



**Ochieng & another v Oracha (Environment & Land Case E001 of 2022)  
[2024] KEELC 13204 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE E001 OF 2022  
GMA ONGONDO, J  
NOVEMBER 13, 2024**

**BETWEEN**

**KERINA AKINYI OCHIENG ..... 1<sup>ST</sup> PLAINTIFF**

**GEOFFREY OCHIENG ORACHA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPHINE AKINYI ORACHA ..... DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. At the heart of the instant suit are land reference numbers Kanyada/Kanyadier/3611 measuring approximately 3.71 Ha in area and Kanyada/Kanyadier/206 measuring approximately 0.08 Ha (The 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land respectively). They are located within Homa Bay County.
2. The plaintiffs are represented by Obonyo Ng'ani and Company Advocates.
3. The defendant is represented by Kijana and Company Advocates.

**B. The Plaintiffs' Case**

4. It is the plaintiffs' case that the 1<sup>st</sup> plaintiff is a sister to the 2<sup>nd</sup> plaintiff. They are children of Nelson Oracha Nyoricho (Deceased-1) who had two wives (both deceased) with a total number of nine children. The defendant's husband, Peter Oracha Nyoricho-(Deceased-2) was a step brother to the plaintiffs. Deceased-1 owned the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land which he inherited from his father Oracha Okech (Deceased-3) who also, had inherited the same from his parents. Deceased-2 being the eldest son of Deceased-1, did register the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land in his own name fraudulently and in breach of trust as he was merely a trustee of the family of Deceased-1. They pleaded particulars of breach of trust and fraud in the plaint.



5. Further, that the defendant did apply for a grant of letters of administration in respect of the estate of Deceased-2 in Homa Bay Chief Magistrate's court Succession Cause number 133 of 2018 where Phoebe Atieno, a step sister to the defendant raised an objection and the court held that it had no jurisdiction to entertain the issue of trust in the cause. Thus, the plaintiffs sued the defendant by way of a plaint (Fast Track) dated 1<sup>st</sup> March 2022 for the following orders;
  - a. The court to be pleased to issue an order declaring that 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land are held and registered in the name of the defendant husband (Peter Oracha Nyoricho- Deceased 2 herein) to be held in trust for the plaintiffs and other siblings.
  - b. An order compelling the transfer of at least half of the two properties equally to the two houses of Nelson Oracha Nyaricho- Deceased 1 herein.
  - c. A declaration of the existence of customary trust as encumbrances during the registration of the 1<sup>st</sup> suit parcel of land.
  - d. A declaration that the change of the name from Deceased 1 to Deceased 2 in the 2<sup>nd</sup> suit parcel of land was unprocedural, fraudulent, and illegal.
  - e. An order of cancellation of the two titles known as the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land.
  - f. Alternatively, and in the event of the failure to comply with number 2 above, the Deputy Registrar of the court shall execute transfer documents.
  - g. Any other or additional relief that this honourable court deems fit and proper to grant.
6. The 1<sup>st</sup> plaintiff (PW1) testified that she is the 3<sup>rd</sup> born daughter to Jeniffer Aoko (Deceased-4) and Deceased-1. That she was born and bred on the 1<sup>st</sup> suit parcel of land where the 2<sup>nd</sup> plaintiff erected a home but the defendant demolished it. She relied on her statement dated 1<sup>st</sup> March 2022 and list of documents of even date (PExhibits 1 to 20) as part of her testimony.
7. Under cross examination. PW1 stated that Deceased-1 owned the 1<sup>st</sup> suit parcel of land and out of his discretion, gave it to Deceased-2. That PExhibit 4 does not disclose that the same was held in trust by Deceased-2 and Elisha Odhiambo Nyoricho. That no suit was filed against Deceased-2 as regard trust during his lifetime. That no person lives thereon. Upon re-examination, PW1 stated that Deceased 2 was given the suit land to hold in trust for her and the family members of Deceased-1.
8. PW2, Peterlis Odoyo Dek, a son of sister to Deceased-1, relied on his statement dated 10<sup>th</sup> April 2023 which was adopted as part of his evidence. During cross examination, he stated that Deceased-1 decided and gave the 1<sup>st</sup> suit parcel of land to Deceased-2 whose name appears in PExhibit 4.
9. PW3, Hesbon Odira Opere, relied on his statement dated 10<sup>th</sup> April 2023 which was adopted as part of his evidence. On cross examination, he stated that Deceased-1 married his sister (Deceased-4) who is the mother to PW1. That PExhibit 4 shows that Deceased-2 is the 1<sup>st</sup> registered proprietor of the 1<sup>st</sup> suit parcel of land. That Deceased-1 gave land to Deceased-2 and that no case was filed against Deceased-2 during his life time. In re-examination, he averred that the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land constitute ancestral land.
10. PW4, Geoffrey Ochieng Oracha (2<sup>nd</sup> plaintiff) relied on his statement dated 10<sup>th</sup> April 2022 as part of his testimony and testified that Deceased-1 and 4 who were his parents lived on the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land. In cross examination, he stated that clan members sat down and decided that Deceased 2 held the suit parcels of land in trust. That Deceased-1 owned them. That he did not know the history



of the suit parcels of land and that the registration of the suit parcels of land in the name of Deceased-2, was not challenged.

11. By the submissions dated 15<sup>th</sup> April 2024, learned counsel for the plaintiffs stated that Deceased-2 is a trustee in respect of the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land for the family members of Deceased-1 under intergenerational equity thus, his root of title thereof has to be examined herein. That the family members of Deceased-1 lived and were brought up on the suit parcels of land which are ancestral as held in *Kanyi-vs-Muthiora* (1984) KLR 712 and customary trust is an encumbrance thereon as noted in *Peter Thuo Muirugaa-vs-Githinji Waweru* (2018) eKLR.
12. Counsel submitted that Deceased-2 obtained the registration of the suit parcels of land in his name by fraud as there was no explanation on how the same was arrived at from Deceased-1. To reinforce the submissions, counsel relied on Article 27 of *the Constitution* of Kenya 2010, Section 117(2) of the old Constitution of Kenya, Sections 27, 28 and 30 of the repealed Registered *Land Act* Chapter 300 Laws of Kenya, Section 28 of the *Land Registration Act* 2016 (2012), *Esiroyo-vs-Esiroyo* (1973) EA 388, *Obiero-vs-Opiyo* (1972) EA 227, *Isack M’Inanga Kiebia-vs-Isaya Theuri M’Lintari* and another (2018) eKLR, and implored the court to grant the orders sought in the plaint.

### C. The Defendant’s Case

13. By the statement of defence and counter claim dated 1<sup>st</sup> November 2022, the defendant denied the plaintiffs’ claim and prayed that the same be dismissed with costs. She stated in part that Deceased-1 owned more than two parcels of land some of which he sold and some he freely gave out to people. That the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land were bequeathed to deceased-2 to hold on behalf of the two wives of Deceased-1 and not in trust for the children of Deceased-1. That the same were registered in the name of Deceased-2 during the adjudication period with the knowledge and consent of the two wives and children of deceased-1. That the allegations of fraud are misplaced and untruthful.
14. In the counter claim, the defendant/counter claimer stated that Deceased-1 during his lifetime distributed his property including bequeathing Deceased-2 with the suit parcels of land without any objection. That the 2<sup>nd</sup> plaintiff/2<sup>nd</sup> defendant is bent to frustrate her and pleaded particulars of malice, bad faith and breach of peace by the 2<sup>nd</sup> defendant. That therefore, judgment be entered for the defendant/counter claimer for;
  - a. An order of permanent injunction restraining the defendant counter claimers and/or their agents, servants from entering, possessing and/or interfering in any manner whatsoever with the counter claimer’s peaceful possession of the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land.
  - b. Costs of this suit with interest thereon at 14% p.a from the date of judgment until payment in full.
  - c. Such further or alternative relief as this Honourable court deems fit to grant.
15. DW1, John Okuku Opon, relied on his statement on record which was adopted as part of his evidence. He testified that Deceased 1 was a brother to his father and their land share a common boundary. That the suit parcels of land belonged to Deceased 1. On cross examination, he stated that adjudication was completed in 1983. That Deceased-1 subdivided the suit land to his sons. That since Deceased 3 lived thereon, the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land got registered in the name of Deceased-2.
16. DW2, Josephine Akinyi Oracha, the defendant, relied on her statement on record which was adopted as part of her evidence. She testified that Deceased-1 died in 1992. That she cultivates the suit land



and relied on the list of documents dated 1<sup>st</sup> November 2022 (DExhibits 1 to 9) and further list of documents dated 10<sup>th</sup> February 2024 (DExhibits 10 to 13).

17. During cross examination, DW2 stated that she got married to Deceased-2 in 1980. That she found Deceased-1 living on the 1<sup>st</sup> suit parcel of land. That Deceased-2 was the first registered proprietor of it. That Deceased-1 gave Deceased-2 the suit parcels of land. In re-examination, she emphasized that Deceased-2 was the first registered proprietor of the 1<sup>st</sup> suit parcel of land.
18. DW3, Perez Akinyi alias Perez Akumu daughter of Deceased-1 and sister to Deceased-2 relied on her statement herein as part of her testimony. She averred that Deceased-2 was given extra land at a meeting and there was no objection to it. That Deceased-1 gave Deceased-2 the suit parcels of land.
19. Learned counsel for the defendant filed submissions dated 3<sup>rd</sup> October 2024 stating the plaintiffs' claim for customary trust, the statement of defence and counter claim dated 1<sup>st</sup> November 2022, statement of issues dated 20<sup>th</sup> March 2023. The defendant disputed the allegation that the 1<sup>st</sup> suit land was registered in the name of Deceased-2 following adjudication process in 1980s and that the 2<sup>nd</sup> suit land remained in the name of deceased-1 who transferred it to Deceased-2 in 1997. Counsel framed issues for determination which include whether; Deceased-2 holds the two suit parcels of land in customary trust for the plaintiffs, the 1<sup>st</sup> suit land is a gift inter vivos and the plaintiffs have no locus standi to originate this suit.
20. Counsel submitted that the plaintiffs have no locus standi herein as they did not present a grant of letters of administration in respect of the estate of Deceased-1. That there was no evidence to support customary trust. That during his lifetime, Deceased-1 gave deceased-2 the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land as a gift and equity respects the intent of Deceased-1. That the plaintiffs have failed to prove the alleged fraud hence, their claim not proved to the requisite standards. Authoritative pronouncements including *Wambugu-vs-Kimani* 919920 2 KLR 58, *Nelson Kiebia* (infra), *Muthuita-vs-Muthuita* (1982-88) 1 KLR 42 and *Koinange-vs-Koinange* (1986) KLR 23, were cited to buttress the submissions.

#### **D. Issues For Determination**

21. Order 15 of the Civil Procedure Rules 2010 provides for framing of issues and materials from which issues may be framed in a matter.
22. It is trite law that the issues for determination in a suit either arise out of the parties' pleadings or as framed by the parties for the court's determination; see *Fernandes-vs-People Newspapers Ltd* (1972) EA 63 and *Galaxy Paints Co.Ltd-vs-Falcon Guards Ltd* (2000) eKLR.
23. Thus, the issues for determination herein are as framed in the Statement of issues dated 20<sup>th</sup> March 2023 and the parties' respective submissions and can be summarized as follows:
  - a. Subject to issue (a) above, whether the plaintiffs have locus standi to institute the instant suit on behalf of the estate of Deceased 1?
  - b. Whether Deceased-2 and subsequently the defendant herein hold the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land in trust for the plaintiffs and other siblings and whether the registration of Deceased-2 as the proprietor thereof was encumbered with customary trust as an overriding interest.
  - c. Whether Deceased-2 procured registration as proprietor of the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land through fraud, illegality and/or misrepresentation.
  - d. Whether the 1<sup>st</sup> suit parcel of land was a gift inter vivos



- e. Whether the defendant's counterclaim is merited.
- f. Who should bear the costs herein?

## E. Discussion And Disposition

- 24. Regarding the first issue, Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya defines the term 'legal representative' as "a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued". (See also Section 82 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya).
- 25. In the case of Alfred Njau –vs- City Council of Nairobi [1983] KLR 625, the Court of Appeal held inter, alia that:
  - “...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
- 26. As submitted by the defendant's counsel, it is trite law that the estate of the deceased is vested in the legal representative; see *Troustik Union International and another-vs-Jane Mbeyu and another* (1993) KLR.
- 27. Indeed, a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession as held in *Rajesh Chudasama-vs-Sailesh Chudasama* (2014) eKLR.
- 28. Further, in *Otieno -vs- Ougo* [1986-1989] EALR 468 the Court of Appeal rendered itself thus:
  - “... 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...”
- 29. In Alfred Njau case (supra), the Court of Appeal distinguished between a cause of action and locus standi and stated in part that:
  - “...To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to...” (Emphasis laid)
- 30. In the present case, I note that according to the green card, the 1<sup>st</sup> suit parcel of land was registered in the name of Deceased-2 as the first registered proprietor thereof with effect from 19<sup>th</sup> January 2015. However, the 2<sup>nd</sup> suit parcel of land initially belonged to Deceased-1 before being transferred and registered in the name of Deceased-2 on the same date.
- 31. The plaintiffs have sought several orders in this suit, including a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land are held and registered in the name of the defendant's husband (Deceased-2 herein) in trust for the plaintiffs and other siblings. The plaintiffs have also sought an order declaring that the change of name from Deceased-1 to Deceased 2 in the 2<sup>nd</sup> suit parcel of land was unprocedural, fraudulent and illegal.



32. Notably, the plaintiffs have not produced in evidence a grant of letters of administration in respect to the estate of Deceased 1, that would authorize them to prosecute the instant suit on behalf of the beneficiaries of that estate. Therefore, it is my considered view that the plaintiffs lack the requisite locus standi to institute and prosecute the present suit on behalf of the estate of Deceased 1, in the absence a grant of letters of administration to his estate.
33. Indeed, it matters not that the plaintiffs have a cause of action. Clearly, they lack the requisite locus standi to seek relief from this court without first obtaining letters of administration to the estate of Deceased; see Alfred Njau case (supra).
34. Moreover, since the dispute involved Deceased-2, the defendant herein ought not to have been sued in her personal capacity but rather as an administratrix of the estate of Deceased- 2.
35. Besides, whereas the defendant instituted the counterclaim in her capacity as the legal representative of the estate of Deceased-2, the defendants to the counterclaim are not the legal representatives of the estate of Deceased-1, who was the original owner of the 1<sup>st</sup> and 2<sup>nd</sup> suit parcels of land herein, to which the principal order sought in the counterclaim relate.
36. Regarding the second issue, trust is a matter of fact to be proved by way of evidence; see also Mumo-vs-Makau (2002) 1 EA 170 and Isack M'inanga Kiebia -vs- Isaaya Theuri M'lintari and another (supra).
37. Trusts including customary trusts are overriding interest on land pursuant to Section 28 of the [Land Registration Act](#), 2016 (2012).
38. However, in view of the foregoing, this court cannot make a determination on the issue of customary trusts.
39. On the third issue, it is trite law that the particulars of fraud be distinctly pleaded and proved; see Kuria Kiarie & 2 others-vs-Sammy Magera (2018) eKLR.
40. Furthermore, I subscribe to the Court of Appeal decision in Kinyanjui Kamau vs George Kamau [2015] eKLR where the court expressed itself as follows;  

“...It is trite law that any allegations of fraud must be pleaded and strictly proved...”
41. In the present case, I am inhibited from making a finding on the issue of fraud due to the prevailing circumstances herein. The same applies to the issue of whether the 1<sup>st</sup> suit parcel of land was a gift inter vivos.
42. To that end, I hereby find the instant suit originated by way of a plaint dated 1<sup>st</sup> March 2022 to be incompetent. The same is hereby struck out.
43. Similarly, the defendant’s counterclaim dated 1<sup>st</sup> November 2022 must equally fail for reasons stated in paragraph 35 above, in the circumstances.
44. Each party to bear own costs.
45. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024**

**G.M.A ONG'ONDO**

**JUDGE**

Present



Mr. Ng'ani, Learned Counsel for the plaintiff

Mr. J. Otieno holding brief for Mr. Kijana, Learned Counsel for the defendant

Plaintiffs

Defendant

Mutiva, Court Assistant

