



Kiriinya (Suing as the Legal Representative of the Estate of Zipporah Kanono – Deceased) v Attorney General & 5 others (Environment and Land Case Civil Suit E012 of 2021) [2024] KEELC 6075 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6075 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT E012 OF 2021
CK NZILI, J
SEPTEMBER 18, 2024**

BETWEEN

STEPHEN KIRIINYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ZIPPORAH KANONO – DECEASED) PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER 2ND DEFENDANT

LAND ADJUDICATION OFFICER 3RD DEFENDANT

LAND REGISTRAR MERU CENTRAL 4TH DEFENDANT

JULIUS MAKEMBO 5TH DEFENDANT

DAVID KAREMA 6TH DEFENDANT

JUDGMENT

1. The plaintiff, as the legal representative of the late Zipporah Kanono, approached this court through a further further amended plaint dated 1.3.2024. His complaint against the 1st, 2nd, and 3rd defendants was that they fraudulently, unprocedurally, and illegally excised land parcels L.R No. 15 and 5248 from land parcel L.R No. Ruri/Rwarera/14, owned by his late mother Zipporah Kanono Mungania measuring 25.5. acres and caused them to be registered in the names of the 5th and 6th defendants in terms of 13 and 5 ½ acres, leaving out only 7 acres under her name.
2. The plaintiff averred that the late mother after learning of the fraud, lodged a complaint with the land registry and was promised that the land shall revert to its original status.



3. The plaintiff averred that in further inquiries, he established that two other parcels of land, namely land parcel L.R No's. Ruiriri/Rwarera/15 and 5289, were fraudulently excised from the initial parcel number. He blamed the 2nd – 6th defendants for the fraud. Additionally, the plaintiff averred that he had lived on the suit parcels of land until early 2018 despite the alleged fraud to take away the land.
4. The plaintiff prayed for a permanent injunction restraining any entry, occupation, possession dealings, trespass, or interference with land parcels L.R No's. 15 and 5289, a declaration that land parcels L.R No's. Ruiriri/Rwarera 15 and 5289 belong to him, and an order that L.R No. Ruiriri/Rwarera/14, measuring approximately 25.5 acres, be placed on the ground back to its original position and the record of existing rights and adjudication register be revised to reflect the same.
5. Though the further further amended plaint was served upon all the defendants, it was only the 5th defendant who entered appearance and filed a statement of defense dated 29.2.2024. In the said defense, the 5th defendant averred that the plaintiff did not disclose a cause of action against him.
6. At the trial, Stephen Kirinya testified as PW 1, relying on his witness statement dated 4.4.2024 as his evidence in chief. PW 1 told the court that he was a legal representative of the estate of his late mother, Zipporah Kanono, who acquired parcel L.R No. 14 as an allocation by the late Jackson Angaine, took vacant possession, and started utilizing the land in August 1968.
7. PW 1 told the court that the stepchildren, namely the 5th & 6th defendants, came to the land in 1996 at the instance of some land committee members. PW 1 said that his late mother complained after the committee members introduced parcels L.R No's. 15 and 5289 which objection went up to the arbitration stage.
8. PW 1 told the court that the objection was not heard until 2013. Meantime, PW 1 told the court that after approaching the then Minister for Lands Mr. Angaine, a directive was issued for the two parcels to reverse into the name of her mother. However, the land officers failed to cancel the same and remove the names of the 5th & 6th defendants from the land adjudication register. Instead of giving the late mother an audience to ventilate her objection, PW 1 told the court that the land adjudication officers involved claimed that the 5th defendant was her brother, which was not true, and was directed to sue only the 6th defendant. PW 1 said that the land adjudication officers introduced the 5th and 6th defendants to his mother's land and yet they were strangers to it. He urged the court to invalidate the three parcels for the land to revert to its initial status.
9. PW 1 relied on consent to sue issued on 13.8.2019, certificate of death, limited grant ad litem, letters from the land adjudication officer dated 1.7.1996 and 12.3.2024, and letter from the late Jackson Angaine dated 28.5.1996 as P. Exh's No. 1-6, respectively.
10. In cross-examination by counsel for the 5th defendant, PW 1 told the court that he was born in 1955, his late father being Murega Marete, who had only one wife. He said he did not know the 5th defendant until the land committee members brought him to the land, claiming that he was a stepbrother.
11. In further, cross-examination by Miss Mbaikyatta, advocate for the 1st – 4th defendants, PW 1 told the court that her late mother acquired parcel L.R No. 14 Ruiriri/Rwarera scheme measuring 25.65 acres as per the land adjudication register on record, which unfortunately was not before the court. Regarding the complaints by her late mother in 1996, PW 1 said that none were present before the court. PW 1 clarified, however, that from P. Exh No. 4 the land adjudication officer referred to a family dispute, yet his late father had only one wife, and therefore, he was not aware of any stepbrother.
12. In re-examination PW 1 told the court that his siblings gave him authority to bring the suit on his behalf and behalf of them. He insisted that her late mother vehemently objected to the presence of the 5th &



- 6th defendants on her land through a letter to the Minister for Lands, as indicated in P. Exh No. 4. PW 1 told the court that he was the one who fenced the land only for the 5th and 6th defendants to be allocated a share, leaving them with only 7 acres of land out of 25.5 acres. He termed the acquisition as irregular.
13. Silas Kiogora testified as PW 2. Relying on his witness statement dated 24.4.2024 as his evidence in chief. PW 2 told the court that he had known the plaintiff as a neighbor since 1968 after his late mother was allocated an adjacent land in the Ruiiri/Rwarera area. He told the court that his parcel was L.R No. 21, measuring only 25 acres for the 5th & 6th defendants to include the land in 1996.
 14. Mwiti Njue testified as D.W. 1. As the Land Registrar Meru central DW 1 told the court that he was unable, after receiving a summons to attend court to trace the record for parcel L.R No. 5289 Ruiiri/Rwarera Adjudication section or the same ordinarily originate from the director of the land adjudication when the land adjudication process is complete and are forwarded to his office for purposes of issuance of title deed and the opening of green card.
 15. DW 1 told the court that this office, as the 4th defendant, could not be sued on account of fraud, for it is not in charge of the land adjudication process. DW 1 told the court that the title deed for the adjudication section area could only relate to parcel numbers that had been cleared of any complaints or pending queries. As far as he was concerned DW 1 said that the record for the subject suit land was yet to be forwarded to his office for the issuance of the title deed.
 16. Mary Maina testified as DW 2. As a Land Adjudication Officer Buuri East/West Sub Counties and the 2nd defendant. DW 2 told the court that the land demarcation book before the court for parcels numbers 14 and 15 were demarcated as two separate parcels of land. However, DW 2 stated that the land adjudication committee case arose, which led to the subdivisions with parcel number 5259 going to Gaturu Mungania while parcel number 14 remained in the name of the plaintiff's late mother.
 17. Similarly, DW 2 testified that by the time the adjudication records were forwarded for registration, parcel numbers 14 and 15 were in the names described above. As regards parcel number 15, DW 2 told the court that it bore the name of Karema Makathimo while parcel no. 5289 was subject to an objection case that transferred the land to the 5th defendant.
 18. DW 2 told the court that parcel no. 14 was also affected by an A/R Objection brought by Elias Kasuyia which objection was dismissed. She denied the existence of any pending objections against parcel number 15. Further, DW 2 said that by the time the adjudication record was forwarded to the titling center, parcel numbers 14, 15 & 5289 bore the names of Zipporah Kanono M'Mungania, Karema Makathimo, and Julius Makembo respectively. However, she could not tell the acreage of the three parcels of land.
 19. Similarly, DW 2 could not confirm if the decision arising out of the committee and objections cases were implemented especially regarding the letter by the late Jackson Angaine. DW 2 said that the area map was still with the director of surveys, who was the only one capable of stating the land sizes.
 20. Julius Makembo M'Mungania testified as D.W. 3. Relying on a witness statement dated 6.5.2024 as his evidence in chief, D.W. 3 told the court that he was a son of M'Mungania Marete and, therefore, a step-brother of the plaintiff since his late father had two wives Zipporah and Maritha Gatura.
 21. According to DW 3, his late father acquired the suit land in 1967, measuring 12.5 acres, and unfortunately, he disappeared in 1984 and has never been traced.
 22. DW 3 said that in 1995, the plaintiff objected to the land adjudication committee whose ruling was delivered on 14.3.2015 sharing the land among the two wives at 7 and 5.5 acres each. Dissatisfied with the outcome, D.W. 3 said that the plaintiff filed an arbitration case in 1996 but later on withdrew it.



- Again, DW 3 denied that the acquisition of the 5 acres was illegal or unprocedural since he holds the land in trust for the children of his mother, Stephen Marete, Joanina Kanugu and Rose Mwendwa. DW 3 relied on the land adjudication and arbitration award and a confirmation letter dated 12.11.2004, showing that he was the owner of Parcel No. 5289 Ruiru/Rwarera Adjudication Section.
23. In cross-examination, DW 3 told the court that he was born in 1983, and by the time his father disappeared in 1984, he was still occupying the suit land. DW 3 said that initially, he used to live in the ancestral land at Gakoromone area but moved to the Ruiru Rwarera area as a family, after the late Jackson Angaine issued his father with some land. D.W. 3 said that initially, the plaintiff's late mother went to occupy the land in Ruiru and left his mother at Gakoromone alongside the plaintiff.
 24. Further, DW 3 said that his land at Gakoromone was disposed of after the plaintiff convinced his late father to do so. DW 3 told the court that both of their mothers participated in the committee case in 1995. DW 3 insisted that after the land at Gakoromone was sold in 1980, the plaintiff sued the proceeds to buy a plot in Giaki, where he lives to date. Additionally, D.W. 3 said that he filed an Objection Case No. 40 against his late mother before she passed on in 2023 and obtained parcel L.R No. 5289, which his late mother transferred to him.
 25. DW 3 told the court that his father, after disposing of the Gakoromone plot, took him to the Ruiru Rwarera area, and by the time he disappeared in 1984, he had already occupied and developed the land courtesy of his father. He denied any irregular involvement in the adjudication process, which he termed procedural and lawful.
 26. D.W. 3 said that after he was demarcated and recorded as the owner of parcel L.R No. 5289 in 2001, no one lodged a claim against it at the adjudication stage by way of a Minister's appeal.
 27. Rose Mwendwa, Stephen Kagule Marete and Julius Muguna M'Mutunga testified as DW 4, 5 & 6 respectively. Relying on witnesses' statements dated 9.5.2024 as their evidence in chief, they confirmed that the plaintiff was their stepbrother, all who grew up together at Mwiteria village before their father was allocated land at Ruiru/Rwarera, by the late Jackson Angaine in 1967.
 28. DW 4, 5 & 6 associated themselves with the evidence of DW 3 on the manner the land in the Mwiteria area was sold, and their parents moved to Ruiru Rwarera till the parcel of land was subdivided and registered between the two houses. Despite services with summons and hearing notices, the 6th defendant did not attend court.
 29. At the close of the defendant case parties were directed to file written submissions. The plaintiff relies on written submissions dated 30.7.2024. The plaintiff submitted that given the letter from Jackson Angaine dated 28.5.1996, the initial land belonged to Zipporah Kanono and not the late M'Mungania Marete for the 5th & 6th defendants to be entitled to it. The plaintiff submitted that any excision of the parcel of land out of parcel L.R No. 14 was irregular, unlawful, and contrary to a categorical letter by the allocating authority.
 30. The 5th defendant relied on written submissions dated 31.7.2024. On whether the plaintiff has proved fraud, the 5th defendant submitted that fraud must not only be specifically pleaded but must also be proved on a balance higher than in ordinary suits. In this case, it was submitted that the evidence by PW 1 & 2 as compared to that of DW 2, 3 & 4, left doubts as to how the fraud occurred if it was reported and investigated by the relevant agencies and whether the plaintiff had any documents to show the initial land was 25.5 acres and belonged to his late father and more importantly if he followed the proper procedure to challenge the subdivisions and subsequent adjudication of the parcels in favor of the 5th & 6th defendants. Reliance was placed on *Arthi Developers Ltd vs West End Butchery Ltd & others* (2015) eKLR.



31. As to the reliefs sought, the 5th defendant submitted that the *Land Adjudication Act* had an elaborate internal dispute mechanism that gave the courts the power to substitute its decision with those of the established bodies, which procedures for redress must be strictly followed.
32. Given that the plaintiff failed to file a Minister's decision after the committee decision of 14.3.1995 in committee case No. 52 of 1994, under Section 29 of (Cap 284), he cannot seek an escape route through this suit, more so when there was no explanation for not lodging the appeal on time or at all.
33. Reliance was placed on Daniel Musili Nyeki & others vs C.S of Lands & Settlement & another, Bernard Malonza Musya & others (I.Ps) (2021) eKLR, Justus Mugaa Impwii vs DLASO Tigania West/East & another (2018) eKLR and Tobias Achola Osidi & others vs Cyprianus Otieno Ogolla & others (2013) eKLR.
34. The 5th defendant submitted that the reliefs sought herein are matters the minister would have dealt with had he filed an appeal, and in the absence of exhausting the said internal dispute mechanism, this court cannot intervene.
35. The court has carefully gone through the history of this file, the pleadings, evidence tendered, and written submissions. The issues calling for my determination are:-
 - i. If the plaintiff could bring this suit.
 - ii. If there are proper pleadings before the court.
 - iii. If the cause of action is time-barred
 - iv. If the court has jurisdiction to hear and determine the suit.
 - v. If the plaintiff has proved any fraud or illegality against the defendants to be entitled to the reliefs sought.
 - vi. What is the order as to costs?
36. It is trite law that parties are bound by their pleadings, and issues for a court's determination arise from the pleadings. The purpose of pleadings is to define the issues so that the opposite party knows what claims it has to answer and prepare to avoid trial by ambush. As parties are adversaries, each must, therefore, state their claims and defenses through pleadings. A party, therefore, may not divert from what is pleaded. If a party intends to rely on some issues which were not included in the initial claim or defense such a party is at liberty to apply for amendment of pleadings.
37. A court, therefore, can only pronounce judgment on issues arising from the pleadings or such issues as framed for the court's determination as held in *Galaxy Paints Co. Ltd vs Falcon Guard Ltd C.A No. 219 of 1998*. See also IEBC & another vs Stephen Mutinda Mule and others (2014) eKLR.
38. In this suit, the plaintiff brings the case as a legal representative of the estate of Zipporah Kanono M'Mungania pursuant to a limited grant ad litem dated 29.1.2020, in Meru Chief Magistrates Court Misc Succession Cause No. 2 of 2020. The initial plaint was filed on 13.4.2021, dated 10.2.2021. It had five plaintiffs and four defendants. There was a list of documents filed on 13.4.2021. Among the documents was a notice of intention to sue the Hon. Attorney General received on 19.6.2018 and dated 18.6.2018 by the plaintiff.
39. The plaint was eventually amended on 16.9.2021 to remove the 2nd – 5th plaintiffs and bring on board the 5th & 6th defendants. A further amended plaint was subsequently filed on 9.12.2022 dated 9.12.2022 by Njoki Thuo & Co. Advocates introducing the Hon. Attorney General (AG), District



- Land Adjudication and Settlement Office Meru District and David Kirema as the 1st, 2nd & 3rd defendants respectively.
40. The 1st & 2nd defendants, filed a statement of defense dated 5.12.2023 to the further amended plaint, denying the contents of paragraphs 4b, 5a, 5b, 5 (c & 5d), 10, 10(a), 10(b), 13 & 13a, 14 & 15 thereof. They denied service of any notice to sue.
 41. Following the filing of the defense, the suit was struck out for non-compliance by an order dated 4.10.2023. After its reinstatement following an application dated 10.10.2023 and 6.12.2023, a further further amended plaint dated 1.3.2024 was filed. Through an application dated 1.3.2024, the plaintiff once again sought to amend his plaint. The same was allowed on 18.3.2024, and the plaintiff was directed to file and serve an amended plaint within 15 days from the date thereof. It is not clear if the plaintiff complied with the said orders.
 42. Be that as it may, once leave is granted to amend, a party must comply with the Rules as to amendments within the stipulated time. The introduced amendments shall be clearly indicated. Failure to comply with the Rules attracts sanctions, including striking out of the pleadings. In this suit, it is not clear, which last documents the current law firm representing the plaintiff, further amendment given the document filed by the last law firm on record for the plaintiff. Order 8 Rule 7 (2) Civil Procedure Rules has to be complied with by underlining addition and striking out deletions. See Cooperative Insurance Co. of (K) Ltd vs Paen Agencies Co. Ltd (2014) eKLR.
 43. The next issue is whether the suit was time-barred. The claim by the plaintiff is based on fraud discovered in 1996, leading to a complaint to and a letter by Hon. Jackson Angaine dated 28.5.1996, by the mother of the plaintiff, who passed on in 2014. In the demand notice to Hon. AG dated 4.2.2019, the land Adjudication Officer Meru is accused of fraud, abuse of office and failure to act as per the Minister's letter to revert the land to its initial adjudication record status.
 44. A claim founded on fraud must be filed within three years from the date the fraud took place or came to the knowledge of the plaintiff as per Sections 4 & 26 of the Limitations of Actions Act (Cap 22). The plaintiff's late mother was aware of the fraud by 1996.
 45. A claim for recovery of land must also be lodged before the expiry of 12 years. A cause of action is a set of facts sufficient to justify a right to sue to obtain property or enforce a right against a party. On fraud a cause of action accrues when the fraud is discovered or comes to the knowledge of the claimant. Regarding recovery of land, section 7 of Cap 22 rules out a recovery suit after 12 years when the right of action accrues. The registration occurred on 14.3.1995 when the A/R Committee gave a ruling. So, 12 years expired in 2017. A claim based on fraud and or recovery of land by the plaintiff, therefore, became time-barred in 1999 and 2017, respectively.
 46. The next issue is the jurisdiction of this court. There is evidence that after the A/R objections, the plaintiff or his mother did not exhaust the internal mechanism set under *Land Adjudication Act* (Cap 284) by filing a Minister's appeal on time or at all. Article 159 of *the Constitution* mandates this court to encourage and respect alternative dispute resolution mechanisms set under *the Constitution* and statutes. The plaintiff relied on a consent to sue issued by the land adjudication officer dated 13.8.2019.
 47. In *Bhaijee & another vs Nondi & another (Civil Appeal 139 of 2019)* (2022) KECA 119 (KLR) (18th February 2022 (Judgment), the court observed that lack of consent renders a suit and its proceedings a nullity. The court cited Geoffrey Muthinja Kabiru & others vs Samuel Munga Henry & 1756 others (2015) eKLR, that where a dispute mechanism exists outside court, the same has to be exhausted before the jurisdiction of the court is invoked.



48. In *Justus Mugaa Impwii vs DLASO* (supra), the court observed that after an objection is allowed by a land adjudication officer, a party aggrieved under Section 29 of Cap 284 has to exercise a right of appeal to the minister within the stipulated period. The exact position was taken in *Reuben Mwangela M'Itelekwa vs Paul Kigea Nabea* (2019) eKLR.
49. In *Armath Gupta's Suing on Behalf of the Estate of the late Amarnath Gupta vs Kazungu & others* (2023) KECA 1280 (KLR) (27th October 2023) (Judgment), a preliminary objection had been raised challenging the jurisdiction of the court to entertain a suit disguised as an appeal against the minister's decision made pursuant to Section 29 of Cap 284.
50. The court observed that once a minister makes a decision such a decision cannot be appealed against under Cap 284 or before the court except through judicial review. The court cited with approval *Julia Kaburia vs. Kaberia & others* (2017) eKLR that Section 30 of Cap 284 provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section and that Section 30 (1) (2) thereof, ousts the jurisdiction of the court once the adjudication of land has started until the adjudication register has been made final.
51. In this suit, the consent issued to the plaintiff, together with the evidence of DW 1 and DW 2, shows that the suit land is still under the adjudication process. PW 1 confirmed in cross-examination by the defendant that he has no pending minister's appeal. Therefore, the consent to sue issued to him is not a consent that he could use to re-open a process already under Cap 284. The exhaustive mechanism includes a minister's appeal followed by judicial review.
52. In *Tobias Achola Osidi & others vs Cyprianus Otieno Ogolla* (supra), the court observed that the Act had given full power and authority to the officers falling under the Act and quasi-bodies set up under it to ascertain and determine interest in land in an adjudication area prior to registration of such interest. The court said that it had no jurisdiction save to exercise a supervisory role and ensure that the process is carried out in accordance with the law and, therefore, cannot usurp the functions and powers of the land adjudication officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land.
53. In this suit it appears that after the objection was determined in 1995/1996, the plaintiff or his late mother did not follow up the A/R objections award through a minister's appeal. Effectively, therefore until the process of land adjudication comes to a logical conclusion and it cannot be re-opened otherwise than in the manner contemplated by the *Land Adjudication Act*. Consequently, I agree with the submissions by the 5th defendant. I find this court bereft of jurisdiction to entertain this suit disguised as a minister's appeal.
54. Even if the court had jurisdiction, fraud must be specifically pleaded and proved on a balance higher than in ordinary suits. See *Arthi Developers Ltd vs. West End Butchery Ltd* (supra), *Virjay Morjaria vs Darbar* (2000) eKLR. Other than making generalized allegations that there was collusion, fraud, and illegality in the subdivisions and or excising of parcel numbers 15 & 5289 from parcel No. 14, the plaintiff was unable to provide any authentic documents to show that his late mother was the initial allottee in 1967, her parcel of land was 25.5. acres that there was irregularity and illegality in hiving out part of the parcel to create parcel No's. 15 and 52, 89 and that the alleged fraud or illegality was committed by the 1st – 6th defendants jointly and severally. Evidence by DW 2 that parcel No. 15 was a stand-alone parcel number since the adjudication process started, and parcel No. 5289 was lawfully created was not challenged at all by the plaintiff.
55. There is a presumption of regularity in public documents generated by the executive officer lawfully in the execution of official duties. This position was emphasized in *Chief Land Registrar & others vs*



Nathan Tirop & others (2018) eKLR. D. Exh No's. 1-3 were not subjected to any forensic examination process and which found them to be fraudulent or irregularly issued. See also Henry vs DLASO Tigania East & West & others; Mborothi & others (Interested Parties E & L Constitutional petition [No. 26 of 2015](#) (2022) KEELC 13840 (KLR) (26th October 2022) Judgment.

56. In Benson Njagi vs Wilson Miriti Thaara (2021) eKLR, the court cited Rosemary Wanjiku Murithi vs George Maina Ndinwa (2014) eKLR on the proposition that proof of fraud involves the question of facts. In this suit, the burden of proof under Sections 107 – 112 of the [Evidence Act](#) was on the plaintiff to lay facts showing that there was a fraudulent scheme in excising, subdividing, transferring, and recording the 5th & 6th defendants as owners of Parcel No's. 15 and 5289 out of Parcel No. 14, to the detriment of the estate of the late Zipporah Kanono.
57. Evidence led by D.W. 3 – 5 that the plaintiff was their stepbrother and on how the two “houses” moved from Mwiteria village to Ruiru Rwarera area was not challenged by the plaintiff. Obvious facts on the existence of two wives of the late M'Mungania Marete were consistent with D. Exh No's. 1 and 2, which are official land adjudication documents.
58. In my considered view, therefore, the plaintiff has failed to prove fraud and or illegality against the defendants to be entitled to the reliefs sought. The upshot is that I find the suit lacking merits. Given the circumstances and the relationship between the plaintiff and the 5th & 6th defendants, I find no basis to grant costs to the defendants. Each party shall bear their costs. See Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others (2013) eKLR.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18th DAY OF SEPTEMBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

1st & 2nd respondent

Thangicia for 1st & 2nd respondent

Miss Muyai for the 4th respondent

Mwirigi B. for the 3rd respondent

