIA ELC case NO 38 of 2019.



18. In that statement she stated that she is the proprietor of the suit land which originally belonged to her late father Samwel Adoroto Seme. That the Plaintiff has unlawfully encroached thereon by building a house without her authority which action is not only illegal but is also against *the Constitution*. She therefore seeks that he be enjoined therefrom.
19. The Defendant also filed the statements of her witnesses Mary Consolata Aupai (dw2) And Emmaculate Idi Ekeya both dated 19<sup>th</sup> October 2021 but filed in BUSIA ELC case NO 37 of 2018.
20. In her statement, Mary Consolata Aupai (DW2) stated that the Plaintiff is her brother while the Defendant is her step sister. That during their life-time, their late father shared out his land among all the beneficiaries including the Defendant. That their late father registered the suit land in his name jointly with the Defendant while the Plaintiff got his own portion of land. That their late father used to tell her that the reason why he registered the suit land jointly in his name and the Defendant's name was in order to protect her from the Plaintiff who by his aggressive and violent nature did not want a daughter to get any share of land. However, upon the death of their father, the Plaintiff invaded the suit land and started putting up a house thereon claiming that married women cannot inherit land from their parents. All efforts to get the Plaintiff to move out of the suit land have proved futile as he has refused to do so. It is her wish therefore that the Plaintiff moves out of the suit land which belongs to the Defendant.
21. Emmaculate Idi Ekeya (DW3) is also a sister to the Plaintiff and step sister to the Defendant. Her statement also dated 19<sup>th</sup> October 2021 is a complete replica of the statement of her sister Mary Consolata Aupa (DW2) and I need not rehash it.
22. The Defendant also filed the list of documents dated 21<sup>st</sup> May 2019 in BUSIA ELC case NO 38 of 2019. It contained the following:
  1. Copy of official search for the land parcel NO Teso/Apokor/2368.
  2. Copy of Green card for the land parcel NO Teso/Apokor/2368.On her part, the Defendant filed her plaint in BUSIA ELC case NO 38 of 2019 in which she sought judgment against the Plaintiff in the following terms:
  1. An order of eviction from the land parcel NO South Teso/Apokor/2368.
  2. An order of permanent injunction restraining the plaintiff, his agents, servants or any other person from interfering with her occupation of the land parcel NO South Teso/Apokor/2368.
  3. General damages.
  4. Costs and interest.
  5. Any other relief this Honourable Court deems fit to grant.
23. The basis of the Defendant's case is that at all material time, she and her late father Samwel Adorot Seme were the registered joint owners of the suit land measuring approximately 1.82 hectares. That upon the demise of their father, the Plaintiff invaded a portion of the suit land which act is not only illegal but also unlawful and an infringement of her peaceful occupation thereof. The Defendant has, as a result of the said unlawful conduct suffered great loss for which she seeks compensation.
24. The Defendant filed a statement dated 21<sup>st</sup> May 2019 basically summarising the contents of her plaint and which I need no rehash. Essentially however, it is her case that she is the registered proprietor of



the suit land which originally belonged to her late father Samwel Adorot Seme on which the Plaintiff has now unlawfully encroached.

25. In resisting the Defendant's claim, the Plaintiff filed a defence dated 8<sup>th</sup> August 2019 in which he stated that he was the one granted the suit land where his late father's homestead is situated and on which he has lived all his life having erected permanent houses thereon. That the Defendant therefore holds the title to the suit land in trust for him and that for all practical purposes, the Defendant's title to the suit land has been extinguished by the Limitation of actions Act hence eviction and injunctive orders cannot issue against him.
26. Further, that the Defendant fraudulently forged the relevant consent and transfer documents to show that the suit land had been transferred from its previous proprietor into the joint names of Samwel Adorot Seme and the Defendant when there was no such transfer. He denied having invaded the suit land adding that he was born thereon and has lived on the same all his life. Therefore, the Court should remove the fraudulent entries in the register and dismiss the Defendant's counter-claim.
27. The hearing commenced on 28<sup>th</sup> September 2023. The Plaintiff was the only witness who testified in support of his case. He adopted as his evidence the contents of his statement dated 4<sup>th</sup> October 2021 and produced as his documentary evidence the documents filed herein.
28. The Defendant's case was also heard on 28<sup>th</sup> September 2023. The Defendant testified and called as her witnesses her two sisters Mary Consolata Upai (dw2) And Emmaculate Idi Ekeya (DW3). They all adopted as their evidence the contents of their respective statements herein. The Defendant also produced the list of documents filed herein.
29. Submissions were thereafter filed both by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Plaintiff and by Mr Makokha instructed by the firm of J. P. Makokha & Company Advocates for the Defendant.
30. I have considered the evidence by the parties as well as the submissions by counsel.
31. The Plaintiff seeks the following substantive remedies:
  1. An order directing the County Land Registrar to cancel entry NO 2 in the register of the land parcel NO South Teso/Apokor/2368.
  2. A declaration that the Defendant holds the title to the land parcel NO South Teso/Apokor/2368 in trust for him.
  3. Costs.

On her part the Defendant seeks the following remedies as per her counter-claim which was the plaint in BUSIA ELC CASE NO 38 of 2019 prior to the consolidation:

1. Eviction of the Plaintiff from the land parcel NO South Teso/Apokor/2368.
2. An order of permanent injunction restraining the Plaintiff by his agents, servants or any other person from interfering with her occupation of the land parcel NO South Teso/Apokor/2368.
3. General damages.
4. Costs and interest.
5. Any other relief this Honourable Court deems fit to grant.



32. The fulcrum of the Plaintiff's case is that the Defendant obtained registration of the suit land by way of fraud. He also pleads that the Defendant holds the said title in trust for him and has particularized the fraud and illegalities as well as trust quite elaborately in paragraphs 8 and 9 of his amended pleadings. I will first consider if the Defendant was involved in any fraudulent and illegal activities in the process of registration of the suit land in her name and whether she is in fact a trustee holding the title thereto in trust for the Plaintiff.

### **Fraud And Other Illegalities**

33. The parties are siblings and it is common ground that the suit land is a resultant sub-division of the land parcel NO South Teso/Apokor/2000 which was itself a sub-division of the land parcel NO South Teso/Apokor/163 both of which belonged to the parties' late father Samwel Adorot Seme. The Plaintiff's allegations of fraud and illegalities against the Defendant as captured in paragraph 8(a) to (1) of his amended pleadings include that she forged their late father's signature, transfer forms, letter of consent and registered the suit land in her name and that of their deceased father. This is what the Plaintiff has pleaded in paragraph 8 of his amended pleadings.

8: "The Plaintiff states that the Defendant secretly and fraudulently caused land parcel NO South Teso/Apokor/2368 to be transferred from the Plaintiff's deceased father to the joint ownership of the Defendant and the Plaintiff's deceased father so as to build a claim to the same."

The register for the suit land shows that it was first registered in the joint names of the Defendant and their late father Samwel Adorot Seme on 26<sup>th</sup> August 1998. The said Samwel Adorot Seme, as per the certificate of death, died on 7<sup>th</sup> October 1999 one year after the said registration. It arose out of the sub-division of the land parcel NO South Teso/Apokor/2000 which itself was first registered in the name of their deceased father on 12<sup>th</sup> July 1996. The Mutation Form for the land parcel NO South Teso/Apokor/2000 to create the suit land are among the documents alleged to have been forged. The registration of the suit land in the joint names of the Defendant and their late father took place prior to the demise of their said father. There is nothing to suggest that their late father complained about that registration during his life time yet he was the person best suited to do so. In that regard, the Plaintiff is, for all intents and purposes, a busy body because the suit land, having been sub-divided from the land parcel NO South Teso/Apokor/2000 which also belonged to their deceased father was registered in his name and the name of the Defendant during his life time.

34. Further, the Plaintiff has made various allegations of fraud but has not proved them to the required standard. That standard was set out in the case of *R.G. Patel -v- Lalji Makanji* 1957 E.A. 314 where the Court held:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

See also *Mutsonga -v- Nyati* 1984 KLR 425 where the Court said:

"Whether there is any evidence to support and allegation of fraud is a question of fact."

The Plaintiff has not approached this Court as the Administrator to the Estate of his late father. He has come to Court in his own capacity as one who was defrauded of the suit land. His capacity to file this suit is clearly in doubt and although he listed as among the documents in support of his case a Grant, no such Grant was filed as I stated earlier in this judgment. Without the Grant, he cannot purport to litigate over property that belonged to a deceased person. And even if he filed the Grant, he cannot



substantiate any allegations of fraud which occurred during the life time of the proprietor of the suit land when there is no evidence to suggest that their deceased father was incapacitated at that time.

35. It is also clear from the documents herein that the registration of the suit land in the sole name of the Defendant was done on 19<sup>th</sup> April 2012 following the demise of their father. The register shows that it was done following orders issued in succession cause NO 43 of 2011. There is nothing to suggest that the orders issued in that succession cause were fraudulent or illegal. If they were, the Court which issued those orders would be the proper forum in which they can be challenged. Not this Court as it has no jurisdiction to do so.
36. Most importantly, as a joint proprietor of the suit land, the Defendant was entitled under Sections 60 and 61 of *Land Registration Act* and Sections 49 and 50 of the *Land Act* to be registered as the sole proprietor thereof. Similar provisions existed in Section 118 of the repealed Registered *Land Act* which was the law when the suit land was registered in the joint names of the Defendant and her late father.
37. The suit land was registered in the name of the Defendant on 19<sup>th</sup> April 2012 under RL 19. Section 60 of the *Land Registration Act* provides that:

60: “If any of the joint tenants of any land, lease or charge dies, the Registrar shall upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.”

Section 61 of the same Act empowers the Registrar, upon production of the Grant, to register the deceased proprietor’s personal representative as the proprietor of the land by way of transmission. There would be no need for any consent of the Land Control Board for that transaction. That the Defendant is the Administrator of her late father’s estate is conceded by the Plaintiff. In paragraph 13 of his statement, he has said:

13: “That my sister is the current administrator of our father’s estate on which my homestead is situated and she cannot therefore evict me when she has a judiciary (sic) duty to act as my trustee and protect my beneficial interests.”

The Plaintiff’s counsel has submitted in paragraph 2 of his submissions that:

2: “The Defendant is registered vide entry NO 4 dated 19/4/2012 on the suit land’s register as the administratrix of the estate of Samuel Adorot Seme through Form RL 19 with the grant of Letters of Administration that is yet to be confirmed hence she acts as a trustee and administratrix of the estate. She therefore holds the suit title through Form RL 19 in trust for the estate of Samuel Adorot Seme In which both the Plaintiff and the Defendant are lawful dependant who are awaiting the full distribution of the Estate’s property in the suit land by the Succession Court. The Defendant’s name is on the register of the suit land so she can hold it until such time when the said temporary Grant of Letters of Administration will be confirmed showing the eventual mode of distribution of the suit title ...” Emphasis mine.

Whether or not the Grant has been confirmed is really of no consequence. This is because, following the death of their deceased father with whom she jointly owned the suit land, all that the Defendant needed to do, and which is clearly what she did, was to approach the Land Registrar with the death certificate. The Land Registrar would then, being satisfied of the death, be obliged to delete the deceased’s name from the register. That would then leave the Defendant as the sole proprietor of the suit land by the principle of survivorship or jus accrescendi. The suit land was, being joint property, not part of the deceased’s estate and the Defendant cannot therefore be a trustee of the Plaintiff.

38. The Plaintiff in paragraph 12 of his statement says;



- 12: “That the transfer of land parcel NO South Teso/Apokor/2368 from Samuel Adorot Seme to the joint ownership of Samuel Adorot Seme and Sarah Amuleni Seme is not supported by any genuine transfer form at the lands office and there was no proper consent from the relevant Land Control Board to authorise such transfer hence the entry NO 2 on the register of the suit parcel of land should be struck out or cancelled to enable us to proceed on an equal footing before the succession Court which will handle the distribution of the same to the entitled beneficiaries.”

Entry NO 2 on the register of the suit land, as I have already stated above, was made on 26<sup>th</sup> August 1998 during the life time of the parties’ deceased father. Only he could complain about whether it was fraudulent or illegal.

39. The remedy of directing the Land Registrar to cancel that entry is clearly not available to the Plaintiff.

### **Trust**

40. The Plaintiff’s other grievance is that the Defendant holds title to the suit land in trust for him. The onus was on him to prove trust. As was held in the case of *Mbothu & Others -v- Waitimu & Others* 1986 KLR 171:

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

When he testified on 28<sup>th</sup> September 2023, the Plaintiff conceded that this late father gave him his own land parcel NO South Teso/Apokor/2003. This is what he said when cross-examined by Mr J. P. Makokha:

“I confirm that I was given parcel NO South Teso/Apokor/2003 during his life-time. My late father did not transfer parcel NO South Teso/Apokor/2368 to me during his life time. It is true that I have two(2) wives. I built my home on parcel NO South Teso/Apokor/2003. It is true that I stopped the Defendant from putting up her home on parcel NO South Teso/Apokor/2368.”

The Defendant’s sisters Mary Consolata Aupai (DW2) And Emmaculate Iidi Ekeya (DW3) had a similar story in paragraph 5 of their respective statements which is:

- 5: “That in his life time, my father used to tell me that the reason he had registered the portion of land parcel NO South Teso/Apokor/2368 in his joint names and my step sister was so as to protect her from my brother who by his aggressive and violent nature did not want a daughter to get any share of the land/inheritance.”

When cross-examined by Mr. Wanyama, Mary Consolata Aupai (DW2), said:

“The portion in dispute was allocated to the Defendant by our late father. She was to live there with her mother and the Plaintiff was also given his portion but he refused to go there. That was in 1995 before our father passed away. It is my evidence that the Plaintiff invaded the land and refused to leave. He says women cannot inherit land.”



On her part, Emmaculate Iidi Ekeya (DW3) said the following when cross-examined by Mr Wanyama:

“Our late father had sub-divided his land and given the suit land to the Defendant and her mother. My late father sub-divided the land in 1995. He kept telling the Plaintiff to leave the portion. He told the Plaintiff and BENARD our brother to leave the portion. BENARD left but the Plaintiff refused to leave. The Plaintiff has put up a house on the portion after our father died.”

And on her part, the Defendant said as follows when cross-examined by Mr Wanyama:

“I confirm that the Plaintiff has invaded the land parcel NO South Teso/Apokor/2368 and built some permanent houses thereon. It is not true that I was given land parcel NO South Teso/Apokor/2369 which I sold.”

Given all the above, it is unlikely, and this Court is not persuaded, that the Defendant is a trustee holding the suit land in trust for the Plaintiff as he alleges. He has admitted that he has another parcel of land being South Teso/Apokor/2003 where he has a home. It is clear that their father intended the suit land to be the property of the Defendant. If he had wanted the Plaintiff to have a share therein, he would have said so and made it clear when he was sharing out his land. The Plaintiff pleaded that the Defendant was given her land parcel NO South Teso/Apokor/2369 which she sold and the proceeds thereof being Kshs.175,000 was banked in her account. One would have expected him to avail such evidence. He did not. And when cross-examined on that issue, he said:

“I can see from the Green card that the Defendant was never registered as the proprietor of the land parcel NO South Teso/Apokor/2369. But it was sold by my late father to Edward Buluma Sifuna. My father sold it on behalf of my sister the Defendant herein.”

The Plaintiff is clearly talking from both sides of his mouth. The truth of the matter is that the suit land was meant to be the sole property of the Defendant and she is not a trustee for the Plaintiff or any other person for purposes of the same. The deceased Samwel Adorot Seme clearly had the foresight to know that the Plaintiff would attempt to short change his step sister and that is why he took the precaution to protect the Defendant’s interest in the suit land. This Court will not allow those noble precautions to go to waste.

41. The Plaintiff’s claim to the suit land by way of a trust is not proved. It is dismissed.
42. The Plaintiff’s suit is therefore for dismissal.
43. With regard to the Defendant’s counter-claim, she seeks the following remedies:
  1. Eviction of the Plaintiff from the suit land.
  2. An order of permanent injunction against the Plaintiff.
  3. General damages.

From the evidence herein, it is clear that the Plaintiff invaded the suit land which is the sole property of the Defendant. He appears to be under the illusion that the suit land is part of the estate of their late father. However, as I have already stated above, the moment their late father died, the Defendant as the surviving joint proprietor of the suit land became the sole proprietor thereof. And that happened as far back as 7<sup>th</sup> October 1999 when Samwel Adorot Seme passed away as per the death certificate produced herein. The evidence is that the Plaintiff invaded the suit land which is the sole property of the Defendant. He is essentially therefore a



trespasser thereon and the Defendant as the absolute owner, is entitled to evict him. Trespass is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

“ An unlawful act committed against the person or property of another esp. Wrongful entry on another's real property.”

It is also a criminal offence and as a trespasser, the Defendant who enjoys all the rights under Section 25(1) of the [Land Registration Act](#) is entitled to the order of eviction of the plaintiff. I allow it.

44. Similarly, the prayer for a permanent injunction is well merited.
45. The Defendant also seeks an award for general damages. Not only has the Plaintiff trespassed onto the suit property for a long period. He has gone further to develop it yet he has his own land. By seeking the eviction of the Plaintiff from the suit land, which Order I have already granted, the Plaintiff clearly trespassed onto the suit land. Trespass is actionable per se i.e., without proof of damage – Park Towers Ltd -v- John Mithamo Njika & Others 2014 eKLR. In the circumstances of this case, taking into account the conduct of the Plaintiff, I am tempted to award such an award that will demonstrate the Court's displeasure at his conduct. I will however award only a nominal sum of Kshs.50,000 in general damages.
46. On the issue of costs, however, the parties being siblings, this Court will not wish to further antagonise them against each other. Each shall meet their own costs.
47. The up-shot of all the above therefore is that having considered all the evidence herein, this Court makes the following disposal orders:
  1. The Plaintiff's suit is dismissed.
  2. Judgment is entered for the Defendant as per her counter-claim as follows:
    - a. The Plaintiff shall vacate the land parcel NO South Teso/Apokor/2368 within 90 days of the delivery of this judgment.
    - b. In default of (a) above, the Plaintiff shall be evicted therefrom.
    - c. Thereafter, the Plaintiff, his agents, servants or any other persons acting through him shall remain permanently enjoined from interfering with the Defendant's occupation and possession of the land parcel NO South Teso/Apokor/2368.
    - d. The Plaintiff shall pay the Defendant general damages assessed at Kshs.50,000 with interest.
    - e. Each party shall meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**6<sup>TH</sup> MARCH 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF MARCH 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO PARTIES.**

Right of Appeal.

