



**Nyamala (Suing as the legal administrator of the Estate of Ismael Nyamala Wendo- Deceased) v Wendo & 4 others (Environment & Land Case 08 of 2021) [2024] KEELC 13919 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13919 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 08 OF 2021  
GMA ONGONDO, J  
DECEMBER 17, 2024  
(FORMERLY MIGORI ELCC NO. 91 OF 2017)**

**BETWEEN**

**ODOYO NYAMALA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ISMAEL NYAMALA WENDO- DECEASED) ..... PLAINTIFF**

**AND**

**NYANGWESO DIANG'A WENDO ..... 1<sup>ST</sup> DEFENDANT  
JOYCE OMONDI WENDO ..... 2<sup>ND</sup> DEFENDANT  
FRANKLINE ODHIAMBO ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT  
CHAIRMAN, HOMA BAY DISTRICT LAND TRIBUNAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. The present suit concerns land reference number Kanyada/Kanyabala/817 measuring approximately five decimal six hectares (5.6 Ha) in area (The suit land herein). The same is contained in Registry Map Sheet Number 9 and located within Homa Bay County.
2. The plaintiff is represented by M/s Ken Omollo and Company Advocates.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are represented by M/s Apondi and Company Advocates.
4. The 3<sup>rd</sup> defendant is represented by M/s G. S. Okoth and Company Advocates.
5. The 4<sup>th</sup> and 5<sup>th</sup> defendants are represented by the Hon. Attorney General.



## B. Summary of the Parties' Respective Cases

6. The plaintiffs generated this suit by way of a further amended plaint dated 19<sup>th</sup> November 2020, seeking the following orders;
  - a. An order declaring that the Homabay District Land Dispute Tribunal had no jurisdiction to hear and give award dated 29<sup>th</sup> November 2005 in Homabay Tribunal Case No. 2 of 2005 and therefore the said award as read and adopted by the court was illegal, null and void.
  - b. An order that this matter had already been heard and determined by a court of competent jurisdiction in Homabay SRMCC No. 241 of 1998 and therefore the subsequent order, award, judgment and/or decree was res judicata.
  - c. An order of permanent injunction restraining the defendants either by themselves or through their children, brothers, sisters, relatives, friends, employees, servants and/or through any other person deriving authority from them from claiming, entering, occupying and or cultivating the suit land.
  - d. An order that the judgment entered herein in respect to the award dated 29.11.2005, is time barred in terms of Section 4 (1) (c) read together with Section 4(4) of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya, and therefore cannot be implemented.
  - e. Costs of this suit.
  - f. Any other remedy that this court may deem just and fit to grant.
7. The plaintiff, Samwel Odoyo Nyamala (PW1), relied on his statement dated 20<sup>th</sup> November 2020 and a grant dated 13<sup>th</sup> November 2019 issued in respect to the estate of Ismael Nyamala Wendo- deceased 1 herein, a copy of death certificate for deceased 1, a copy of death certificate for Salome Nanga Wendo (deceased 2 herein) (PExhibits 1 to 3 respectively), as well as his list of documents dated 20<sup>th</sup> September 2011 and filed on 21<sup>st</sup> September 2011 serial numbers 2 to 11 and 14 (PExhibits 4 to 14), as part of his testimony.
8. PW1 testified that he is the son and legal representative of the estate of deceased 1. That initially, the suit land was owned by deceased 2 but upon her demise, deceased 1 took out a grant of letters of administration to her estate and transmitted the title of the suit land to himself and a title deed was duly issued to him. That an objection lodged by the 1<sup>st</sup> to 3<sup>rd</sup> defendants was dismissed. That thereafter, the 1<sup>st</sup> to 3<sup>rd</sup> defendants instituted proceedings before the Land Disputes Tribunal (the Tribunal) but the Tribunal gave an award in favour of deceased 1.
9. Furthermore, PW1 testified that deceased 2 was married to one Jacob Wendo (deceased 3), who had subdivided the family land amongst his wives that is; deceased 2, Atai Wendo (deceased 4) and the 2<sup>nd</sup> defendant herein. That deceased 1 filed a suit in Homa Bay Chief Magistrate's Court (PExhibit 16) but the 3<sup>rd</sup> defendant agreed by consent to move out of the suit land. That the suit land does not comprise the entire family land hence, the defendants' claim that the same is held in trust is untenable.
10. During cross-examination, PW1 stated that the suit land is currently occupied by the 2<sup>nd</sup> defendant. That both deceased 2 and 4 are buried there. That the homes of deceased 2, 4 and the 2<sup>nd</sup> defendant herein (all wives of deceased 3) are in one compound and stand on 1 ½ acre piece of the suit land. That the 2<sup>nd</sup> defendant has a son. That deceased 2 was the 1<sup>st</sup> wife of deceased 3 but not a trustee over the suit land. That deceased 1 was a son to deceased 3 and deceased 2. He admitted that originally, the suit



land belonged to deceased 3. That deceased 1 has at least two other parcels of land Reference Numbers Kanyada/Kanyabala/824 and 854 registered in his name, but that he purchased them.

11. The plaintiff's counsel filed submissions dated 7<sup>th</sup> April 2024 and supplementary submissions dated 20<sup>th</sup> May 2024. It was submitted that the issue of ownership of the suit land was settled in Homa Bay Senior Magistrate's Court Case No. 241 of 1998 which allowed deceased 1 to succeed the estate of deceased 2 and have the suit land transmitted to him and a title deed issued. That therefore, the subsequent award issued by the Tribunal was null and void, since the tribunal had no jurisdiction to entertain the case that was before it over the suit. That the Judicial Review application he filed to oust the decision of the tribunal was struck out on a technicality. That the counterclaimants did not raise the issue of existence of a customary trust over the suit land in Homa Bay Senior Magistrate's Court Case No. 241 of 1998 hence, their claim thereto is invalid. That having alleged that deceased 2 procured registration of the suit land in her name through fraud, the counterclaimants cannot claim that the same was held in trust. Thus, counsel urged the court to allow the claim and dismiss the counterclaim with costs. Reliance was placed on various authorities, including the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari and another* (2018) eKLR, to buttress the submissions.
12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an amended statement of defence and counterclaim dated 24<sup>th</sup> March 2016 and sought the following orders:
  - a. A declaration that the registration of the suit land in the name of deceased 2 and in the name of the defendant to the counterclaim was/is in trust for the counterclaimants.
  - b. An order directing the defendant to the counterclaim to subdivide the suit land into three equal portions each measuring approximately 1.86 Ha and transfer 1.86 Ha to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/ counter claimers and also 1.86 Ha to the 4<sup>th</sup> counter claimer failure to which the Deputy Registrar of this court be authorized to execute all relevant and necessary documents for purposes of subdividing and transferring the aforesaid respective parcels of the counterclaimants.
  - c. Permanent injunction restraining the defendant to the counterclaim either by himself, his agents, servants, assignees, family members and any other person or persons howsoever acting directly or indirectly under his instructions from trespassing onto, cultivating, building and or in any way or manner whatsoever interfering with the peaceful occupation, possession and use of the counterclaimants portions of land which will be registered in their names.
  - d. Costs of the counterclaim/cross suit.
  - e. Such further or other relief(s) this honourable court will deem fit to grant in the circumstances.
13. The 2<sup>nd</sup> defendant, Joyce Omondi Wendo (DW1), testified that she is a widow to deceased 3. She relied on her statement dated 10<sup>th</sup> July 2015, which was adopted as part of her evidence. She averred that deceased 3 brought them to the suit land, together with deceased 2 and 4 and she has lived thereon to date.
14. In cross examination, she stated that their husband, deceased 3, established a homestead for all his wives on the suit land. That PW1 subdivided the suit land after land adjudication.
15. DW2, Philemon Otieno Omaki, relied on his statement dated 4<sup>th</sup> April 2018, which was adopted as part of his evidence. During cross-examination, he stated that deceased 3 was his paternal uncle. That DW1 is rightfully in occupation of the suit land since she is the last surviving widow of deceased 3 who initially owned the suit land.



16. Nyangweso Diang'a Wendo (DW3) relied on his statement dated 3<sup>rd</sup> May 2012, which was adopted as part of his evidence as well as the 1<sup>st</sup> and 2<sup>nd</sup> defendants' further list of documents dated 4<sup>th</sup> April 2018 and duly filed on 5<sup>th</sup> April 2018 serial numbers 1 to 8 (PExhibits 1 to 8 respectively). He stated that he is a son to the 2<sup>nd</sup> defendant and deceased 3. That deceased 3 established a home for all his wives, inclusive the 2<sup>nd</sup> defendant, on the suit land. That he lives thereon, together with the 2<sup>nd</sup> defendant and others.
17. In cross-examination, he admitted that L.R. No. Kanyada/Kanyabala/ 855 which previously belonged to deceased 3 is currently registered under his name. That similarly, L.R. No. Kanyada/Kanyabala/818 which also belonged to deceased 3 is currently registered in the name of one Joseph Nyamala Wendo (deceased), who is his brother and a son to DW1. That his other biological brother, the 3<sup>rd</sup> defendant herein, is the legal owner of the suit land and lives thereon. He alleged that deceased 3 was mentally disturbed during adjudication process and sought the assistance of deceased 1 to finalize the process.
18. DW4, Joshua Chwanya Ochogo, Senior Principal Chief Homa Bay Town Location, produced in evidence proceedings of 27<sup>th</sup> January 1997, 4<sup>th</sup> February 1997 and the verdict of 6<sup>th</sup> February 1997 (PExhibit 9). That it was resolved that the suit land belonged to deceased 3 and ought to be subdivided among his sons.
19. During cross-examination, he conceded that DExhibit 9 was overtaken by events when the plaintiff obtained an order of injunction on 7<sup>th</sup> February 1997 as against DW4. That it was further invalidated by the succession proceedings in respect to the estate of deceased 2 (Homa Bay Magistrate's Court Succession Cause No. 12 of 1997).
20. DW5, Frankline Adhiambo Wendo, the 3<sup>rd</sup> defendant herein, relied on his statement dated 9<sup>th</sup> December 2022, which was adopted as part of his evidence in chief. On cross-examination, he stated that all his brothers were allocated land by deceased 3, except him since he was a minor at the time. That he has lived thereon since birth. That they objected to the 2<sup>nd</sup> defendant's construction of his home thereon since he had been allocated a separate parcel of land.
21. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel filed submissions dated 2<sup>nd</sup> April 2024 and identified five issues for determination namely:
  - a. Whether the registration of the suit land in the name of deceased 2 and in the name of the defendant to the counterclaim was/is in trust for the counter claimers.
  - b. Whether the court ought to issue an order directing the defendant to the counterclaim to subdivide the suit land into three equal portions each measuring approximately 1.86 Ha and transfer 1.86 Ha to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant/ counter claimers and also 1.86 Ha to the 4<sup>th</sup> counter claimers.
  - c. Whether the court can issue an order of permanent injunction restraining the defendants either by themselves or through their children, brothers, sisters, relatives, friends, employees, servants and or through any other person deriving authority from them from claiming, entering, occupying and or cultivating the suit land.
  - d. Whether the court ought to issue an order declaring that the Tribunal had no jurisdiction to hear and give award dated 29<sup>th</sup> November 2005 in Homabay Tribunal Case No. 2 of 2005.
  - e. Who should bear costs of the suit?
22. Briefly, learned counsel submitted that the deceased 2 held the suit land in trust for the defendants/ counterclaimants by virtue of customary trust. That the same ought to be distributed among the three



wives of deceased 3. That the decision in Homabay Tribunal Case No. 2 of 2005 can only be quashed by way of judicial review. That the plaintiff has failed to prove his case on a balance of probabilities and the same ought to be dismissed with costs to the defendants. That further, the counterclaim is merited and ought to be allowed with costs. Reliance was placed on various authoritative pronouncements, including the case of *Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & others* (2015) eKLR and *Isack M'inanga Kiebia v Isaaya Theuri M'lintari and another* (2018) eKLR, to buttress the submissions.

23. The 3<sup>rd</sup> defendant's counsel filed submissions dated 18<sup>th</sup> March 2024 and submitted that the plaintiff failed to follow the applicable law when he lodged a Judicial Review application as opposed to an appeal to the Provincial Appeal Tribunal, to challenge the decision in Homabay Tribunal Case No. 2 of 2005. That the remaining suit land should be apportioned to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, since all the other beneficiaries and dependants of deceased 3 have been provided for, save for the two. That the plaintiff allocated himself three parcels of land during adjudication, with a total acreage of 10.4 Hectares. That there is a customary trust subsisting on the suit land. Thus, counsel urged the court to dismiss the plaintiff's suit and allow the 3<sup>rd</sup> defendant's counterclaim with costs. Counsel relied on the case of *Isack M'inanga Kiebia* (supra), to reinforce the submissions.
24. Daniel Kobimbo, Senior Litigation Counsel, filed submissions for the 4<sup>th</sup> and 5<sup>th</sup> defendants, on behalf of the office of the Hon. Attorney General. Learned Counsel submitted on a single issue thus: whether this suit is properly before this court and deponed inter alia; that the plaintiff erred in lodging a Judicial Review application as opposed to an appeal to the Provincial Appeal Tribunal, to challenge the decision in Homabay Tribunal Case No. 2 of 2005. That the plaintiff failed to exhaust the remedies available under the Land Disputes Tribunal Act. Thus, he urged the court to dismiss the suit with costs. To fortify the submissions, counsel relied on the case of *Abidha Nicholus v. The Attorney General & 7 Others & National Environmental Complaints Committee & 5 Others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR), among other authoritative pronouncements.

### **C. Issues for Determination**

25. It is established law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd-vs-Falcon Guards Ltd* (1999) eKLR.
26. I have duly considered the entire pleadings, the testimonies of PW1 as well as DW1 to DW5 and the parties' respective submissions. So, the following issues fall for determination:
  - a. Whether the plaintiff has proved his claim to the requisite standard.
  - b. Whether the counterclaimants have proved the counterclaim to the requisite standard
  - c. What orders can this court issue to meet the ends of justice?

### **D. Discussion and Determination**

27. It is important to note that this matter was referred for Court Annexed Mediation in line with Article 159 (2)(c) and (e) of *the Constitution* of Kenya, 2010 on 24<sup>th</sup> July 2024. However, parties failed to agree hence, necessitating this judgment.
28. The plaintiff avers that the Tribunal had no jurisdiction to entertain the case that was before it over the suit land. That the award issued was null and void. So, is that the correct position?



29. It is trite that the decision of a tribunal can only be quashed by way of judicial review and not as lodged herein, pursuant to Article 47 of the Constitution of Kenya 2010.
30. Be that as it may, I note that the issue of ownership of the suit land herein was heard and determined vide Homa Bay Senior Resident Magistrate's Court Civil Suit No. 241 of 1998 wherein the court found that deceased 1 was the rightful beneficiary of deceased 2 thus, entitled to be registered as the owner of the suit land. Further, an order of permanent injunction was issued restraining the 1<sup>st</sup> defendant herein or any other person on his behalf from cultivating or in any other way utilizing the suit land.
31. Notably, no appeal was lodged against the decision of the lower court thus, the same is still in force. So, is the present suit res judicata?
32. The substantive law on Res Judicata is found in Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya which provides that:
- “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”
33. I note that the suit at the lower court was filed by deceased 1, the original plaintiff, as against the 1<sup>st</sup> defendant herein. He sought the prayers infra:
- a. An order of permanent injunction restraining the 1<sup>st</sup> defendant herein or any other person on his behalf from cultivating or in any other way utilizing the suit land.
  - b. An order declaring that the plaintiff (deceased 1) is the rightful beneficiary of the estate of deceased 2 and he is entitled to be registered as the owner of the suit land.
  - c. General damages for trespass.
  - d. Costs of the suit.
34. The same was substantially allowed, except for prayer number (c).
35. Indeed, the cardinal principle is that litigation has to come to an end; see Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 22 page 273.
36. In the premises, it is my considered view that the present suit is res judicata. Therefore, this court lacks jurisdiction to determine the same.
37. Consequently, the counterclaim also fails.
38. Given the nature of the suit and the relationship between the parties, each party is hereby directed to bear their own costs.
39. Orders accordingly.
40. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 17<sup>TH</sup> DAY OF DECEMBER 2024.**

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



## **JUDGE**

Present

1. Ms. P. Odhiambo holding brief for G. S. Okoth, Learned Counsel for the 3<sup>rd</sup> defendant
2. Ms. Mwaura holding brief for Odingo, Learned Counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants
3. Plaintiff in person
4. 1<sup>st</sup> defendant in person
5. 3<sup>rd</sup> defendant in person

