



**Kibuna & another v Kibuna & 6 others (Environment & Land Case 491 of 2017) [2024] KEELC 5817 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5817 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 491 OF 2017**

**OA ANGOTE, J**

**JULY 31, 2024**

**BETWEEN**

**MICHAEL KINYUA KIBUNA ..... 1<sup>ST</sup> PLAINTIFF**

**EDWARD KIBUNA KINYUA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PENINAH NJAHIRA KIBUNA ..... 1<sup>ST</sup> DEFENDANT**

**SIMON P KAHWAI I KIBUNA ..... 2<sup>ND</sup> DEFENDANT**

**HENRY GITAU KIBUNA ..... 3<sup>RD</sup> DEFENDANT**

**GLADY'S WANJIKU GAKUHA ..... 4<sup>TH</sup> DEFENDANT**

**PHILIP ULUMA (LIQUIDATOR - NG'UNDU FARMERS CO-OPERATIVE SOCIETY LIMITED) ..... 5<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, NAIROBI ..... 6<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide an Amended Complaint dated 17<sup>th</sup> May, 2018, the Plaintiffs seek as against the Defendants, jointly and severally, the following reliefs;
  - i. A Permanent Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, their servants, employees and/or agents from selling, transferring, alienating or otherwise dealing and/or interfering with the parcel of land known as Title No Nairobi/Block 126/773.
  - ii. A Declaration that the transfer and the registration of Tile No Nairobi/Block 126/773 to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is null and void ab initio and is hereby cancelled forthwith.



- iii. An Order of restitution declaring the 2<sup>nd</sup> Plaintiff as the beneficial owner of all that parcel of land known as Title No Nairobi/Block 126/773 by virtue of adverse possession and inter vivos gift.
  - iv. An Order of rectification of the Register of Titles and registration of the 2<sup>nd</sup> Plaintiffs' name in the Register of Titles at Nairobi Land Registry as the proprietor of Title No Nairobi/Block 126/173.
  - v. Costs of the suit.
  - vi. Any other or such relief that the Honourable Court may deem fit and just to grant.
2. It is the Plaintiffs' case that at all material times, the late Kibuna Ndegwa was the registered bona fide member/shareholder of Plot 701 by virtue of an allotment letter and share certificate number 249 issued by Ng'undu Farmers Co-operative Society Limited [under liquidation] now registered as Nairobi/Block 126/773(hereinafter the suit property).
  3. The Plaintiffs averred in the Plaint that during his lifetime, and with the full knowledge of the 1<sup>st</sup> -4<sup>th</sup> Defendants, the late Kibuna Ndegwa made an inter vivos gift of the suit property to the 2<sup>nd</sup> Plaintiff surrendering the original ownership documents to the 1<sup>st</sup> Plaintiff for custody, and relinquishing ownership and control thereof and that he further granted them possession and they have been in actual, open, un-interrupted possession of the suit property since 1989.
  4. According to the Plaintiffs, the above notwithstanding, on 25<sup>th</sup> January, 2013, the 6<sup>th</sup> Defendant presided over the transfer of the suit property to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and issued them with, a certificate of lease in respect thereof in breach of the original allottees proprietorship rights.
  5. They assert that the transfer of the suit property was fraudulent and subsequently void and that the particulars of fraud as against the 1<sup>st</sup> -4<sup>th</sup> Defendants include fraudulently obtaining the certificate of lease with the intent to dispose the property to third parties.
  6. Further particulars of fraud were set out as colluding with the 5<sup>th</sup> Defendant to alter the members/ shareholders register; colluding with the 6<sup>th</sup> Defendant to procure a lease on the basis of fraudulent documents; and interfering and meddling with the suit property, the subject of a succession cause in the Estate of the late Kibuna Ndegwa.
  7. As against the 5<sup>th</sup> Defendant, the particulars of fraud and negligence were set out as abetting the fraudulent transfer of the suit property contrary to the *Law of Succession Act* and failing to verify the membership register before authenticating the transfer in favour of the 1<sup>st</sup> -4<sup>th</sup> Defendants.
  8. Further particulars of fraud and negligence against the 5<sup>th</sup> Defendant were set out as including failing to protect the interests of the bona fide allottee and presiding over alteration of the Ng'undu Farmers Co-operative Society members/shareholders register; failing to give advice over the intestate estate and failing to take remedial action to notify the 6<sup>th</sup> Defendant of the Plaintiffs' formal complaints of mischief and irregularity.
  9. With respect to the 6<sup>th</sup> Defendant, the Plaintiffs set out the particulars of fraud and negligence against it as abetting and presiding over the fraudulent transfer of the suit property; colluding with the 1<sup>st</sup>-4<sup>th</sup> Defendants to make false entries in the green card; permitting and/or causing the registration of forged or falsified documents and issuing a certificate of lease without following due process of law.
  10. The Plaintiffs maintain that upon issuance of a notice dated 11<sup>th</sup> September, 2007 by the 5<sup>th</sup> Defendant calling upon all members and interested parties of Ng'undu Farmers Co-operative, they asked him to



take measures to protect the interests of the original allottee which he failed to do and that being the custodian of all primary documents pertaining to Ng'undu Farmers' Co-operative Society, he abused his office and authority to abet fraud exposing the late Kibuna Ndegwa's estate to intermeddling.

11. It was averred in the Plaint that the 6<sup>th</sup> Defendant abused his office by transferring the suit property without due verification of the requisite transfer documents; that the 1<sup>st</sup> Defendant has on her own volition signed a written statement denouncing the transfer of the suit property and has demonstrated readiness to relinquish her title and that despite demand and notice, the 1<sup>st</sup> -4<sup>th</sup> Defendants have refused to surrender their interests in the title whereas the 5<sup>th</sup> and 6<sup>th</sup> Defendants have refused to take remedial action.
12. The 1<sup>st</sup> -4<sup>th</sup> Defendants filed a statement of Defence on 27<sup>th</sup> October, 2017. Vide their Defence, they denied the assertions as set out in the Plaint stating that whereas the Plaintiffs lived on the suit property with the permission of the deceased, at no point in time did the deceased relinquish control of, or ownership of the suit property and that having been on the property with permission, the doctrine of adverse possession is not applicable.
13. The Defendants assert that the registration of the title in their names was done in accordance with the law as property cannot be registered in the name of a deceased person; that the 5<sup>th</sup> and 6<sup>th</sup> Defendants in so registering the property were acting in their legal capacities pursuant to an agreement by all the beneficiaries of the Estate of the late Kibuna Ndegwa agreed upon in various meetings and that the 1<sup>st</sup> Plaintiff was present, signed the minutes of the family meetings held on diverse dates in this regard and did not voice any objection.
14. According to the Defendants, the 1<sup>st</sup> Defendant has never met the Plaintiffs' Advocate or the Chief, and that she did not sign any documents stating that the Plaintiffs are entitled to the suit property and if such a document exists, the contents therein were never explained to her and that she has always maintained that the deceased's' properties be divided among his three wives which is what he decreed.
15. The Defendants stated that they would raise an objection as to the locus of the Plaintiffs to institute the suit and the Court's jurisdiction to determine the same and that as the property belonged to the deceased, the Plaintiffs ought to have filed an appropriate succession matter at the High Court as this Court does not have jurisdiction.
16. They Defendants asserted in the Defence that the late Kibuna Ndegwa had three wives being the late Leah Wairimu, Prisca Wanjiku and Peninah Njahira who were entitled to share the suit property as all the other properties of the deceased had been shared by him during his lifetime and that the properties aforesaid had been shared between his three wives with each child of the said wives getting a share through their respective mothers.
17. They contend that upon being informed that Ng'undu Farmers Co-operative Society was being wound up, all the beneficiaries agreed on how the suit property was to be registered and sub-divided; that the 1<sup>st</sup> -4<sup>th</sup> Defendants' registration being a first registration cannot be defeated even if the same was fraudulent and that the Plaintiffs' suit should be dismissed.
18. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants filed a Defence on 11<sup>th</sup> September, 2018. They denied the assertions as set out in the Amended Plaint only admitting that the late Kibuna Ndegwa was registered as a shareholder in Ng'undu Farmers' Co-operative Society. They averred that by law, the Court has the mandate to determine the validity of the title on the basis of the evidence adduced by the parties.



## Hearing and Evidence

19. PW1 was John Kiiru Githu, Assistant Chief, Nembu sub-location, Mutati location. He adopted his witness statement dated the 23<sup>rd</sup> June, 2017 as his evidence in chief.
20. It was his oral testimony that he knows the entire family of the late Ndegwa as they all hail from his area of jurisdiction and that sometime in December, 2015, Michael Kinyua reported that his brothers, in collaboration with their mother, Peninah Njahira and Gladys' Wanjiku had conspired to sell the suit property contrary to his father's wishes.
21. PW1 stated that he summoned the family members sometime in 2019; that Michael Kinyua produced a share certificate in the name of his father and stated that his father gave the 2<sup>nd</sup> Plaintiff the property and that they have been on the suit property since 1989, a fact disputed by the Defendants.
22. PW1 stated that the Defendants only gave him transfer documents from Ng'undu Farmers; that the aforesaid transfer form was incomplete as it did not have photos of the Directors of Ng'undu Farmers; that similarly, the form was not dated nor certified by an Advocate and that they never gave him the title.
23. It was his further evidence during cross-examination that he wasn't there when the land was given to the 2<sup>nd</sup> Plaintiff; that the deceased had share certificates; that he is not aware of the liquidation process and that if there was a letter from the chief to the society approving the allocation to the Defendants, then the question of fraud is negated.
24. PW2 was Michael Kinyua Kibuna, the first Plaintiff. He adopted his witness statement dated 20<sup>th</sup> July, 2017 as his evidence in chief and produced the documents number 1-11 as PEXHB1.
25. It was his evidence that he resides on the Kamulu land with his son Edward, the 2<sup>nd</sup> Plaintiff; that his father gave him the documents for the suit property in 1989 and together with his son, they have lived there since then; that his mother is Leah Wairimu; that the 1<sup>st</sup>-4<sup>th</sup> Defendants are his brothers, sister in law and step mother; that none of his family members have ever objected to their occupation of the land, and that they were fully aware that the same was granted to him by their father.
26. PW2 stated that him and his son lodged a complaint with the chief regarding the suit property and gave the chief the documents; that his father gave him the documents; that his father lived in Nembu and that the transfer and registration of the suit property in favour of the Defendants was fraudulent.
27. It was his further evidence on cross-examination that when the deceased died, the 2<sup>nd</sup> Plaintiff was a minor; that the 2<sup>nd</sup> Plaintiff was the only grandson given land; that his father died in 1995; that he has been on the suit property since 1989; that his father called the entire family and informed them that he had given the 2<sup>nd</sup> Plaintiff the entire suit property and that they have never done succession.
28. PW3 was Edward Kibuna Kinyua, the 2<sup>nd</sup> Plaintiff. He adopted his witness statement dated 20<sup>th</sup> July, 2017 as his evidence in chief. It was his oral testimony that he lives on the suit property which belongs to him; that he has the share certificate, ballots and receipts which were given to him by his grandfather and that his grandfather gave them to his father and asked that they be given to him when he grows up.
29. It was his further evidence on cross that his grandfather showed him the land and its beacons sometime in 1990 when he was around 13 years old; that his father was present; that he should have undertaken succession first and that the Defendants title is fraudulent because no succession was undertaken.
30. PW4 was Gabriel Ndegwa Kibuna. He adopted his witness statement dated 26<sup>th</sup> March, 2018 as his evidence in chief. It was his evidence that the suit property belonged to his late father who decided to give it to the 2<sup>nd</sup> Plaintiff; that he had initially given the suit property to him and Michael but his



- mother Peninah would not allow him to go to Kamulu; that consequently, Michael and his family were allowed there and that it was agreed that the property would be transferred to Edward when he reached adulthood.
31. It was his evidence that his father shared his property equally and as such, none of the family members raised the issue of the suit property; that some of his brothers later decided that the suit property could not be given to a grandson; that they could not undertake succession twice because they had obtained the title to the land before succession; that the Registrar should not have issued them with the title before succession was undertaken; that he is unaware of any family meeting allowing them to get a title and that they never resolved to have the title sub-divided into two.
  32. In cross-examination PW4 stated his father never transferred the land when he was alive; that there is nothing in writing giving the land to Edward; that there is no letter of allotment; that spouses have rights on the land and that he is not aware that his father had three shares in Ng'undu Farmers.
  33. It was his further evidence on cross-examination that his father gave him land in Nembu but he doesn't have a title because they have not done succession; that Michael lives in Kamulu but has another parcel in Nembu; that three families are represented in the lease; that his father's wishes were verbal and that he doesn't know the person who did the letter of allotment in favour of Edward.
  34. DW1 was Simon Kahura Kibuna, the 2<sup>nd</sup> Defendant. He adopted his witness statement dated 8<sup>th</sup> March, 2018 and produced the documents of an even date as DEXHB1-5. It was his testimony that before its registration, the suit property was owned by the late Kibuna Ndegwa who had purchased three shares in Ng'undu Farmers Co-operative Society Limited.
  35. According to the 2<sup>nd</sup> Defendant, the deceased died on 6<sup>th</sup> March, 1995; that the suit property was issued with a number and subsequently registered and that the 5<sup>th</sup> Defendant informed them that they should have the suit property transferred as the company was being wound up and there was a risk of the property getting lost.
  36. He testified that since legally, property cannot be registered in the name of the deceased, the family members held meetings and agreed that the suit property be registered in the names of the 1<sup>st</sup> -4<sup>th</sup> Defendants as representatives of the three families; that they thereafter sought the documents required by the 5<sup>th</sup> Defendant from the Chief and other Government offices and the 6<sup>th</sup> Defendant registered the property in their names and that the registration aforesaid was proper and lawful.
  37. DW1 asserted that the 1<sup>st</sup> Plaintiff was only allowed to live on the suit property because he was troublesome; that they held several meetings in which the 1<sup>st</sup> Plaintiff was present where they agreed to have the property registered as it was; that the deceased had three wives and all his properties have been shared among the three and that it was on that basis that the deceased purchased three shares in Ng'undu.
  38. According to him, the documents in respect of the suit property were unlawfully taken by the 1<sup>st</sup> Plaintiff and not handed over to him as alleged; that there is indeed no share transfer evincing the same and that the three families are represented in the title with the 1<sup>st</sup> Plaintiff being represented by his brother Henry.
  39. DW2 was Benson Limo Long'oleyang, the Principle Land Registrar in the Ministry of Lands. It was his evidence that the land of the deceased can only be registered in the name of an Administrator and that the Lease was registered on 25<sup>th</sup> January, 2013 and the title is valid. He stated on cross-examination that Ng'undu Farmers wrote to them on the ownership of the property and based on the foregoing, they opened a file, prepared an allotment and upon payment of fees they prepared a Lease.



40. DW3 was Henry Gitau Kibuna. He adopted his witness statement dated 8<sup>th</sup> March, 2018 and placed reliance on the documents produced. According to DW3, the suit property was owned by the late Kibuna Ndegwa having been acquired from Ng'undu Co-operative Society through purchase of shares and that the property was registered in the names of the beneficiaries of the deceased since legally, property cannot be registered in the name of a deceased.
41. It was his evidence that the decision to have the property registered in the 1<sup>st</sup> -4<sup>th</sup> Defendants names was arrived at after a series of meetings in which the 1<sup>st</sup> Plaintiff was present; that the 1<sup>st</sup> Plaintiff did not voice any objections in the meetings; that they obtained the requisite documents from the 5<sup>th</sup> Defendant and that the 6<sup>th</sup> Defendant lawfully undertook the registration.
42. In cross-examination, DW3 stated that there are other children who are not on the list of ownership of the suit property; that Michael has been on the land and was taken there by their father and that he was allowed to live there temporarily but was not given the same.

### Submissions

43. The Plaintiffs' Counsel submitted that the Plaintiffs have established that the deceased gave the 2<sup>nd</sup> Plaintiff the property as a gift inter vivos pursuant to which the 1<sup>st</sup> Plaintiff was given the original documents by the deceased and that they were granted possession of the land by the deceased.
44. Counsel submitted that the Plaintiffs have been on the suit property for a period of 35 years enjoying quiet, open, uninterrupted possession entitling them to the same by virtue of adverse possession and that the suit property is part of the estate of the deceased and pursuant to the [Law of Succession Act](#), the parties had no mandate to arrogate themselves the property as they purported to.
45. Counsel submitted that the transfer and registration of the suit property was done without due regard to the law by the 5<sup>th</sup> and 6<sup>th</sup> Defendants; that the Defendants failed to show the propriety of the transfer of the property and the same should be invalidated and that the Plaintiffs are entitled to the orders sought in the Plaint.
46. The 1<sup>st</sup>-4<sup>th</sup> Defendants' Counsel submitted that the registration of the suit property in the 1<sup>st</sup> -4<sup>th</sup> Defendants names was valid; that at the time of registration, the property's owner, the late Kibuna Ndegwa having been deceased, his family met and agreed that the property be registered in their names representing each of the three families and that there was no evidence of any fraud or irregularities as alleged.
47. According to Counsel, the Plaintiffs have not met the threshold for a successful plea of adverse possession as set out in Section 7 of the [Limitation of Actions Act](#) and explained by the Court in *Wambugu vs Njuguna*[1983]eKLR and that in the case of *Gabriel Mui vs Mukindia Maranya*[1933]EA , the Court was categorical that the adverse character of the possession must be established.
48. It was submitted that having admitted to have entered into the property with permission, the Plaintiffs claim for adverse possession cannot lie. Reliance was placed on the cases of *Chevron K Limited vs Harrison Wa Shutu* [2016] eKLR and *Mtaana Lewa vs Kahindi Ngala Mwangandi*[2015]eKLR.
49. Further, Counsel submitted, at the time the Plaintiffs entered the property, the same had no title and subsequently, there was no title against which a plea of adverse possession could run. Reliance in this respect was placed on the case of [Sophie Wanjiku John vs Jane Mwibaki Kimani, Civil Suit 490 of 2010](#).



50. It was submitted by the Defendants' counsel that there is no evidence that the property was a gifted inter vivos to the 2<sup>nd</sup> Plaintiff as alleged.
51. Counsel urged that the Plaintiffs have not met the threshold for the grant of permanent injunctive orders having failed to impugn the title held by the Defendants as per Section 26(1) of the [Land Registration Act](#); that in *Ratilal Gordhanbai Patel vs Lalji Makanji*[1957]E.A, the Court emphasized that allegations of fraud must be specifically pleaded and proved which the Plaintiffs have failed to do and that the suit is unmerited and should be dismissed.

### **Analysis and Determination**

52. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;
  - i. Whether this Court has jurisdiction to entertain the suit?
  - ii. Whether the Plaintiffs have locus to institute the suit?
  - iii. Whether the 2<sup>nd</sup> Plaintiff has any legal and/or beneficial rights to the property?
  - iv. Whether the registration of the suit property in the names of the 1<sup>st</sup>-4<sup>th</sup> Defendants was fraudulent and/or irregular?
  - v. What are the appropriate orders to issue?
53. Vide the Defence, the 1<sup>st</sup> and 4<sup>th</sup> Defendants questioned this Court's jurisdiction to entertain the suit and the Plaintiffs locus in instituting the same. They contend that because the suit property belongs to the deceased, the Plaintiffs should have filed an appropriate succession matter at the High Court. None of the parties submitted on these objection.
54. The centrality of jurisdiction in any proceedings need not be re-stated. Nyarangi J.A succinctly captured this in *Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited* [1989] KLR 1 thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
55. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* [2013] eKLR stated as follows:

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”



56. Speaking to the source of the Court’s jurisdiction, the Apex Court of Kenya in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2012]eKLR stated as follows:

“ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

57. This Court’s jurisdiction is found in Article 162(2) (b) of *the Constitution* of Kenya, 2010 as read with Section 13 of the *Environment and Land Court Act*. Article 162(2)(b) provides thus:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – the environment and the use and occupation of, and title to, land.”

58. Pursuant to the constitutional dictate aforesaid, Parliament enacted the *Environment and Land Court Act*, 2011 which provides at Section 13 as follows:

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

59. On the other hand, Article 165(3) of *the Constitution* confers the High Court with jurisdiction and provides:

- (3) Subject to clause (5), the High Court shall have-
  - a. Unlimited original jurisdiction in criminal and civil matters.”

60. Within the High Court, the Probate Court’s jurisdiction is derived from Sections 2 and 47 of the *Law of Succession Act*. Section 2, under the head ‘Application of the Act’ provides as follows:

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”



- (2) The states of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

61. Whereas Section 47 of the same Act provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

62. The jurisdiction of the Environment and Land Court vis a vis the High Court with respect to matters touching on both land and succession was considered by Nyamweya J. in *Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited* [2017] eKLR as follows:

“In *Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC* (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

63. Expounding on the same, the Court in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR had this to say:

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order



appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

64. Vide the Complaint, the Plaintiffs seek, inter-alia, for declarations that they are the legitimate owners of the suit property. They seek to have the transfer and registration of the suit property in the 1<sup>st</sup> -4<sup>th</sup> Defendants’ names cancelled and the register rectified to have the 2<sup>nd</sup> Plaintiff registered as the owner.
65. In asserting ownership of the suit property, the Plaintiffs do not claim to be beneficiaries of the estate of the deceased. They contend that the 2<sup>nd</sup> Defendant was given the property by the deceased during his lifetime as an *inter vivos* gift and/or he is entitled to the same by virtue of adverse possession. This, the Court opines, is a claim on title to land and it is vested with jurisdiction to determine the same.
66. It is not the duty or mandate of the High Court to resolve disputes between parties claiming ownership of title to land. That mandate lies solely with the Environment and Land court which was established under Article 162 (b) of *the Constitution* of Kenya 2010. The Court finds that it is well vested with jurisdiction to determine this suit.
67. The next objection falls on whether the Plaintiffs have the requisite locus to institute this suit. The term *locus standi* literally means a place of standing. It means a right to appear in court to file, prosecute, or appear or be heard in any proceedings [See *Alfred Njau & 5 Others vs City Council of Nairobi* 1983 eKLR].
68. It is trite that the presence of proper parties in a suit is *sine quo non* the jurisdiction of the court. This position was fortified by the Court in *Apex Finance International Limited & another vs Kenya Anti-Corruption Commission* [2012] eKLR citing with approval the Nigerian Supreme Court case of *Goodwill & Trust Investment Ltd & Another vs Will & Bush Ltd* SC.266/2005 (25.03.2011) where the Court held as follows:

“it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in *limine*. When proper parties are not before the court, the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”



69. The Plaintiffs herein have instituted the suit in their own names and on their own behalf seeking ownership of the suit property. Consequently, no question as to locus arises. This objection therefore fails.
70. The Plaintiffs instituted this suit seeking inter-alia, a declaration that the 2<sup>nd</sup> Plaintiff is the owner of the suit property having acquired it by way of adverse possession and/or inter vivos gift. They seek to have the title in the names of the 1<sup>st</sup>-4<sup>th</sup> Defendants invalidated and the register rectified to have him registered as the proprietor of the suit property.
71. It is the Plaintiffs' case that Kibuna Ndegwa, who was the father and grandfather of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively was the registered, bonafide shareholder of Plot No 701 by virtue of an allotment letter and share certificate no 249 issued to him by Ng'undu Farmers Limited and that the aforesaid plot was thereafter registered as Nairobi/Block 126/773.
72. They contend that during his lifetime, the deceased made an inter vivos gift of the suit property to the 2<sup>nd</sup> Plaintiff with the full knowledge of the 1<sup>st</sup> -4<sup>th</sup> Defendants and gave custody of the original documents to the 1<sup>st</sup> Plaintiff; that they have further been in actual, open, uninterrupted possession of the land since 1989 having been granted access thereto by the deceased and equally seek to rely on the doctrine of adverse possession.
73. They assert that the registration of the suit property in the 1<sup>st</sup> -4<sup>th</sup> Defendants' name was averse to the 2<sup>nd</sup> Plaintiff's proprietorship rights aforesaid and further ran contra to the Law of Succession Act and is liable to be impugned.
74. The Plaintiffs adduced into evidence a copy of the share certificate no 249; ballot card no 000701 for plot 701 dated the 24<sup>th</sup> October, 1987; Death Certificate for the late Kibuna Ndegwa; notification of liquidation of Ngu'ndu Farmers Limited Co-operative Society; lease for the suit property registered on 25<sup>th</sup> January, 2013; official search dated 3<sup>rd</sup> August, 2015 and land rent payment dated 9<sup>th</sup> November, 2015.
75. The Defendants also adduced into evidence the findings by the Assistant Chief dated 19<sup>th</sup> November, 2015; Affidavit by Peninah Kibuna dated 8<sup>th</sup> November, 2016; letter to the Commissioner of Co-operatives and copied to the Land Registrar-Nairobi dated 4<sup>th</sup> July, 2017 and the Affidavit by Gabriel Duncan Ndegwa dated 22<sup>nd</sup> March, 2018.
76. On their part, the 1<sup>st</sup>-4<sup>th</sup> Defendants maintained that the deceased, having died before registration of the suit property, they, as a family, held meetings which the 1<sup>st</sup> Plaintiff was party to in which it was decided that the suit property would be registered in their names representing the three families of the deceased and that the transfer was lawful and the Plaintiffs have no entitlement to the suit property as alleged.
77. They adduced into evidence copies of the letter to the Commissioner of Lands dated 29<sup>th</sup> January, 2013; letter from the Ministry of Lands dated 10<sup>th</sup> December, 2012; letters from the 6<sup>th</sup> Defendant; the lease document and the transfer document. The 5<sup>th</sup> to 7<sup>th</sup> Defendants maintain that transactions with respect to the suit property were done above board.
78. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act which provides as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



3. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
79. And Sections 109 and 112 of the same Act which states as follows:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
80. Beginning with the claim that the suit property was a gift inter vivos, Blacks law Dictionary, 10<sup>th</sup> Edition describes a gift inter vivos as follows:
- “Gift between the living relating to or involving property conveyed not by will or in contemplation of an imminent death, but during the conveyors lifetime.”
81. Discussing the law with respect to gift inter vivos, the Court in *In Re Estate of Chesimbili Sindani (deceased)* 2021 eKLR stated thus:
- “The principles relating to inter vivos gifts have been stated in very many cases...From the case law above, the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that the deceased intended to make a gift inter vivos. That would be the case where the deceased has complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift inter vivos. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.”
82. The Court is so guided. In the present case, the Plaintiffs claim is that the deceased gave them possession of the suit property as well ownership documents thereof, being the documents with respect to the ownership of shares in Ng’undu Co-operative, to wit, the allotment letter, share certificate, ballot card



and membership list ostensibly to enable registration of the suit property to the 2<sup>nd</sup> Plaintiff once he attained adulthood. This position was supported by PW4, one of the 1<sup>st</sup> Plaintiff's siblings.

83. In contrast, the 1<sup>st</sup> -4<sup>th</sup> Defendants, while not disputing the fact of the Plaintiffs' possession of the suit property, assert that no ownership rights were intended to be transferred to them. Whereas they dispute the fact that the 1<sup>st</sup> Plaintiff was given custody of the original documents with respect to the property, they have not established that the Plaintiffs got hold of the documents in any irregular manner.
84. Nonetheless, the Plaintiffs admit that there is "nothing in writing" from the deceased giving the property to the 2<sup>nd</sup> Plaintiff. Indeed, between his acquisition of the shares in Ngu'ndu Co-operative sometime in 1984, to his death in 1995, there is no evidence of any attempt by the deceased to transfer his shares to any of the Plaintiffs.
85. Even if the Court was convinced that the giving of possession and the documents signaled an intent to gift the land, that gifting process was not completed during the deceased's lifetime. The effect thereof is that upon his death, the property remained part of the deceased's Estate.
86. In the absence of evidence that indeed the deceased intended to gift the 2<sup>nd</sup> Plaintiff the suit property, I find that the Plaintiffs have not proved that the suit property belongs to the 2<sup>nd</sup> Plaintiff by way of a gift inter vivos.
87. Moving to the claim for adverse possession, the law on the same is provided for under Section 7 of the Act as follows;

"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."

88. Further provisions are made under Sections 13, 17 and 38 of the *Limitation of Actions Act* whose net effect is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum period of 12 years.
89. Discussing the essential elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR stated thus:

"A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
  - (b) what was the nature of his possession;
  - (c) whether the fact of his possession was known to the other party;
  - (d) for how long his possession has continued; and
  - (e) that the possession was open and undisturbed for the requisite 12 years."
90. Considering the elements as set out in the Wefwafwa case (supra), it is clear that the Plaintiffs' claim in this regard fails at the onset. The Plaintiffs assert that they entered into the suit property and have resided thereon with the deceased's permission. This is contra to the concept of adverse possession.
  91. Further, the 1<sup>st</sup> to 4<sup>th</sup> Defendants having been registered as the first proprietors, for purposes of a claim of adverse possession against them, time only begun to run upon their registration as proprietors



sometime in 2013. In this respect, the suit having been filed in 2017, 12 years had not yet lapsed from the registration of the suit property in 2013.

92. As explained by the Court of Appeal in *Solomon Muathe Mitau & 787 others vs Nguni Group Ranch* [2017] eKLR:

“In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the Title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land...The respondent was in law entitled to take action against any intruder from the date of registration and it follows that evidence led for periods prior to the ownership of the land by the respondent was of no probative value.”

93. The claim of adverse possession therefore fails.

94. The evidence before the Court shows that the 1<sup>st</sup>-4<sup>th</sup> Defendants are the registered proprietors of the suit property having been so registered on 25<sup>th</sup> January, 2013 pursuant to the provisions of the retired Registered *Land Act*. The Defendants were registered as proprietors of the land on behalf of all the beneficiaries of the deceased.

95. It is undisputed that the deceased Kibuna Ndegwa was the legitimate proprietor of the suit property having purchased the same by way of shares in Ngu’ndu Farmers Co-operative Society sometime in 1984. He was granted plot 71. As at the time of his death in 1995, his plot had yet to be titled.

96. Sometime in 2007, the 5<sup>th</sup> Defendant notified members and shareholders of Ngu’ndu Farmers that the same was under liquidation and asked that all parties with claims thereto make the same known. In response, the Defendants met and agreed to have the property registered in their names. To this end, Ng’undu Co-operative wrote to the Ministry of Lands and identified the 1<sup>st</sup>-4<sup>th</sup> Defendants as the owners of the plot and subsequently the suit property.

97. The 1<sup>st</sup> to 4<sup>th</sup> Defendants have throughout their pleadings and testimonies asserted that property cannot be registered in the name of the deceased. Nonetheless, the law is clear on the manner of dealing with any property of a deceased person. Section 45(1) of the *Law of Succession Act* is explicit that the same is only permissible to the extent provided for by the provisions of that Act. It provides thus:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”

98. Section 55(1) of the said Act further provides that:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”

99. Section 79 provides that:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”



100. In the circumstances, it was not open to the Defendants or indeed any members of the deceased family to unilaterally sit and decide that the deceased's plot of land should be registered in the names of the 1<sup>st</sup> - 4<sup>th</sup> Defendants. DW3 in giving his evidence critically noted that land of a deceased can only be registered in the name of an Administrator. The Defendants' actions aforesaid were a direct breach of Section 45 of the *Law of Succession Act*.
101. It was the 6<sup>th</sup> Defendants evidence that they undertook registration of the property based on the documents given to them. DEXHB 3 of the 1<sup>st</sup>-4<sup>th</sup> Defendants evidence is an undated letter from the 5<sup>th</sup> Defendant to the 6<sup>th</sup> indicating that the 1<sup>st</sup>-4<sup>th</sup> Defendants were the owners of parcel 126/773 each owning a share. This was clearly fraudulent.
102. The three shares in Ng'undu Farmers at all times belonged to the deceased as evinced by share certificate no 249. The Court harbours no doubt that the registration of the suit property in the name of the Defendants was actuated by fraud at the instance of the 1<sup>st</sup> -5<sup>th</sup> Defendants.
103. The 1<sup>st</sup> -4<sup>th</sup> Defendants allege that even if fraud was established, their title is indefeasible. The Court disagrees. The Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) was categorical that the law does not protect irregularly acquired title. The Justices stated inter-alia:
- “Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...
- Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”
104. In the end, the Court finds that the registration of the suit property was not only fraudulent, but ultimately constituted a nullity having contravened the provisions of section 45 of the *Law of Succession Act*.
105. Ultimately, the Court finds that the title to the suit property is amenable to be cancelled. The suit property should be registered in the name of the late Isaiya Kibuna Ndegwa (deceased) pending the appointment of the legal administrators of his estate and distribution.
106. In the end, the court makes the following orders:
- i. A Declaration be and is hereby issued that the transfer and the registration of Title No Nairobi/Block 126/773 to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is null and void ab initio.
  - ii. A mandatory order is hereby issued directed to the Chief Land Registrar or any other appropriate Land Registrar to forthwith cancel in the land register, the registration of Title Nairobi/Block 126/773 in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and have the property registered in the name of Isaiya Kibuna Ndegwa(deceased) forthwith pending the process of Succession.
  - iii. The 1<sup>st</sup> - 4th Defendants shall bear the costs of the suit.

**DATE, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**



In the presence of;

Mr. Wamote for Munga for Applicant

Mr. Thimba for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant -Tracy

