



**Chai v Pachenje (Legal administrator of the Estate of Violet Cherotich Patrick)
(Land Case E003 of 2021) [2024] KEELC 4353 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
LAND CASE E003 OF 2021
EC CHERONO, J
MAY 23, 2024**

BETWEEN

RAIMON CHONGO CHAI PLAINTIFF

AND

**PHYLICE CHESOS PACHENJE (LEGAL ADMINISTRATOR OF THE ESTATE
OF VIOLET CHEROTICH PATRICK) DEFENDANT**

JUDGMENT

1. By way of a plaint dated 9th February, 2021 the Plaintiff sought for the following orders against the Defendant;
 - a. A declaration that the Land Disputes Tribunal now disbanded lacked jurisdiction to entertain ownership dispute and the judgment has also been statute barred hence incapable of enforcement.
 - b. Costs of the suit and interests
 - c. Any other relief this Honourable Court deems fit to grant.
2. In his said plaint, the Plaintiff contends that he is the registered proprietor of land parcel no/ Elgon/ kapkateny/645 measuring 9.3 Ha and that the defendant without any colour of right sued him at the Mt. Elgon Land Disputes Tribunal in case No. 4 of 2007 and obtained a judgment for subdivision of his parcel of land to transfer a portion to her (the defendant). It was his case that he was aggrieved by this decision which was later adopted by the Court in Kimilili SRM Court case No. 14 of 2007.
3. Upon being served with the plaint, the defendant entered appearance through the firm of Kraido & Co Advocates on 14th April, 2021 and filed a defence and counterclaim dated 10th May, 2021.
4. It was the defendant's contention that the plaintiff obtained registration of the original parcel of land i.e. Elgon/ Kapkateny/409 which was later sub-divided into Elgon/ Kapkateny/645, 646 and 647 and



- that the plaintiff holds Elgon/ Kapkateny/645 in trust for the estate of Geoffrey Paus Chai-Deceased. It was averred that the current suit has been filed over 12 years since the said decision was made and that the plaintiff was guilty of laches and the claim is statute barred.
5. In her counterclaim, the defendant averred that she is the administratrix of the estate of Geoffrey Paus Chai-deceased who died intestate on the 26th December, 1971. She stated that she was issued with letters of administration for the said estate on 10th May, 2021 in Kimilili Succession Cause No. 13 of 2021. She averred that the deceased was the owner of the original Land Parcel No. Elgon/ Kapkateny/409 having inherited the same from his father one Chai Chemasut but Raimon Chongo Chai who was the deceased's brother wrongly transferred the same to himself in 1995 and caused the above mention subdivision. It was further stated that the said Raimon caused the transfer of Land Parcel No. Elgon/ Kapkateny/646 and 647 to Wilred Kumut Naibei and Simon Kae Saul thus retaining Land Parcel No. Elgon/ Kapkateny/645.
 6. It was her contention that the said Raimon who had equally inherited from his father Chai Chemasuet was not entitled to Land Parcel No. ELGON/ KAPKATENY/409 or any part thereof. It was alleged that the said Raimon held the parcel of land in trust for the estate of Geoffrey Chai-deceased and his actions were mistaken.
 7. The defendant in his counter claim therefore sought for the following orders;
 - a. A declaration that the defendants counter claim holds and have held land parcel number Land Parcel No. Elgon/ Kapkateny 645, 646 and 647 as trustees for and on behalf of the estate.
 - b. In the alternative, an order that the registration of Land Parcel No. Elgon/ Kapkateny 645, 646 and 647 in the names of the 1st, 2nd and 3rd defendants in the counter-claim respectively be cancelled and the same do revert to the original Land Parcel No. Elgon/ Kapkateny/409 in the name of Geoffrey Paus Chai-deceased.
 - c. Costs of the counter-claim.
 - d. Any other orders in the interest of justice.
 8. The plaintiff herein filed his defence to counter-claim dated 16th March, 2022.
 9. After Close of pleadings, the matter proceeded by way of viva voce evidence wherein both parties called one witness each and closed their respective cases.
 10. Pw1 Raimon Chongo Chai adopted his witness statement filed in court on 19th June, 2023 as his evidence in chief. He went on to produce as his documentary evidence the list of documents dated 9th February, 2021 as PExhibit 1-4.
 11. In cross-examination he stated that one Geoffrey Baus Chai was his brother with their father being Chai Chemaswet who died in 1972. He testified that Land Parcel No. Elgon/ Kapkateny/409('the suit land') was registered in his father's name as at the time of his death and that he was awarded the suit land by the Land District Tribunal and that the family of had been given its share.
 12. In re-examination it was his testimony that when he filed for letters of administration the defendant and their siblings did not object and that seeing that they were girls they are not entitled to any share of the land.
 13. The plaintiff thereafter closed his case.



14. Dw1 Phyllice Cheso Pachenje adopted her witness statement dated 10th May, 2021 as her evidence in chief and produced as documentary evidence her list of documents dated 10th May, 2021 as DExhibit 1-4. She urged the court to allow her prayers as per her counter-claim.
15. During cross examination she testified that her father had a share in the suit land which he did not sell and that she and her siblings were entitled to the same. She stated that the succession proceedings were secretly done and as such she could not object as she did not know of the same.
16. In re-examination she testified that the suit land was to be shared amongst the 4 sons of Chai Chemaswet and that she and her siblings were entitled to their father's share. She stated that she filed a case in the Mt. Elgon Land Disputes Tribunal which decided that she and her siblings ought to be given a share of the suit land and that the said decision was not appealed against.
17. The defendant thereafter closed her case. And directions were taken for parties to file submissions.
18. I have considered the pleadings, evidence and the submissions of all counsels and in my view, the following are the issues for determination;
 - a. Whether the land district tribunal had jurisdiction to determine the ownership dispute of the suit land.
 - b. Whether the plaintiff held Land Parcel No. Elgon/kapkateny/409 in trust for the estate of Geoffrey Paus Chai-deceased.
 - c. Whether titles for Land Parcel No. Elgon/kapkateny/645, 646 and 647 should be cancelled and registered in the name of Geoffrey Paus Chai-deceased.
 - d. Who shall bear the costs of the suit.
19. The plaintiff in this case filed this suit claiming that the defendant's father died in 1971 leaving a widow and three daughters. He further stated that his father one Chai Naibei Chemaswet who died in 1972, prior to his death subdivided the suit land i.e Land Parcel No. Elgon/Kapkateny/409 between himself (the plaintiff) and his brother Wilfred Kumut Naibei, having initially allocated shares of other pieces of land to his other children.
20. It was his claim that in 1995, he filed a succession cause for his father's estate and secured titles for the suit land which was subsequently sub-divided into three portions i.e. Elgon/Kapkateny/645 registered in his name, Elgon/Kapkateny/646 registered in the name of Simon Kae Saul and Elgon/Kapkateny/647 registered in the name of Wilfred Kumut Naibei. He contends that his brother Geoffrey Paus Chai was not allocated any share since he had already died and having left behind a widow and daughters, they were not entitled to land.
21. It was his case that during the 2007 post-election skirmishes, he fled from his home and when he returned in 2010, he found that the defendant through her mother had filed a case before the Land District tribunal and that the tribunal's award had been adopted by the Court in Kimilili and land surveyors had been ordered to sub-divide his land. He therefore urged this Honourable Court to find that the tribunal did not have jurisdiction to entertain an ownership dispute and that the resultant judgment was statute barred.
22. The defendant on the other hand identified herself as the daughter to Geoffrey Paus Chai and she averred that her father was a beneficiary of the suit land which he exclusively inherited from his father Chai Chemaswet. She claims that the plaintiff wrongly caused the suit land to be transferred to his name and thereafter sub-divided and registered the resultant portion in his name, Simon Kae Saul and



Wilfred Kumut Naibei. It was his contention that the plaintiff did not have a share in the suit land since he had already been allocated another piece of land which he had settled in.

23. The defendant argued that the plaintiff took advantage and allocated the suit land to himself after he inherited the defendant's mother upon the death of their father and his brother Geoffrey Paus Chai. They contend that the plaintiff wants to disinherit them due to their gender. She urged the court to dismiss the suit and allow her counterclaim.
24. I have examined the proceedings of the Land District Tribunal Case No.4 of 2007 and find that the said dispute was basically on beneficial interest of land arising from inheritance.
25. On the first issue for determination, the plaintiff challenged the jurisdiction of the Land District Tribunal in its decision which was adopted by the Senior Resident Magistrates Court at Kimilili. The issue of jurisdiction has been discussed by courts on numerous decisions and held that jurisdiction is everything and that anything done without jurisdiction by a court of law or tribunal is null and void and ineffectual. See Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd [1989] KLR 1.
26. In Joseph Malakwen Lelei & another Vs Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal and states as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

"3(1) subject to this Act, all cases of a civil nature involving a dispute as to:-

- (a) The division of, or the determination of boundaries to land, including land held on in common,
- (b) A claim to occupy, or work land or
- (c) Trespass to land."

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....

27. Further, in M'Marete Vs Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 (2004) eKLR the court held-

"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered *Land Act* to the Appellant. In our view, the Tribunal acted in excess of its jurisdiction."

28. Guided by the above case laws and legal provisions, it is clear that the Land District tribunal exceeded its jurisdiction therefore the proceedings before them and the decision they made were null and void



ab initio. Therefore, the consequent adoption of the decision of the Tribunal as judgment of the court by the Magistrate's Court was of no effect. The Magistrates Court could not give effect to something that was already a nullity.

29. On the second question for determination, the defendant in her counterclaim sought for a declaration that the plaintiff held Land Parcel No. Elgon/kapkateny/409 in trust for the estate of Geoffrey Paus Chai-deceased. It will be noted that customary trust is among the overriding interests provided for under Section 28 of the [Land Registration Act](#), 2012, and for which a proprietor holds land subject to, as provided in Section 25 of the [Land Registration Act](#), 2012. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another.
30. The Black Law Dictionary Ninth Edition describes 'Trust' as

“The right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one another (the trustee at the request of another for the benefit of a third party.
31. While discussing the burden of proving trust, the Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR held:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-
“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.”
32. Further see the discussion of the Court of Appeal in the case of *Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Center* [2018] eKLR
33. Guided by the above quoted authorities and provisions of the law as well as the evidence adduced, it is clear that a trust cannot be inferred and the alleging party must prove the same by adducing evidence. The plaintiff, being the one claiming the existence of a trust must satisfy the requirements of Section 108 and 109 of the [Evidence Act](#) and since this is a civil claim, he has to discharge his burden of proof on a balance of probabilities.
34. The defendant in her defence and in support of her counterclaim stated that the suit land was initially allocated to her father who died in the year 1971 and that the plaintiff who was his uncle had taken advantage of her fathers' death and the fact that he (the plaintiff) inherited her mother as his wife. The plaintiff in opposition to the defendants counterclaim averred that the suit land was his inheritance from his father which was to be shared between him and his brother Wilfred Kumut Chai. He stated that the defendant's deceased father Geoffery Paus Chai was not allocated any land since he died before their father Chai Chemaswet died and left behind a widow and daughters. The plaintiff confirmed that he indeed inherited his late brothers' wife and asserted that the defendant and her siblings have no claim over the suit land since they were females.
35. The principles for customary trust was set out by the Supreme Court in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR where it was held as follows:

“ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land 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 the 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.”

36. From the foregoing principles of the law, it is clear that if the 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.
37. From the evidence adduced in this case, it is clear that the suit land is family land and the defendant belong to that family by being a granddaughter of the original owner Mzee Chai Chemaswet. The close family relationship between the defendant, the family of Mzee Chai Chemaswet and the plaintiff herein is apparent. Furthermore, it is clear that the defendant is asserting rights on behalf of her father's estate, given that her father was the plaintiff's brother and also a son of Mzee Chai Chemaswet.
38. Further, on examination of the evidence as presented by both parties, it emerges that Geoffrey Paus Chai-deceased died in the year 1971 while Mzee Chai Chemaswet died in the year 1972. At the time of death of Mzee Chai Chemaswet, the plaintiff on his own admission had inherited Geoffrey Paus Chai's wife. It is this Honourable Courts view that the plaintiff was allocated Geoffrey Paus Chai's share to hold in trust for his family which he had now inherited and was under his care.
39. The upshot of my finding is that Honourable satisfied that the defendant in her capacity as the administrator of the estate of Violet Cheronno Patrick (deceased) who was also the administrator of George Paus Chai (also deceased) has on a balance of probabilities proved her case against the plaintiff. Consequently, I do proceed to dismiss the plaintiff's suit and enter judgment in favour of the defendant against the plaintiff in the counterclaim in the following terms;
 - a. A declaration be and is hereby made that the plaintiff holds Land Parcel No. Elgon/Kapkateny/409 in favour of the estate of Violet Cherotich Patrick(deceased) and on behalf of Geoffrey Paus Chai (deceased).
 - b. The subsequent subdivision and registration of Land Parcel No. Elgon/Kapkateny/645,646 and 647 be and is hereby cancelled and the same do revert to the original land parcel No. Land Parcel No. Elgon/Kapkateny/409 and in the name of Geoffrey Paus Chai (deceased).
 - c. An order that the 1st, 2nd and 3rd defendants by counterclaim severally do execute all such documents and do all such and things as may be necessary to re-transfer to the estate of Geoffrey Paus Chai-deceased the land parcel Numbers Elgon/kapkateny/645, Elgon/kapkateny/646 And Elgon/kapkateny/647.



d. Due to the nature of relationship between the parties, each party shall bear its own costs.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF MAY, 2024.

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HON.E.C CHERONO

JUDGE

In the presence of;

1. Mr. Kigundo H/B Kraido for the defendants
2. Mr. Shikhu H/B Sichangi for the plaintiff
3. Bett C/A

