



**Werimo (Suing as the Legal Representative of the Estate of Deceased Werimo Otwila) v Okwomi & 6 others (Environment & Land Case 30 of 2015) [2025] KEELC 640 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 640 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 30 OF 2015  
BN OLAO, J  
FEBRUARY 18, 2025**

**BETWEEN**

**ROSETILA ATHIENO WERIMO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DECEASED WERIMO OTWILA) ..... PLAINTIFF**

**AND**

**SUSY AYUMA OKWOMI ..... 1<sup>ST</sup> DEFENDANT  
LINUS PETER NAMBIRO ..... 2<sup>ND</sup> DEFENDANT  
MICHAEL ONYANGO RANGINYA ..... 3<sup>RD</sup> DEFENDANT  
GEORGE WILLIAM WASIKEH ..... 4<sup>TH</sup> DEFENDANT  
TEDDY DUMSANE NDONDI ..... 5<sup>TH</sup> DEFENDANT  
COUNTY GOVERNMENT OF BUSIA ..... 6<sup>TH</sup> DEFENDANT  
LAND REGISTRAR BUSIA ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Rosetila Athieno Werimo (the Plaintiff herein and suing as the legal representative of Werimo Otwila) approached this Court vide her further amended plaint dated 14<sup>th</sup> June 2022 in which she impleaded Susy Ayuma Okwomi, Linus Peter Nambiro, Michael Onyango Ranginya, George William Wasikeh, Teddy Dumsane Dondi, County Government Of Busia and the Land Registrar Busia (the 1<sup>st</sup> to 7<sup>th</sup> Defendants respectively). She sought judgment against them in the following terms with respect to the land parcel No Marachi/Kingandole/1117 (the suit land):
  - a. Cancellation of the registration of the Defendants as the registered owners of land parcel No Marachi/Kingandole/1117 to revert to the original land parcel No Marachi/Kingandole/813



and an order of permanent injunction restraining the Defendants by themselves, their workers, agents or any other person claiming through them from constructing on, cultivating, farming, alienating or in any manner whatsoever interfering with the suit land.

- aa) The Court do issue an order directing the 7<sup>th</sup> Defendant to cancel the title deed to the land parcel No Marachi/Kingadole/1117 and to revert to the original No Marachi/Kingandole/813.
- b. Costs of the suit.
- c. Any other relief this Honourable Court may deem fit and expedient.

It is the Plaintiff's case that one Erastus Naftali Likuyiwho is the 1<sup>st</sup> Defendant's late husband and whose Estate she represents fraudulently and without any colour of right, sub-divided the land parcel No Marachi/Kingandole/813 into two portions being Marachi/kingandole/1116 and 1117. And using a fake Identity Card, he transferred the suit land to himself yet the Estate of her deceased husband is yet to be administered pending the finalization of P&A Cause No 142 of 2010 where one Benedict Muniko Werimo has filed an objection. That the 1<sup>st</sup> to 5<sup>th</sup> Defendants have acquired the land of her late husband Werimo Otswila (deceased herein) through fraud and impersonation. Particulars of the fraud by the 1<sup>st</sup> Defendant are pleaded in paragraph 8 (a) to (e) of the further amended plaint as follows:

- a. Forging land documents.
- b. Using fake Identity Card for land transaction.
- c. Presenting falsified documents to the Land Registrar for registration.
- d. Transferring suit land to third partner.
- e. Making false land control board application and consent to sub-divide the transfer land.

The Plaintiff adds that the Defendants have intermeddled with the Estate of the deceased with an intent to circumvent the pending succession thus causing loss and damage to the Plaintiff.

- 2. With regard to the 6<sup>th</sup> to 7<sup>th</sup> Defendants, the Plaintiff has pleaded that they abetted fraud against the Estate of the deceased through various acts of commission and omission. These acts are pleaded in paragraph 10(i) to (iii) of the further amended plaint to include:
  - i. Failing to diligently vet the documents presented for the sub-division and transfer of the deceased's land.
  - ii. Failing to verify the documents presented to them to facilitate the transfer and registration of titles notwithstanding the graving (sic) inconsistencies in there.
  - iii. Aiding and abetting the fraudulent transfer of the deceased's Estate.

The sub-division of the land parcel No Marachi/Kingandole/813 by the 1<sup>st</sup> Defendant's late husband Erastus Naftali Likuyi was illegal and fraudulent. The same should be cancelled.

- 3. The Plaintiff filed an undated brief statement with the original plaint which was filed on 26<sup>th</sup> March 2015 (although the same is dated 16<sup>th</sup> March 2014).
- 4. In that statement, she confirms that she is the wife to the deceased who died on 6<sup>th</sup> December 1989 leaving behind six (6) sons namely:
  - 1. Augustine Owino Werimo
  - 2. Stephen Okuku Werimo



3. Martin Nyongesa Werimo
4. Christopher Ogutu Werimo
5. Ngome Werimo And
6. Benedict Munika Werimo

That she is the Administrator to the Estate of the deceased since 5<sup>th</sup> July 2011 and filed this suit in that capacity. That the Defendants fraudulently sub-divided the original land No Marachi/Kingandole/813 and registered it using fake documents. She seeks that the entries to the register be cancelled and the original title be restored.

5. The Plaintiff who as at the time of the trial had donated a Power of Attorney to his son Christopher Ogutu Werimo(PW1) also filed a list of documents on 28<sup>th</sup> January 2020, the list of documents annexed to her supporting affidavit dated 24<sup>th</sup> February 2021 seeking the substitution of the 5<sup>th</sup> Defendant with Teddy Dumsane Dondi and the list of documents annexed to her replying affidavit dated 16<sup>th</sup> July 2015 in response to the 5<sup>th</sup> Defendant's Notice of Motion dated 17<sup>th</sup> June 2015. Those documents are:

1. Application for consent of the Land Control Board.
2. Identification of Management System of Kenya.
3. Caution registered on the land parcel No Marachi/Kingandole/1117.
4. Register for the land parcel No Marachi/Kingandole/813.
5. Letter of consent for the transfer of the land parcel No Marachi/Kingandole/813 from Welimo Othwilato Erastus Naftali Likuyidated 27<sup>th</sup> June 1977.
6. Register for the land parcel No Marachi/Kingandole/1117.
7. Letter dated 21<sup>st</sup> April 2015 by Tom M. Chepkwesi Land Registrar Busia addressed to The Commission On Administrative Justice.

RE: Complaint by Christopher Ogutu regarding land parcel No Marachi/Kingandole/1117 (813).

8. Certificate of Official Search for the land parcel No Marachi/Kingandole/1117.
9. Mutation Form for the land parcel No Marachi/Kingandole/813.
10. Identity cards for Christopher Ogutu Werimo and Rosetila Athieno Werimo.
11. Transfer of land Form for parcel No Marachi/Kingandole/1117 from Linus Peter Nambiro To Michael Onyango Ranginyadated 6<sup>th</sup> September 1996.
12. Transfer of Land Form for parcel No Marachi/Kingandole/1117 from Michael Onyango Ranginya To George William Wasikehdated 13<sup>th</sup> April 2001.
13. Letter of consent for the transfer of the land parcel No Marachi/Kingandole/1117 dated 10<sup>th</sup> July 1996 from Linus Peter Nambiro To Michael Onyango Ranginya.
14. Grant of Letter of Administration dated 30<sup>th</sup> July 2020 issued to Teddy Dumsane Dondi in respect to the Estate of Nicholas Nehemia Dondi In Busia Chief Magistrate's Court Succession Cause No 317 of 2019.



15. Application dated 23<sup>rd</sup> April 1977 for consent of the Land Control Board by Welimo Otswila (as registered owner) to Erastus Naftali Likuyi (as purchaser) for land parcel No Marachi/Kingandole/813.
16. Letter dated 6<sup>th</sup> March 2009 addressed to the Chairman Land Control Board Nambale Division by the District Probation Officer Kibera Nairobi:  
 RE: Christopher Ogutu & Others Claimant -v- 1. Linus Peter Nambiro And 2. George William Wasikeh (objectors)  
 L.R No Marachi/Kingandole/1117.
17. Power of Attorney donated by the Plaintiff to her son Christopher Ogutu Werimo.
6. The 1<sup>st</sup> Defendant Erastus Naftali Likuyi (now deceased) was represented by his wife Susy Ayuma Okwomi at the trial. But there is no evidence that he filed any defence.
7. The 2<sup>nd</sup> Defendant Linus Peter Nambiro acting in person filed his defence dated 22<sup>nd</sup> January 2021. He denied all the allegation of fraud pleaded against him including forging, using fake Identity documents to sub-divide and transfer the suit land and put the Plaintiff to strict proof thereof. He added that there have been numerous similar suits over the suit land involving the same parties. They include Busia SP MCC NO 590 of 1994 and Busia High Court Application No 32 of 2001.
8. He recorded several statements but during the plenary hearing, he chose to adopt the statement dated 31<sup>st</sup> October 2022. Therein, he states that the Plaintiff is the 2<sup>nd</sup> wife to Werimo Otswila (deceased) and lives with her sons on the land parcel No Marachi/Kingandole/1116 following orders issued in Civil Case No 142 of 2010. That there is a judgment delivered in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 on 17<sup>th</sup> January 1996 to the effect that he followed all the legal procedures to acquire the suit land. That in the said Judgment, orders were issued restraining the Plaintiff's sons Christopher Ogutu Werimo, Masinde Werimo and the late Stephen Wamumba Werimo together with their agents, servants and relatives from interfering with the suit land. That the Plaintiff should produce any order issued by the High Court reversing the Judgment of the Magistrate's Court.
9. That this case has been filed 24 years after the judgment in the Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 which the Plaintiff's sons lost. That the Plaintiff is also aware about the sale agreement between Werimo Ostwila and Erastus Naphtali Likuyi dated 16<sup>th</sup> April 1977 and which was witnessed by Werimo Ostwila's eldest son Benedict Munika Werimo and Augustine Owino a.k.a Maginde Werimo as well as the 2<sup>nd</sup> Defendant's father Samuel Bwibo. That the Plaintiff's husband was paid Kshs.6,400 for a portion of land measuring 5 acres out of the original land parcel No Marachi/Kingandole/813 and the said transaction was approved by the Land Control Board on 23<sup>rd</sup> April 1977 and the said land was sub-divided to create land parcels No Marachi/Kingandole/1116 and 1117 following an application signed by Werimo Otswila. That he therefore followed all the legal processes and obtained the sale agreement, letter for application for consent, the letter of consent, judgment in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 and ruling. That the Plaintiff's son Christopher Ogutu Werimo is hiding under the Plaintiff's name in this case to obtain orders which he could not get in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994.
10. The 2<sup>nd</sup> Defendant filed the following documents in support of his case as per his lists of documents filed herein and dated 28<sup>th</sup> February 2022, 18<sup>th</sup> July 2023 and 22<sup>nd</sup> January 2021. The said documents are as follows:



1. Copy of sale agreement dated 16<sup>th</sup> April 1977 between Werimo Otswila and Erastus Naftali Likuyi.
2. Copy of sale agreement dated 7<sup>th</sup> June 1988 between Linus Peter Nambiro and Erastus Naftali Likuyi for Marachi/kingandole/1117.
3. Letter of consent dated 28<sup>th</sup> June 1977 for the sub-division of the land parcel No Marachi/Kingandole/813.
4. Application for consent to transfer land parcel No Marachi/Kingandole/1117 from Erastus Naftali Likuyi to Linus Peter Nambiro.
5. Application for consent for the Land Control Board dated 23<sup>rd</sup> April 1977 by Werimo Otwila to sub-divide the land parcel No Marachi/Kingandole/813 into two (2) portions and transfer 10 acres to Erastus Naftali Likuyi.
6. Letter of consent to transfer land parcel No Marachi/Kingandole/1117.
7. Application for correction of name in the register of the land parcel No Marachi/Kingandole/1117 from Erastus Okwomi Likuyito Erastus Naftali Likuyi.
8. Letter dated 4<sup>th</sup> February 2020 addressed to the Deputy Registrar Busia Court by Titus Ojwang the County Surveyor on the implementation of Court Order in Succession Cause No 142 of 2010 Estate of Werimo Otswila and parcel No Marachi/Kingandole/1116.
9. Mutation Form.
10. Copy of Judgement in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 Linus Peter Nambiro -v- Benedict Murika Ochanga & 3 Others.
11. Copy of ruling in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 Linus Peter Nambiro -v- Benedict Muricha Ochanga & 3 Others.
12. Copy of ruling delivered on 28<sup>th</sup> February 2003 in Busia High Court Civil Application No 32 of 2001.
13. Copy of a letter dated 21<sup>st</sup> April 2015 addressed to COMmission On Administration Of Justice By Tom M. Chepkwesi on the complaint by Christopher Ogutu regarding the land parcel No Marachi/Kingandole/1117.
14. Copy of sale agreement dated 16<sup>th</sup> April 1977 between Werimo OTHWILA for the sale of the land parcel measuring 10 acres.
15. Application for consent of Land Control Board by Welimo Otwilato sub-divide Marachi/kingandole/813 and transfer 10 acres to Erastus Naftali Likuyi dated 23<sup>rd</sup> April 1977.
16. Letter of consent for the transfer of the land No Marachi/Kingandole/813 from Welimo Othwila to Erastus Naftali Likuyi dated 27<sup>th</sup> June 1977.
17. Copy of sale agreement in Kiswahililanguage dated 7<sup>th</sup> October 1988 between Erastus Naftali Likuyi (as vendor) and Linus Peter Nambiro (as purchaser) for the land parcel No Marachi/Kingandole/1117.
18. Application by Erastus Naftali Likuyi to transfer the land parcel No Marachi/Kingandole/1117 to Linus Peter Nambiro.



19. Letter of consent which is not legible.
20. Register for the land parcel No Marachi/Kingandole/1117.
21. Certificate of Official Search for the land parcel No Marachi/Kingandole/813.

I may add at this stage that some of the documents filed by the parties herein are a replica of those already filed by others.

11. The 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants did not file any defences.
12. The 5<sup>th</sup> Defendant filed an amended defence to the amended plaint and also filed a counter claim dated 4<sup>th</sup> June 2015. He denied that the Plaintiff is the Administrator to the Estate of the deceased Werimo Otwila and put her to strict proof thereof. He added that he is the registered proprietor of the suit land and denied the allegations contained in paragraphs 4 and 5 of the plaint and put the Plaintiff to strict proof thereof. He pleaded further that in fact the Plaintiff's suit is statute barred since her children had litigated with the 2<sup>nd</sup> Defendant over the suit land in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 and therefore her suit does not disclose any cause of action.
13. In his counter claim, the 5<sup>th</sup> Defendant pleaded that the Plaintiff and her family members have unlawfully, illegally and contrary to the order of the Court in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 invaded the suit land where they started cultivating and have even constructed a house. In the process, the Plaintiff has prevented the 5<sup>th</sup> Defendant from accessing his land.
14. The 5<sup>th</sup> Defendant therefore sought judgment by his counter claim in the following terms:
  1. Dismissal of the Plaintiffs suit.
  2. Judgment for the 5<sup>th</sup> Defendant against the Plaintiff as follows:
    - a. An order of eviction of the Plaintiff and her family from the suit land.
    - b. An order of permanent injunction restraining the Plaintiff, her family members, employees, agents and all those claiming through her from being on the suit land, entering, developing, cultivating or in any other way dealing with the 5<sup>th</sup> Defendant's said parcel of land.
    - c. Costs.

In support of his defence and counter claim, the 5<sup>th</sup> Defendant filed a statement dated 17<sup>th</sup> June 2015. He stated that he is the registered proprietor of the suit land measuring 4.05 Hectares which he acquired by way of purchase in November 2008 and holds the title deed thereto issued in December 2008. That he is the fifth (5<sup>th</sup>) purchaser of the suit land but resides in Ongata Rongai. He had intended to grow sugar cane on the suit land but his wife fell sick and is now bedridden and this has depleted his finances and he decided to sell it. On 15<sup>th</sup> April 2015, he visited the suit land in the company of Titus Ojwang the Government Surveyor and was horrified to find that the Plaintiff and her family have put up a house thereon and were busy ploughing it. His enquiries revealed that one of the Plaintiff's sons had been sued by a previous owner of the suit land but had been enjoined not to interfere with the same. That the Plaintiff and her sons attempted to appeal to the High Court but lost.

15. The 5<sup>th</sup> Defendant annexed to his statement the following documents:
  1. Copy of the title deed to the land parcel No Marachi/Kingandole/1117 in the 5<sup>th</sup> Defendant's name and dated 11<sup>th</sup> December 2008.



2. Register of the land parcel No Marachi/Kingandole/1117.
  3. Copy of the judgment delivered on 17<sup>th</sup> January 1996 in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 Linus Peter Nambiro -v- Benedict Murika Ochanga & 3 Others.
  4. Copy of the ruling delivered on 28<sup>th</sup> February 2003 in Busia High Court Civil Application No 32 Of 2001 Benedict Muniko Ochango, Stephen W. Werimo, Masinde Werimo -v- Linus Peter Nambiro.
16. The Plaintiff filed a reply to the 5<sup>th</sup> Defendant's amended defence and counter-claim. She joined issue with the 5<sup>th</sup> Defendant and put him to strict proof of all the particulars in the counter-claim. She added that she would raise a Preliminary Objection on a point of law against the 5<sup>th</sup> Defendant's defence and counter claim and that she would also offer evidence to support her claim of forgery and fraud against the 5<sup>th</sup> Defendant. She pleaded that she has adversely possessed the suit land together with her family.
  17. The 6<sup>th</sup> Defendant having been granted leave filed a defence dated 23<sup>rd</sup> April 2020 and filed on 5<sup>th</sup> March 2020. Other than the descriptive averments, the 6<sup>th</sup> Defendant denied all the other averments of the Plaintiff including the alleged claim of omission and commission which led to the fraudulent sub division of the land parcel No Marachi/Kingandole/813 to create the suit land. It pleaded that the mandate to sub-divide land does not, in law, fall under it's mandate and put the Plaintiff to strict proof thereof. It added that at the appropriate time, it would raise a Preliminary Objection for the dismissal of the suit for misjoinder and for not disclosing any cause of action. It urged the Court to dismiss the suit.
  18. Mercy Imothe 6<sup>th</sup> Defendant's Chief Officer in the Department of Housing, Land and Urban Development filed a statement dated 15<sup>th</sup> November 2023 in which she stated that the 6<sup>th</sup> Defendant is a stranger to the Plaintiff's case. She added that the suit land which measures 4.05 Hectares is public property duly registered in the name of the 6<sup>th</sup> Defendant in trust for the Public although it initially housed a government house and cultural centre. She denied that the mandate to transfer land is bestowed in the 6<sup>th</sup> Defendant and added that a Preliminary Objection would be raised for the dismissal of the suit for misjoinder.
  19. The 6<sup>th</sup> Defendant also filed a Preliminary Objection dated 15<sup>th</sup> December 2020 in which it averred that this Court is divested of the jurisdiction to entertain this suit since the Plaintiff has no locus standi to file these proceedings as she is neither the Executor nor Administrator of the Estate of her late husband Werimo Ostwila.
  20. The Plaintiff filed a reply to the 6<sup>th</sup> Defendant's defence. She reiterated the averments in her plaint and added that the 6<sup>th</sup> Defendant is a beneficiary of the fraudulent actions of the 5<sup>th</sup> Defendant.
  21. The hearing commenced on 10<sup>th</sup> November 2022 when the Plaintiff's son Christopher Ogotu Werimo (PW1) testified on her behalf on account of a Power of Attorney donated to him. He adopted as Plaintiff's testimony the Plaintiff's statement filed herein and whose contents I have already summarised. He also produced as the plaintiff's documentary evidence the documents filed herein. He was the only witness who testified on behalf of the Plaintiff.
  22. On 13<sup>th</sup> March 2023, the 2<sup>nd</sup> Defendant testified. He adopted as his evidence the contents of his statement dated 31<sup>st</sup> October 2022. He also produced as his documentary evidence the documents contained in the lists dated 26<sup>th</sup> January 2021, 28<sup>th</sup> February 2022, 31<sup>st</sup> October 2022 and 19<sup>th</sup> July 2023 which was filed late but with the leave of this Court.



23. Teddy Dumsane Dondi (DW1) testified on 25<sup>th</sup> July 2023 on behalf of the Estate of his late father Nicholus Dondi who had been sued as the 5<sup>th</sup> Defendant and who he said was no longer the proprietor of the suit land having sold it to the 6<sup>th</sup> Defendant. He adopted his late father's statement and also produced as the 5<sup>th</sup> Defendant's documentary evidence the list filed on 24<sup>th</sup> March 2021.
24. Susy Ayuma Okwomi(DW3) the 1<sup>st</sup> Defendant herein testified on 30<sup>th</sup> October 2023. She is the widow of Erastus Naftali Likuyi the original 1<sup>st</sup> Defendant in this case. She said she knows nothing about the case.
25. Mercy Imo(DW4) testified on behalf of the 6<sup>th</sup> Defendant the County Government of Busia. She is the 6<sup>th</sup> Defendant's Chief Officer in charge of Housing. She adopted as her testimony the contents of her statement dated 15<sup>th</sup> November 2023.
26. The 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants did not file any pleadings and did not therefore participate in the trial.
27. Submissions were thereafter filed by the Plaintiff through her son Christopher Ogotu Werimo, the 2<sup>nd</sup> Defendant also acting in person, MR J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the 5<sup>th</sup> Defendant and by Mr Egesa Wambura The Busia County Legal Counsel on behalf of the 6<sup>th</sup> Defendant.
28. I have considered the evidence by the parties herein as well as the submissions filed by them or their counsel.
29. It is the Plaintiff's case that the 1<sup>st</sup> Defendant fraudulently and without any colour of right sub-divided the land parcel No Marachi/Kingandole/813 belonging to the deceased which was then sub-divided into two portions being land parcels No Marachi/Kingandole/1116 and 1117. The allegations of fraud against the 1<sup>st</sup> Defendant have been particularized in paragraph 8(a) to 8(e) of the further amended plaint. She also pleads that the other Defendants were involved in the fraud, acts of commission and omission which amounted to intermeddling with the Estate of the deceased.
30. The 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants have in their separate defences denied those allegations of fraud or acts of commission and omission and even questioned her capacity to file this suit. They have also pleaded that the suit is res judicata while the 5<sup>th</sup> Defendant has filed a counter-claim seeking the Plaintiff's eviction from the suit land and an order injunctioning her therefrom. The 6<sup>th</sup> Defendant did not file any counter-claim but believes that the suit land is infact public land which it holds in trust for the public.
31. I consider the following to be the issues for my determination in this dispute:
  1. Whether the Plaintiff has the locus standi to file this suit, and if so;
  2. Whether the Plaintiff has proved her claim to the suit land or it is statue barred.
  3. Whether infact the suit is res judicata.
  4. Whether the 5<sup>th</sup> Defendant has proved his counter-claim.
  5. Whether infact the suit land is public land held in trust for the public by the 6<sup>th</sup> Defendant.
  6. Who bear the costs.

I shall interrogate the above in the following paragraphs of this judgment.



## 1. Plaintiff's Locus Standi

32. Although the Plaintiff has pleaded in paragraph 1(b) of her further amended plaint that she is the Administrator of the Estate of the deceased, she went on further to plead in paragraph 7 as follows:

7: “The Plaintiff herein petitioned for Letters of Administration to his Estate in 27.5.10 vide P&A NO 142/2010 and to date the Estate is still un-administered due to objection by one of the beneficiary Benedict Muniko Werimo.”

The 6<sup>th</sup> Defendant filed a Preliminary Objection dated 15<sup>th</sup> December 2020 in which it pleaded that the Plaintiff is neither an Executor nor an appointed Administrator in respect of the Estate of the deceased. It is common knowledge that the suit land is a resultant sub-division of the original land parcel No Marachi/Kingandole/813 which was first registered in the name of Werimo Otswila (deceased) on 8<sup>th</sup> November 1966 before it was sub-divided to give rise to the suit land and another parcel No Marachi/Kingandole/1116. The Plaintiff therefore, as, the wife of the deceased, was required to first obtain either a Limited Grant or a full Grant of Letters of Administration in respect of the Estate of the deceased which would clothe her with the requisite capacity or locus standi to file this suit. In the case of *Otieno -v- Ougo* 1986 – 1989 EALR 468, the Court of Appeal held that:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

The Plaintiff did not avail any evidence to prove that she has obtained any Grant of Letters of Administration confirmed or otherwise, clothing her with the authority to file this suit on behalf of the deceased husband. By her own pleading, the attempt to do so was thwarted by Benedict Muniko Werimo. Her suit is clearly incompetent and must therefore be struck out without further ado for lack of locus standi.

33. I will nonetheless proceed to consider the Plaintiff's claim on the merits or otherwise based on the evidence herein:

## 2. Whether The Plaintiff Has Proved Her Claim On Fraud.

34. The Plaintiff's claim to the suit land is predicated on allegations of fraud initially as against the 1<sup>st</sup> Defendant. It is instructive to note, however, that from her own pleadings in the further amended plaint, the Plaintiff has not stated when the fraudulent activities with regard to the original land parcel No Marachi/Kingandole/813 were committed or when she discovered them. That means, therefore, that this Court must rely on the documents filed herein.

35. An action based on fraud, which is a tort must be filed within 3 years from the date on which the cause of action accrued. Section 4(2) of the Limitation of Actions Act is clear and it provides:

4(2) “An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

The Register to the suit land shows that it was created on 1<sup>st</sup> December 1977 following the sub-division of the original land parcel No Marachi/Kingandole/813. It was transferred to Erastus Naftali Likuyi the 1<sup>st</sup> Defendant and now represented by Susy Ayuma Okwomi. Therefore, the fraud, if any, was committed on 1<sup>st</sup> December 1977 or thereabout. This suit was filed on 26<sup>th</sup> March 2014 some 37 years later. It is hopelessly statute barred and if the Plaintiff discovered the fraud later, she did not say so.



She cannot therefore benefit from the provisions of Section 26 of the Limitation of Actions Act which provides that:

- 26: “Where, in the case of an action for which a period of limitation is prescribed, either-
- (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
  - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
  - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

I have not heard the Plaintiff plead that the cause of action was concealed or that she discovered the fraud in 2014 when she first filed this suit. Therefore, even if there was evidence of fraud on the part of the 1<sup>st</sup> Defendant in the manner in which he acquired the original land parcel No Marachi/Kingandole/813, the law is clear that such action must be filed within the time set out in the law.

### 3. Whether The Plaintiff’s Suit Is Res Judicata

36. The doctrine of res judicata is provided for in Section 7 of the Civil Procedure Act as follows:

- 7: “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

Before res judicata can be invoked to defeat a suit, the following must be proved:

1. The matter in dispute in the former suit must be directly and substantially in dispute in the subsequent suit.
2. The former suit must have been between the same parties or those under whom they claim litigating under the same title.
3. The former suit must have been heard and finally decided.
4. The Court or Tribunal which heard and determined the former suit must have been competent to do so.

The term res judicata is defined in Black’s Law Dictionary 10<sup>th</sup> Edition As:

“Latin, ‘a thing adjudicated’. An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are:

- (1) an earlier decision on the issue,
- (2) a final judgment on the merits, and
- (3) the involvement of the same parties, or parties in privity with the original parties.”



In the case of James Njuguna Chui -v- John Njugu Kimani C.a. Civil Appeal No322 of 2014 [2017 eKLR], the Court described the rationale of res judicata as follows:

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to re-litigate or re-agitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, Courtesy of the repeat litigation.”

The same Court stated in the case of Ngugi -v- Kinyanjui & Others 1989 KLR 146 that Section 7 of the Civil Procedure Act is a bar and an injunction against the re-litigation of a matter already heard and finally determined by a competent forum.

37. Finally, in the case of John Florence Maritime Services Ltd & Another -v- Cabinet Secretary For Transport & Infrastructure & Others 2015 eKLR, it was stated that:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

It is not in dispute that the 5<sup>th</sup> Defendant Nicholus Nehemia NdondI is the current registered proprietor of the suit land. He holds the title deed thereto issued on 11<sup>th</sup> December 2008 having acquired it from the 4<sup>th</sup> Defendant George William Wasigeh who acquired it on 4<sup>th</sup> June 2001 from Michael Onyango Ranginya the 3<sup>rd</sup> Defendant. The 2<sup>nd</sup> Defendant Linus Peter Nambiro acquired it on 9<sup>th</sup> March 1989 from Erastus Naftali Likuyi who became the second registered owner on 1<sup>st</sup> December 1977 following a purchase from the deceased who was the first owner.

38. The 2<sup>nd</sup> Defendant pleaded in his defence that there have been numerous cases involving the same parties over the suit land. These include Busia Senior Principal Magistrates Court Civil Case No 590 of 1994. He produced as part of his documentary evidence a copy of the judgment dated therein by N. O. Ateya Senior Principal Magistrate on 17<sup>th</sup> January 1996. The same was delivered on his behalf by S. N. Riechi Senior Resident Magistrate (as he then was) on 24<sup>th</sup> April 1996. That case involved Linus Peter Nambiro the 2<sup>nd</sup> Defendant herein as the Plaintiff against Benedict Murika Ochanga & 3 Others as Defendants. The dispute was over the ownership of the suit land where the 2<sup>nd</sup> Defendant (as Plaintiff) was claiming damages for trespass on the suit land and an order of injunction. Judgment was delivered in favour of the 2<sup>nd</sup> Defendant who was awarded damages assessed at Kshs.210,000 for trespass and the Defendants were also restrained from interfering with the suit land.



39. The 5<sup>th</sup> Defendant also pleaded in his defence and counter-claim that the Plaintiff's children had litigated with the 2<sup>nd</sup> Defendant in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 and therefore her suit does not disclose any cause of action. He added that he is the registered proprietor of the suit land and sought against the Plaintiff in his counter-claim, an order evicting her and injunctioning her and her family from the same. He also filed the judgment in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 and the subsequent appeal being Busia High Court Civil Application No 32 of 2001 where MBITO J delivered a ruling on 28<sup>th</sup> February 2003 dismissing the application for leave to appeal out of time against the judgment of Hon. N. O. Ateya In Busia Senior Principal Magistrates Court Civil Case No 590 of 1994. The Applicants were Benedict Muniko Ochango, Stephen Werimo, Masinde Werimo and Ogutu Werimo while the 2<sup>nd</sup> Defendant was the Respondent. It is therefore not in dispute that the suit land was the subject of Busia Senior Principal Magistrates Civil Suit No 590 of 1994 which was fully heard and determined in favour of the 2<sup>nd</sup> Defendant. An attempt to challenge that judgment through an appeal was thwarted vide a ruling delivered by Mbitio J In Busia High Court Civil Application No 32 of 2001. Those pleadings were cited both by the 2<sup>nd</sup> and 5<sup>th</sup> Defendants in their respective defences. In his statement dated 31<sup>st</sup> October 2022, the 2<sup>nd</sup> Defendant stated in paragraphs 2 and 3 that the Plaintiff, other than being the wife of the deceased, is also the mother to Christopher Ogutu Werimo (the Donee of the Power of Attorney herein and who testified on her behalf) and is also the mother of Masinde Werimo and the late Stephen W. Werimo. She is also the step mother to Benedict . The ruling in Busia High Court Civil Application No 32 of 2001, as I have already stated above, show that the Applicants who were seeking leave to appeal against the judgment in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 were Benedict Muniko Ochango, Stephen W. Werimo, Masinde Werimo and Ogutu Werimo. The parties did not avail the proceedings and all the names of the parties therein. From the ruling however, it is clear that the 2<sup>nd</sup> Defendant herein was the Plaintiff in that case while Benedict Murika Ochanga was one of the four Defendants in that case. Going by the citation of Busia High Court Civil Application No. 32 of 2001, it is obvious to me that the 3 Other Defendants In Busia Chief Magistrate's Court Civil Case No 590 of 1994 could only be Stephen W. Werimo, Masinde Werimo and Ogutu Werimo. I am also not in any doubt that the Benedict Murika Ochang Cited In Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 and the Benedict Muniko Ochang the 1<sup>st</sup> Applicant in Busia High Court Civil Application No 32 of 2001 refer to one and the same person.
40. In view of the undisputed relationship between the Plaintiff herein and Benedict Muniko (murika) Ochanga, Masinde Werimo and Stephen W. Werimo who are the Plaintiff's step son and sons respectively and who were the Defendants in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 which also involved the suit land, it is clear that the Plaintiff herein is pursuing the same claim over the same land which her sons were pursuing in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994. That makes this suit res judicata and is covered under explanation NO 6 of Section 7 of the Civil Procedure Act which provides that:
- 6: "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."
- The Plaintiff through her Attorney Christopher Ogutu Werimo submitted on this issue at paragraph 7 of her submissions as follows:
- 7: "My Lord, during cross-examination of Christopher Ogutu Werimo the holder of Power of Attorney given by the Plaintiff, the 2<sup>nd</sup> Defendant tried to insinuate that this matter is res judicata in view of the proceedings in Busia SRM CC NO 590 of 1994. The Plaintiff wishes to clarify that the parties in the said case and the current case are not the same. Secondly, as much



as the two cases are both touching on the suit land, the issues raised are different. Importantly, Busia SRM CC NO 590 of 1994 was heard and determined but they did not get a fair hearing. The Busia SRM CC NO 590 of 1994 case was not heard and determined on its merits thus it does not satisfy the threshold set in Section 7 of the Civil Procedure Act just like it was decided in Busia ELC Case No 54 of 2018 by Judge B. Olao. Besides, the 2<sup>nd</sup> Defendant does not demonstrate how this case is res judicata as provided for in Section 7 of the Civil Procedure Act.”

The Plaintiff goes ahead in paragraph 8 of her submissions to cite the provision of Section 7 of the Civil Procedure Act and then concludes on this issue by submitting in paragraph 10 as follows:

10: “My Lord as, per the above Section and case, it is clear that the present case cannot be termed as res judicata.”

The Plaintiff is acting in person and did not avail the full judgment in Busia ELC Case No 54 of 2018 (formerly Busia CMCC Case No 22 of 2012) Anakletus Wambura -v- John Wambura & Geoffrey. I have nonetheless been able to trace it and it was in fact a judgment by Omollo J delivered on 20<sup>th</sup> July 2022 and not by myself although I subsequently determined a ruling in the same case on an application for stay of execution pending appeal on the said judgment. In that judgment, Omollo J confronted with a plea of res judicata addressed it at page 20 as follows:

20: “In reply to the counter-claim, the Plaintiff claimed that the same is res judicata ELC case no 52 of 2015 and time barred. On the question of res judicata, the case number 52 of 2015 was brought by the current Defendants against the Plaintiff by way of an originating summons. In the copy of the ruling from that case produced by the Plaintiff, the originating summons was struck out for failure to annex a copy of the extract of the register of the suit land. The former case was not heard and determined on its merits thus it does not satisfy the threshold set in section 7 of the Civil Procedure Act.”

The Plaintiff being a pro se litigant obviously does not know what hearing and determination of a case on merit means and obviously did not comprehend what Omollo J was saying. It is however clear from the above paragraph of the judgment of Omollo J that the case NO 54 of 2018 which was being cited had been struck out without the parties being heard. That is very different from the circumstances in this case in which, as is clear from the judgment of N. O. Ateya Senior Principal Magistrate in Busia Civil Case No 590 of 1994 and which is being invoked to prove res judicata, the Plaintiff testified in support of his case and called a witness. The judgment is brief and without the benefit of the proceedings, it is not clear who testified on behalf of the Defendants in that case. What is clear however is that Busia Senior Principal Magistrate’s Court Civil Case No 590 of 1994 was not struck out and therefore, the plea of res judicata has been properly invoked in this case. If the Plaintiff’s submission is that the Defendants in Busia Senior Principal Magistrate’s Court Civil Case No 590 of 1994 did not get a fair trial, that was an issue which ought to have been raised in a subsequent appeal but as is clear from the Ruling delivered by MBITO J on 28<sup>th</sup> February 2003 in Busia High Court Civil Application No 32 of 2001, the Defendant’s attempt to appeal that judgment was dismissed. However, for purposes of res judicata, Busia Senior Principal Magistrate’s Court Civil Case No 590 of 1994 was “heard and finally decided” as set out in Section 7 of the Limitation of Actions Act.

41. The Plaintiff has also submitted that “as much as the two cases are both touching on the suit land, the issues raised are different.” The Plaintiff has not elaborated on what is the difference between the issues raised in Busia Senior Principal Magistrate’s Court Civil Case No 590 of 1994 and in this case although she concedes that the subject matter is the same. The answer to that submission, however, is provided



in the English case of Henderson -v- Henderson 1843 3 Hare100 [1843 67 ER 313] a decision which has been applied in this country and where WIGRAM V.C held that:

“The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable, diligence, might have brought forward”.

It has not been suggested by the Plaintiff which matter relating to the suit land was not brought up for determination in Busia Senior Principal Magistrate’s Court Civil Case No 590 of 1994. And in any event, even if there was any such matter, the Plaintiff’s attempt to evade the plea of res judicata is met by Explanation NO 4 of Section 7 of the Civil Procedure Act which reads:

4: “Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In view of the above, it is clear beyond peradventure that the plea of res judicata is well taken. This suit must be dismissed.

#### **4. Whether The 5<sup>th</sup> Defendant Has Proved His Counter-claim**

42. Nicholas Nehemia Dondithe 5<sup>th</sup> Defendant in this case was not a party in Busia Senior Principal Magistrates Court Civil Case No 590 of 1994. He is the registered proprietor of the suit land and holds a title deed thereto issued on 11<sup>th</sup> December 2008. He is a new entrant in these proceedings. He filed a defence and counter-claim to the Plaintiff’s suit in which he denied all the allegation of fraud levelled against him by the Plaintiff. In his statement in support of his case, he stated how he purchased the suit land from the 2<sup>nd</sup> Defendant for the purpose of carrying out sugar cane planning but his wife fell ill and was bedridden which depleted his finances and so he was not able to put the suit land to that use. When he inspected it in 2015 in the company of the surveyor Mr Titus Ojwang, he found that the Plaintiff and her family had ploughed it and had put up a house thereon.

43. In his counter-claim therefore, he seeks judgment against the Plaintiff in the following terms:

1. Dismissal of the Plaintiff’s suit.
2. An order of eviction of the Plaintiff and her family.
3. An order restraining the Plaintiff, her family members, employees, agents and all those claiming under her from being on the suit land, entering, developing, cultivating or in any other dealing with the suit land.

In a reply to the counter claim, the Plaintiff put the 5<sup>th</sup> Defendant to strict proof thereof adding that she would raise a Preliminary Objection on points of law. She added further that she and her family have adversely possessed the suit land during their life time.

44. The Plaintiff’s allegations of fraud as against the 2<sup>nd</sup> Defendant with respect of his acquisition of the suit land having been dismissed, it follows that the 5<sup>th</sup> Defendant holds a good title to the suit land. As the registered proprietor of the suit land, the 5<sup>th</sup> Defendant is entitled to all the rights and privileges available to him as the absolute owner thereof. Those privileges and rights include the power to evict trespassers from the suit land and to injunct them therefrom as provided under Section 24 of the Land Registration Act. The Plaintiff has pleaded in paragraph 4 of her reply to the 5<sup>th</sup> Defendant’s defence and counter claim that she would offer evidence of forgery and fraud against the Defendants. However,



her claim against the Defendants having collapsed principally because of being statute barred and res judicata, there is nothing upon which her reply to the 5<sup>th</sup> Defendant's counter-claim can be supported.

45. In the last paragraph of the judgement in Busia Senior Principal Magistrate's Court Civil Case No 590 of 1994 HON. N. O. Ateya Senior Principal made the following disposal order:

"I have gone through the Plaintiff's evidence on record. I am satisfied that the Plaintiff has proved his claim on the balance of probabilities as required by law. I am satisfied that the Defendants stopped the Plaintiff from planting contract cane on his land. The Plaintiff suffered loss and is entitled to compensation. I enter judgment for the Plaintiff and assess general damages on that arm at Kshs.210,000 with costs and interest at Court rates. I also order an injunction to issue restraining the Defendants, their agents and servants from interfering with the Plaintiff's land in question."

That judgment was delivered on 24<sup>th</sup> April 1996 and as is now clear, an application to appeal it was dismissed on 28<sup>th</sup> February 2003 by MBITO J. It follows therefore that the Defendants in that case, including their mother who is the Plaintiff in this case, are trespassers on the suit land and ought to be evicted and permanently enjoined therefrom. The Plaintiff has stated in her reply to defence and defence to counter claim that she and her co-beneficiaries have adversely possessed the suit land during their life time. If the Plaintiff was suggesting that she and her co-beneficiaries are entitled to the suit land by way of adverse possession, that is not her claim in this case. In any event, it is doubtful if a party who remains in occupation of land in defiance of a Court order can be entitled to orders of ownership of the same land on the basis of adverse possession. The 5<sup>th</sup> Defendant's counter-claim is that the Plaintiff should be evicted from the suit land and enjoined therefrom. Trespass to land is a continuing tort and is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

"An unlawful act committed against the person or property of another; especially wrongful entry on another's real property".

The 5<sup>th</sup> Defendant has pleaded that the Plaintiff and her family, having invaded the suit land, have constructed a house thereon and continue to cultivate it. That is a continuing trespass which is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

"A trespass in the nature of a permanent invasion on another's rights, such as sign that overhangs another's property".

In Clerk And Lindsell On Torts 16<sup>th</sup> Edition at paragraph 23-01, a continuing trespass is defined thus:

"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."

The above was affirmed in the case of Nguruman Ltd -v- Shampole Group Ranch & Others C.a. Civil Appeal No73 of 2004[2007 eKLR]. The Plaintiff's continued occupation of the suit land is not really disputed. She claims entitlement thereto but as is now clear, that occupation is not justified.

46. In view of all the above, the 5<sup>th</sup> Defendant's counter-claim is proved. I allow it.

## **5. Whether The Suit Land Is Infact Public Land Held In Trust For The Public By The 6<sup>th</sup> Defendant**

47. The 6<sup>th</sup> Defendant's claim that the suit land is public land held by it in trust for the public was not specifically pleaded in it's defence dated 23<sup>rd</sup> April 2020 and filed herein on 5<sup>th</sup> March 2020. In



that defence, the 6<sup>th</sup> Defendant denied the allegations of omission and commission as pleaded by the Plaintiff. It added that the Plaintiff's suit does not disclose any reasonable cause of action and that at the earliest opportunity, it would apply for its name to be expunged from these pleadings for misjoinder and for the suit to be dismissed.

48. The claim that the suit land is public property held by the 6<sup>th</sup> Defendant in trust was only raised in the statement of Mercy Imo dated 15<sup>th</sup> November 2023. She is the 6<sup>th</sup> Defendant's Chief Officer in charge of Lands, Housing and Urban Development. She stated as follows in paragraphs 2, 3 and 4 of that statement:

2: "That the Land Title No Marachi/Kingandole/1117 measuring 4.05 HA is public property held in trust by the County Government of Busia and duly registered in the name of the County Government, the 6<sup>th</sup> Defendant herein."

3: "That the said parcel of land was duly acquired by the 6<sup>th</sup> Defendant as a bona fide purchaser."

4: That the said parcel of land has since been reserved and used for public utility having initially housed a government cultural centre."

The general rule is that cases are determined on the basis of the parties' pleadings – *Galaxy Paints Co. Ltd -v- Falcon Guards Ltd* 2000 2 E.a. 385 And Also *Standard Chartered Bank Kenya Ltd -v- Intercom Services Ltd & 4 Others C.a. Civil No37 of 2003 [2004 2 KLR 183]*. I did not see the 6<sup>th</sup> Defendant counter-claim for the suit land which is occupied by the Plaintiff. And clearly, the principles enunciated in *ODD JOBS -V- MUBIA* 1970 E.A 476 are not applicable in the circumstances of this case.

49. I have nonetheless seen among the documents filed by the Plaintiff herself, a copy of the Certificate of Official Search for the land parcel No Marachi/Kingandole/1117 dated 12<sup>th</sup> April 2019 showing that the County Government OF Busia was issued with the title deed thereof on 6<sup>th</sup> December 2018. The same is reflected in the register to the suit land as entries NO 18 and 19. However, I did not see that copy of the title deed to the suit land showing that the same is registered in the name of the 6<sup>th</sup> Defendant. On the other hand, the copy of the title deed issued to the 5<sup>th</sup> Defendant shows it was issued on 11<sup>th</sup> December 2008 in the name of the 5<sup>th</sup> Defendant. By entry NO 17, a restriction was placed thereon and the Plaintiff was restrained from dealing with the suit land pending the hearing and determination of this suit. The register is not clear as to who lodged the restriction. What is clear from the register, however, is that by entries NO 18 and 19 dated 6<sup>th</sup> December 2018, the suit land was registered in the name of the 6<sup>th</sup> Defendant and a title deed was issued to it. The 6<sup>th</sup> Defendant did not avail a copy of that title deed during the trial. The only copy of title deed to the suit land which was availed at the trial is the one dated 11<sup>th</sup> December 2008 in the name of the 5<sup>th</sup> Defendant.

50. If the 6<sup>th</sup> Defendant also holds a title deed to the suit land issued on 6<sup>th</sup> December 2018, that can only mean that its title deed was issued ten (10) years after the 5<sup>th</sup> Defendant had obtained his title deed on 11<sup>th</sup> December 2008. The 5<sup>th</sup> Defendant's title having been obtained first, must take priority. This was settled in the case of *Wreck Motors Enterprises -v- The Commissioner Of Lands And Others C.a. Civil Appeal No 71 of 1997* where it was held that:

"Where there are two competing titles, the one registered earlier is the one that takes priority."

The register to the suit land shows that it has always been private property since 1<sup>st</sup> December 1977 when it was first registered in the names of the deceased before being transferred to Erastus Naftali Likuyi and subsequently to the other proprietors. It is not clear how it was converted to public land and the 6<sup>th</sup> Defendant did not offer any evidence in that regard. This Court, on the evidence before it



must therefore make a finding, which I hereby do, that the suit land is private property belonging to the 5<sup>th</sup> Defendant and is not public land held in trust by the 6<sup>th</sup> Defendant for the public.

51. On the issue of costs, they follow the event. I see no reason to order otherwise.
52. Ultimately, therefore and having considered the evidence herein, this Court makes the following disposal orders in this matter:
  1. The Plaintiff's suit is dismissed with costs to the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.
  2. The land parcel No Marachi/Kingandole/1117 is not public land held in trust by the 6<sup>th</sup> Defendant on behalf of the public.
  3. The 5<sup>th</sup> Defendant's counter-claim against the Plaintiff is allowed in the following terms:
    - a. The Plaintiff, her family members, employees, agents and all those claiming under her shall within 90 days of this judgment remove their structures and vacate from the land parcel No Marachi/Kingandole/1117 or be evicted therefrom.
    - b. Thereafter, the Plaintiff, her family members, employees, agents and all those claiming under her shall be permanently enjoined from interfering with the 5<sup>th</sup> Defendant's occupation and use of the land parcel No Marachi/Kingandole/1117.
    - c. The Plaintiff shall meet the 5<sup>th</sup> Defendant's costs of the counter-claim.

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> FEBRUARY 2025**

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 18<sup>TH</sup> DAY OF FEBRUARY 2025 WITH NOTICE TO THE PARTIES.**

The Plaintiff who was previously represented by the firm of KORONGO & COMPANY ADVOCATES but who on 28<sup>th</sup> January 2020 filed a Notice to Act in person was notified through her address:

ROSELITA ATHIENO Werimo

O. BOX 46175

NAIROBI.

Plaintiff present in person.

Plaintiff's Donee Christopher Ogutu Werimo also present.

2<sup>nd</sup> Defendant present in person.

Mr. Makokha for Mr. Wambura for the 6<sup>th</sup> Defendant present

No appearance by the other parties.

Right of Appeal.

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> FEBRUARY 2025**

