



REPUBLIC OF KENYA



**Awino v Oduka & 6 others (Environment & Land Case 578 of 2015)  
[2024] KEELC 6187 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6187 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 578 OF 2015  
E ASATI, J  
SEPTEMBER 19, 2024  
(FORMERLY CIVIL SUIT NO. 12 OF 2012 (O.S))**

**BETWEEN**

**OJWANG' BONIFACE R. AWINO ..... PLAINTIFF**

**AND**

**NAM ODUKA ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN OWINO ODUKA ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH OMULO OPIL ..... 3<sup>RD</sup> DEFENDANT**

**PHILIP OMOLO AIDA ..... 4<sup>TH</sup> DEFENDANT**

**OMONDI OKOTH ..... 5<sup>TH</sup> DEFENDANT**

**TOM JUMA KENYE ..... 6<sup>TH</sup> DEFENDANT**

**MARTIN JUMA NAM ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide the plaint dated 18<sup>th</sup> January, 2012, the Plaintiff herein, Ojwang' Bonface R. Awino, sued the Defendants in Kisumu HCC No.005 of 2012 over parcels of land within Kakola Land Adjudication Section known as parcel numbers 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 (the suit lands). He claimed that he was the registered proprietor under adjudication of suit land parcel No.4151 and a co-owner of the rest of the suit lands.
2. He further claimed that the suit lands are ancestral lands which he inherited from his father Awino Owuor whose initial ownership and right thereto was confirmed in Nyando DMC Land Case No.54 of 1969 (Asimbo Oduka –vs- Awino Owuor) when the suit against the said Awino Owuor was dismissed.



3. That the Defendants had nonetheless invaded some of the suit lands and were cultivating rice on them by force despite his protests. He pleaded that the actions of the Defendants are illegal and meant to unlawfully dispossess him and that unless they are restrained by an order of the court, his interest in and title to the suit lands are likely to be eroded or even extinguished.
4. He further pleaded that he had obtained written consent of the District Land Adjudication & Settlement Officer to institute the suit. He sought for the following relief against the Defendants: -
  - a. General damages for trespass to land.
  - b. An order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants do vacate all portions of land parcels 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication Section situated within Kakla sub-location forthwith or be evicted therefrom, together with an order that all the structures constructed thereon by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants or any of them be demolished forthwith.
  - c. a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants by themselves or their families or servants or agents, proxies or any of them from entering, remaining on, occupying, cultivating, developing or in any other way using or interfering with the Plaintiff's title to the said land parcel No. 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication section situated within Kakola sub-location, or any of them or any portion thereof or doing anything else which may restrict, curtail, erode, diminish or interfere with the Plaintiff's title to quiet possession, use and enjoyment of any of the said parcels of land.
  - d. Costs of the suit and interest thereon at court rates.
5. In response to the Plaintiff's claim, the Defendants filed a Statement of Defence of the Defendants and Counter-claim dated 13<sup>th</sup> April, 2012. They denied the Plaintiff's claim and averred that if at all the suit lands are registered in the Plaintiff's name then the registration was procured by fraud. They further averred that the suit lands are their family lands on which they have been residing and been in possession of since the 1920s.
6. Vide the Counter-claim, the Defendants sought for the following relief against the Plaintiff: -
  - a. A declaration that the Plaintiff acquired the registration of land parcel Numbers 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication section fraudulently and by misrepresentation and replacing them with the Defendants' name respectively.
  - b. An order cancelling the Plaintiff's name in the register regarding title No. 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication section and replacing them with the Defendants' names with referral to their respective titles.
  - c. a permanent injunction restraining the Plaintiff by himself or through his agents, servants, employees or persons claiming under him from interfering in any way with the Defendants' respective rights and interests in title No. 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola adjudication section.
  - d. Costs of the suit.
7. The Plaintiff replied vide his Defence to Counter-claim dated 24<sup>th</sup> April, 2012 that the Counter-claim was misconceived, bad in law, an abuse of the court process and intended to defraud him.



8. At the establishment of the Environment and Land Court, the suit was transferred from the High Court at Kisumu to the Environment and Land Court Kisumu for hearing and disposal and given the current case number.

### **The Evidence**

9. The Plaintiff's evidence comprised of his own testimony, the exhibits he produced and the testimony of one witness. The Plaintiff who testified as PW1 stated that all the suit lands are his and that some are still in his father's name. That although the adjudication process was complete, he was yet to be issued with title deeds. That land parcel NO.4151 was in his name while the rest of the suit land were in his father's name.
10. That there have been disputes over the suit lands between his family and the family of the Defendants. That there was a dispute filed in the year 1969 namely; Case No.54 of 1969 at Nyando District Magistrate's Court which he won. That another dispute was case No.7 of 1977 in the same court between his father and one Opiko Matela. That his father won the case. That there were other disputes during adjudication between his father and the family of the Defendants. That the disputes were numbers 31, 32, 33, 34, 35, 36, 37, 40, 41 and 42 all of 1985. That his father won all the disputes. That there was in addition case No.61 of 1986 which concerned parcel No.4151 which he won.
11. That after the Adjudication Committee decision, he filed an appeal to the Board which gave him the parcels of land. That the Defendants were not satisfied in respect of land parcels NO.1971, 1975, 1981, 1982, 1983 and 1987 and they filed objection proceedings.
12. That the Defendants did not file objection in respect of the other parcels and especially parcel No.4151. that vide letter dated 1<sup>st</sup> October, 2010, the Adjudication Officer confirmed that land parcel No.4151 belonged to him,
13. He testified further that the Defendants invaded his land and went ahead to construct houses on parcel No.4151 and started cultivating it. That his cousin by the name of Joseph Ochieng and his son Festo Odhiambo who tried to stop the Defendants were arrested and charged in Nyando Court Criminal Case No.1 of 2012 which case was heard, concluded and his cousin and son acquitted.
14. He prayed that the Defendants be evicted from the land parcel No.4151 where they have settled and from the rest of the other lands where they are cultivating. He also prayed for a permanent injunction and costs. He stated that he has not used the parcels from the year 2009. That he was stopped from planting rice. That the total acreage of the suit lands could be about 5 acres. He prayed for loss of earning since the year 2009.
15. He produced the following documents as exhibits, Letter dated 23<sup>rd</sup> October, 2009, Consent of the Land Adjudication Officer dated 16<sup>th</sup> November, 2011, Proceedings and Judgement in Nyando DMC No.54 of 1969, Proceedings and Judgement in Nyando DMC NO.7 of 1977, decision in adjudication dispute No.31 to 42 of 1985, decision in Arbitration Board case No.61 of 1986, Letter dated 1<sup>st</sup> October, 2010 by Adjudication Officer to Ahero Police station and Proceedings in Nyando Criminal Case No.1 of 2012.
16. On cross-examination, the Plaintiff stated that the Defendants were distant relatives who were welcomed onto the land by his great grandfather about 117 years ago who gave them a portion of land to settle. That he had not interfered with the Defendants' portion. That his father by the name of Awino Owuor died in the year 1992. That one Asimbo Oduka, deceased, was his neighbor who comes from the Defendants' family.



17. That the late Asimbo Oduka and the Plaintiff's father had case No.54 of 1969. That the map shows that Asimbo Oduka was given parcel marked A while the Plaintiff's father was given parcel marked B. That after adjudication parcel "A" was registered as parcel No.4151 and parcel B as No.4153. That it was parcel No. A that the son of the Defendant called Martin (the 2<sup>nd</sup> Defendant) is settled.
18. The Plaintiff stated further that he knew the widow of one Tengu who was indicated as having a house on the lower part of portion marked A. That the Defendants he had sued were part of the Tengu family. That only the 1<sup>st</sup> Defendant is using the land in dispute among the people who filed objection proceedings.
19. PW2 was George Oluoch Ogutu the Land Adjudication Officer Kisumu and Nyando. He produced as exhibit proceedings in respect of objection NO.s 697, 698, 699, 878, 992 and 681 of 2004 which were in respect of land parcel Numbers 1981, 1982, 1983, 1987 and 1971 Kakola Adjudication section. He stated that he was not aware of any appeal having been filed against the decision thereon.
20. On cross-examination he stated that Kakola Adjudication section is not registered. That the parties to the objection proceedings were given a right of appeal to the Minister as usual. That land parcel No.1981 had been allocated to Vitalis Okoth, No.1982 to Bowa Oganda, 1983 to Alexis Ogawala and 1972 to James Odongo.
21. On re-examination he stated that the objection proceedings were dismissed and the land remained with the defendants who were Awino Owuor and Ajwang Boniface.
22. The evidence of the Defence comprised of the testimonies of DW1 and DW2 and the exhibits they produced. DW1 was Martin Owino Oduka, the 2<sup>nd</sup> Defendant herein. He testified that case No. Nyando DMC No.54 of 1969 was between the Plaintiff's father and Asimbo Oduka who was DW1's elder brother. That the decision in the case was that the land be sub-divided with the Plaintiff's father getting portion marked B and the Defendants getting parcel marked A. That Martin Juma still stays on the land. That his sister in law was buried on the land. That the dispute later went to the Land Committees No.61 to 72 of 1984 but was dismissed. That land parcel No.1972 was one of the subject parcels. That West Kano Irrigation Project compensated the Plaintiff for parcel NO.1961. That land parcel No.4153 is for the Plaintiff's father. That case No.7 of the 1977 did not concern the Defendants. That the cases that followed as shown in exhibits P.5 were marked *res judicata* in view of the decision in case No.54 of 1969 which sub-divided the land.
23. DW1 produced exhibits namely; proceedings for Kisumu Land Adjudication Cases No.61 to 72 all of 1984, Letter dated 4<sup>th</sup> November, 2010 from the District Adjudication and Settlement Officer, Kenya Gazette Notice No.2264 dated 5<sup>th</sup> May, 1989, Statement of Claim in Nyando DMC NO.7 OF 1977, Proceedings and Judgement and Letter of Assistant Chief Kakola-Ahero sub-location dated 7<sup>th</sup> October, 2010.
24. On cross-examination, DW1 stated that one Helena occupies land parcel No.1971 but had not been sued. That he occupies parcel No.1972, that No. 1958 is occupied by Isaya Omiya deceased, No.1959 is being used by the 3<sup>rd</sup> Defendant. That the person occupying Numbers 1981, 1983, 1975 and 1982 has not been sued. Parcel No.1987 is being used by the Plaintiff. That the 4<sup>th</sup> Defendant is using parcel No.1979. That parcel A was registered as No.4151 with Tengu Oduka while parcel B was registered with the Plaintiff and Awino Owuor.
25. That the Defendants filed appeal to the Minister and are still waiting for the decision.
26. On re-examination DW1 stated that the Plaintiff had used the decision in Case No.7 of 1977 to get registered with their land fraudulently as his family was not involved in the case.



27. DW2 Benjamin Otieno Odongo produced a letter dated 4<sup>th</sup> November, 2010 and receipts. He testified that there was an appeal pending before the Minister and that parties ought to wait for the outcome before seeking redress in court.

### **Submissions**

28. Written submissions dated 15<sup>th</sup> December, 2023 were filed by the firm of D.O.E. Anyul & Company Advocates on behalf of the Defendants. Counsel submitted that if all parties herein including the Land Adjudication department and the Land Registrar's office could respect the verdict in Nyando DMC Case No.54 of 1969 ASIMBO ODUKA –VS- AWINO OWUOR, the problem herein could end. That the Defendant herein are the descendants of Asimbo Oduka while the Plaintiff is a son of Awino Owuor, the parties in Nyando DMC Case No.54 of 1969.
29. That the judgement in the said case sub-divided the land with the Plaintiff taking the North part while the Defendants were to take the South part. That efforts to set aside the judgement were not successful hence the judgement remained. That the judgement was never appealed against.
30. That after adjudication was done in accordance with verdict in case No.54 of 1969, the Plaintiff's father and without setting aside the judgement in case No.54 of 1969 lodged several objections with the Adjudication officer against the suit parcels of land being objection Number 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71 and 72 all of 1984. That the objections were against land parcel numbers 1972, 1971, 1958, 1951, 1980, 1981, 1982, 2388, 1987, 1979 and 1975. Counsel submitted that the objections were not necessary as the adjudication had been done as per the judgement in Nyando DMC Land Case No.54 of 1969. That the objections were dismissed.
31. That after the objections were dismissed, the Plaintiff and his father lodged arbitration cases with the Arbitration Board being case numbers 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 42 of 1985 against the aforementioned titles. That the Arbitration Board awarded to Bonface Ojwang all the 12 parcels namely; numbers 1972, 1972, 1971, 1958, 1951, 1980, 1981, 1982, 1983, 2388, 1987, 1979. That the Arbitration Board messed up everything by failing to appreciate that case No.7 of 1977 did not involve the Defendants and did not concern the parcels and secondly, the adjudication/demarcation of the parcels had been done in accordance with the judgement in Nyando DMC Case No.54 of 1969.
32. That the Arbitration Board had no jurisdiction to overturn the decision of the court in Nyando DMC Case No.54 of 1969, that the adjudication department should be directed to complete the demarcation process based on the judgment in Land Case No.54 of 1969. That the Arbitration Board failed to appreciate that already there were homes and the court had directed on how the homes were to be demarcated and not to be interfered with.
33. Counsel urged the court to find that the Plaintiff had not proved his case and that the Defendants had proved the counterclaim on a balance of probabilities.
34. No written submissions were filed on behalf of the Plaintiff.

### **Issues for Determination**

35. From the pleadings filed, the evidence adduced and the submissions made, the following emerge as the issues for determination;
- a. Whether or not the Plaintiff is the owner of land parcel No.4151 Kakola Adjudication section;
  - b. Whether or not the Plaintiff is co-owner of land parcels known as 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication Section.



- c. Whether or not the Plaintiff procured the registration of land parcel No. 4151, 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 in his name by fraud and misrepresentation.
- d. Whether or not there is an appeal still pending in respect of the suit lands to the Minister.
- e. Whether or not the Plaintiff is entitled to the relief sought in the plaint.
- f. Whether or not the Defendants are entitled to the relief sought in the counter-claim.
- g. Who pays the costs of the suit and the Counter-claim?

### **Analysis and Determination**

36. Order 21 Rules 4 and 5 Civil Procedure Rules 2010 requires that judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. That in suits in which issues have been framed, the court shall state its findings or decisions, with the reasons therefor, upon each separate issue. Guided by this provision of the law I proceed to determine the issue already framed herein.
37. From the evidence it is clear that the suit lands are lands still under adjudication hence governed by the provisions of the *Land Adjudication Act*. Section 30 of the *Land Adjudication Act* provides for the staying of suits until the adjudication register becomes final. The section requires a party desiring to file suit in respect of land still under adjudication to obtain consent of the Land Adjudication Officer. Section 30 (1) provides:
- “Except with the consent of the Adjudication Officer in writing, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for the adjudication section has become final in all respects under section 29 (3) of this Act.”
38. Section 29 provides for appeals to the Minister, disposal thereof and the marking of the register of an adjudication section as final.
37. The meaning of section 30 of the Act is that a claimant will not have locus standi to institute a suit and the court will not have jurisdiction to entertain a suit in respect of land in an adjudication section for which the register has not become final unless consent pursuant to section 30 of the Act has been obtained.
38. In this case the Plaintiff produced as exhibit a letter dated 16<sup>th</sup> December 2011 authored by one B. O. Oduge Land Adjudication Officer Nyando area. He gave consent under section 30 of the *Land Adjudication Act* for institution of the suit. The suit is therefore properly before court.

### **The first issue for determination is whether or not the Plaintiff is the owner of land parcel No.4151 Kakola Land Adjudication Section.**

39. The Plaintiff pleaded in paragraph 3 of the plaint that he was the registered owner under adjudication of land parcel number 4151 Kakola Land Adjudication Section. He produced letter dated 1/10/2010 which listed land parcel Number 4151 as land registered in the name of Awino Owuor and Bonface ojwang. Another letter dated 23<sup>rd</sup> October, 2009 by L. T. Ochieng Land Adjudication Officer Nyando division and addressed to the Plaintiff stated that parcel No.4151 among others is registered in the name of BONFACE OJWANG AWINO and “Any use therefore by force from any other person is illegal and should be forced as a criminal offence and reported to a nearest police station.”



40. The Plaintiff testified that he inherited the land from his father Awino Owuor. He testified that there was a dispute filed namely; Nyando DMC Case No. 54 of 1969 which he won. He produced the proceedings in respect of the case as exhibit. A reading of the said proceedings and judgement show that the Plaintiff's father was the Defendant in the case. That vide the judgement therein dated 16.4.1970 the subject land was sub-divided as per the sketch map drawn by the court and attached to the judgement.
41. The sub-division were marked "A" and "B". The court then ordered that;
- “ 1. Land North of the boundary marked "A" is awarded to the Plaintiff with half costs.
  2. Land South of the boundary marked B is awarded to the Defendant”.
42. The Plaintiff's father was the Defendant in the case. So he was awarded land parcel marked as B.
43. A sketch map drawn by the court attached to the judgement showed the position of the portions marked "A" and "B" respectively on the ground. However, the proceedings show that the case did not end at that point but that there were further proceedings after the judgement. The judgement was delivered on 16<sup>th</sup> April, 1970. On 14<sup>th</sup> August, 1972, there were proceedings wherein the Defendant was present and the Plaintiff absent. Counsel requested that the Plaintiff's case be dismissed for none attendance and the Plaintiff be ordered to vacate the land. The court made the order that the case was dismissed with costs and ordered the Plaintiff to vacate the land as originally claimed. The proceedings further show that on 5<sup>th</sup> June, 1973, a date was given for hearing of an application; that on 30<sup>th</sup> July, 1973 an application for setting aside the court order of 14<sup>th</sup> August, 1972 dismissing the Plaintiff's suit was heard; that Counsel for the Defendant in his submissions explained that the case had gone on appeal which appeal ordered re-hearing and that the suit was to be heard de novo and that the ruling was delivered on 29<sup>th</sup> November, 1973 as follows;
44. There was a lot of delay in filing this application. There is also no reason shown why the Plaintiff was not here at 9.35a.m. This application should have been dismissed with costs to the Defendant. However, I consider that land is a source of life for an ordinary African, and therefore the parties should be allowed to contest the case to prove their right of ownership.
45. I will therefore allow this application on the grounds that the Plaintiff will pay a sum of Kshs.670/- to the Defendant within 30 days from today, if not, the application will be dismissed with costs to the defendant”.
46. The proceedings show further that on 16<sup>th</sup> January, 1974 the court found that the Kshs.670 had not been paid and dismissed the application with costs.
47. This means that the order dismissing the suit remained.
48. It is therefore not true as contended by the Defendants that they are entitled to land parcel No.4151 which had been marked by the court as portion "A" pursuant to a judgement in Nyando DM Case No.54 of 1969. The final decision in the said case was a dismissal of the suit filed by the Defendants relative one Asimbo Oduka.
49. It is therefore correct to state that the land remained with the Plaintiff's father Awino Owuor and was later registered in the name of the Plaintiff as per the contents of the Land adjudication Officer's letter dated 23/10/2009. I find that the plaintiff is the owner on adjudication of land parcel No.4151.



**The next issue for determination is whether or not the Plaintiff is co-owner of land parcels known as Number 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication Section.**

50. The Plaintiff pleaded in paragraph 3 of the plaint that at all material times he had been and still is co-owner of land parcel Number 2388, 1951, 1958, 1971, 1972, 1975, 1979, 1980, 1981, 1982, 1983 and 1987 situate within Kakola sub-location jointly with his father Awino Awuor. In paragraph 4 of the Plaint, he pleaded that the lands were ancestral land inherited by him from his father the late Awino Owuor. This is confirmed by the letter by the Land Adjudication officer dated 1<sup>st</sup> October 2010.
51. The Defendants on the other hand pleaded in the Defence and Counter-claim that the lands are their family land on which they have been residing and have had possession since 1920s to date.
52. It was however common ground that the land Arbitration Board awarded all the twelve land parcels to the Plaintiff and his father after a successful appeal which award the Defendants were dissatisfied with hence the appeal to the Minister.
53. On the basis of the evidence placed before court I find that the plaintiff is a co-owner of the above-mentioned parcels of land as confirmed by the Land adjudication officers letter dated 1<sup>st</sup> October 2010.

**Whether or not there is an appeal pending before the Minister**

54. The letter dated 4<sup>th</sup> November, 2010 (exhibit D7) by one B.O. Oduge District Land Adjudication and Settlement Officer Nyando District is titled “Land Dipute: Plot No. s 1971, 1980, 1981, 1982, 1983 and 1987, Kakola Adjudication Section”.

The contents of the letter were as follows:

You are all aware that the above parcels of land have been subject to objection cases vide *Objection No.681/2000*, No.697/2000, No.699/2000 and 878/2000 and were awarded to Awino Awuor and Bonfas Ojwang as joint properties. However, James Obunga Okawa, Claudio Obwolo Wangwera, Pitalas Okoth Ogada and Alexius Ogada Nam have since filed appeal cases against them. This means that they were not satisfied by the ruling of Land Adjudication Officer at the objection level.

You are therefore all instructed to maintain the status quo by each of you using the original parcels they were using until the cases are heard and determined. The Chief is asked to ensure the order is adhered to”.

55. The letter was addressed to six people among them the Plaintiff herein and his late father Awino Awuor.
56. From the evidence placed before court, particularly the testimonies of DW1 and DW3 and the documents produced by DW3, I find that there is an appeal to the Minister pending in respect of some of the suit parcels of land. Receipt dated 22<sup>nd</sup> May, 2004 for Tom Kenye is in respect of appeal over parcel No.1987, receipt dated 29<sup>th</sup> April, 2004 for Julian A. Okoth is for parcel Nos.1981 and 1983 and receipt dated 13<sup>th</sup> May, 2004.
57. DW3 an Assistant Director of Land Adjudication and Settlement testified that there was an appeal to the Minister which appeal had not been settled. That the parties were to maintain the status quo until the appeal is heard and determined. He testified that the appeal had not been heard. He produced the letter dated 4<sup>th</sup> November, 2010 as exhibit.



**The next issue for determination is whether or not the Plaintiff procured registration of the Land Parcel Number 4151, 2388, 1951, 1958, 1971, 1980, 1981, 1982, 1983, 197 in his name by fraud and misrepresentation.**

58. This court has already made a finding on parcel No.4151 in issue Number 1 hereinabove.
59. In respect of the rest of the parcels, while the Plaintiff pleaded that the lands belonged to him because they were ancestral lands which he inherited from his late father and that he was a co-owner thereof with his late father, the Defendants pleaded in paragraph 10 of the Defence and Counter-claim that the Plaintiff cheated his way and therefore obtained the registration of the subject parcels of land by fraudulent means and misrepresentation of facts. The Defendant itemized the particulars of fraud on the part of the Plaintiff to be;
- a. Consciously and deliberately presented false and falsified documents to the adjudication official.
  - b. The Plaintiff knew or ought to have known that Nyando Land Case No.7 OF 1977 and the basis upon which the Plaintiff lays his claim upon the suit parcels of land never involved the subject parcels of land and were in any event between the Plaintiff's father AWino Owuor and Domnicus Opiko who is not related to any of the Defendants.
  - c. The Plaintiff obtained the registration of all the suit parcels of land in error.
  - d. The Plaintiff deliberately misled the land officials while procuring registration into his name.
60. The Defendants' case is that the proceedings in Case No.7 of 1977 which the Plaintiff used to convince the Land Arbitration Board to award him the suit parcels did not relate to the suit parcels.

Fraud has been defined in Black's Law Dictionary 11<sup>th</sup> Edition as

"A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment."

61. It is a well-established principle of law that fraud must be specifically pleaded and strictly proved. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts."

62. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
63. When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required."
64. Similarly, in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:



65. It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.
66. Though the Defendants pleaded fraud and itemized the particulars thereof, no evidence was tendered to prove the same to the required degree. Instead, what emerged from the evidence is that the plaintiff and his late father were awarded the suit lands through lawful process; namely, the court case and the adjudication process. Parcel number 4151 through the case No. 54 of 1969 at Nyando Court and Arbitration Board case No. 61 of 1986 and the rest through the decision of the Arbitration Board. These are not fraudulent processes.
67. I find that it has not been proved that the Plaintiff procured registration of the suit lands through fraud or misrepresentation.

**The next issue for determination is whether or not the Plaintiff is entitled to the relief sought in the Plaintiff.**

68. The pleadings and evidence placed before court is that the suit lands are registered in the names of the Plaintiff and his late father Awino Owuor through the court and land adjudication process. That there are appeal(s) to Minister challenging the registration of some of the parcels of land. I find that subject to the outcome of the appeal process, the plaintiff is entitled to the orders sought.
69. On general damages for trespass to land as one of the relief sought, the plaintiff testified that he had been prevented from using the land since the year 2009. That the Defendants who entered the land have been cultivating rice while some settled on land parcel No. 4151. The Defendants do not deny entry onto the suit lands but claim ownership thereof. Having found that the lands were awarded to the Plaintiff and his late father, I find further that the Defendants trespassed onto the suit lands. In *Duncan Nderitu Ndegwa vs KPLC Ltd & another* [2018]eKLR it was held that once trespass to land is established it is actionable per se and no proof of damages is necessary for the court to award general damages. Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 45 states at paragraph 26 page1503 states that the owner of land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass. In the circumstances of this case I find that a sum of Kshs.500,000 will be adequate compensation for the trespass to land.
70. Regarding the orders of eviction and permanent injunction sought, the court has found that some of the suit lands are subject to an appeal before the Minister for which it will be proper and just to await the outcome thereof. However, for the parcels which are not subject of appeal I find that the Plaintiff is entitled to quiet enjoyment thereof without interference by the Defendants.
71. Regarding costs of the suit, under the provisions of section 27 of the *Civil Procedure Act*, costs follow the event.



**The next issue for determination is whether or not the Defendants are entitled to the relief sought in the counter-claim.**

72. The Counter-claim was based on the plea of fraud. The court has already found that fraud was not proved as against the Plaintiff. On the basis of the evidence placed before court, there is no proof that the Defendants are entitled to the reliefs sought.

**Determination**

73. The court has found that firstly, land parcel No.4151 was rightly registered in the name of the Plaintiff after a suit filed by the relative of the Defendants namely Nyando Dm Land Case No.54/1969 was dismissed and after the award by the Arbitration Board. Secondly, that the rest of the parcels were awarded to the Plaintiff's father through the adjudication process by the Arbitration Board after hearing an appeal filed thereto by the Plaintiff's father and are currently registered under adjudication in the names of the plaintiff and the plaintiff's father. Further, that there is an appeal pending to the Minister in terms of Section 29 of the *Land Adjudication Act*, against the decision of the Arbitration Board in respect of Land Parcel Numbers 1971, 1980, 1981, 1982, 1983 and 1987 Kakola Adjudication Section.

74. On the basis of the aforementioned determinations, the court finds that the plaintiff has proved his case on a balance of probabilities. The court finds that the counter-claim by the Defendants has not been proved and dismisses it with no order as to costs. The court enters judgement in favour of the plaintiff for: -

- i. General damages for trespass to land of Kshs.500, 000.
- ii. An order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants do vacate and remove their structures from land parcels numbers 4151, 2388, 1951, 1958, 1972, 1975 and 1979 which are not subject of the appeal to the Minister, within 90 days hereof failing which an eviction order shall issue for their eviction and demolition of their structures from the said parcels of land as by law provided.
- iii. An order of permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants by themselves or their servants or agents, proxies or any of them from entering, remaining on, occupying, cultivating, developing or in any other way using or interfering with the Plaintiff's title to the said land parcel No. 4151, 2388, 1951, 1958, 1972, 1975 and 1979 Kakola Adjudication section situated within Kakola sub-location, or any of them or any portion thereof or doing anything else which may restrict, curtail erode, diminish or interfere with the Plaintiff's title to quiet possession, use and enjoyment of any of the said parcels of land after vacating or being evicted from the land parcels.
- iv. In respect of the parcels the subject matter of the appeal to the Minister namely; parcel Nos.1971,1980, 1981, 1982, 1983 and 1987 Kakola Adjudication Section the Defendants are hereby ordered to fast-track the appeal(s) and file the decision(s) and/or progress report thereof herein within six (6) months hereof failing which the orders in (ii) and (iii) herein shall apply to the said parcels. In case of a decision(s) in the appeals the parcels of land the subject of the appeals shall be dealt with in accordance with the decision(s).
- v. Costs of the suit to the plaintiff.

Orders accordingly.



**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

No appearance for the Plaintiff

Anyul for the Defendants.

