Wasike & another (Suing as the Legal Representative of the Estate of Cornelius Oundo Wasike - Deceased) v Ohala & 15 others (Environment and Land Judicial Review Case 19 of 2020) [2023] KEELC 20144 (KLR) (25 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20144 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 19 OF 2020

BN OLAO, BN OLAO, BN OLAO & BN OLAO, JJ

SEPTEMBER 25, 2023

BETWEEN

BASCO OKHUBEDO WASIKE ..... 1ST APPLICANT

BASCO OKHUBEDO WASIKE ..... 2ND APPLICANT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CORNELIUS OUNDO WASIKE - DECEASED

AND

HILLARY EMMANUEL OHALA ..... 1ST DEFENDANT

HILLARY EMMANUEL OHALA ..... 2ND DEFENDANT

ROBERT WERE OHALA ..... 3RD DEFENDANT

ROBERT WERE OHALA ..... 4TH DEFENDANT

RAYMOND WANDERA OHALA ..... 5TH DEFENDANT

RAYMOND WANDERA OHALA ..... 6TH DEFENDANT

DENNIS ROBINS OHALA ..... 7TH DEFENDANT

DENNIS ROBINS OHALA ..... 8TH DEFENDANT

WILLIAM WANZALA OHALA ..... 9TH DEFENDANT

WILLIAM WANZALA OHALA ..... 10TH DEFENDANT

BENARD JUMA OHALA ..... 11TH DEFENDANT

BENARD JUMA OHALA ..... 12TH DEFENDANT

DAVID OYE ASHIOYA ..... 13TH DEFENDANT

DAVID OYE ASHIOYA ..... 14TH DEFENDANT

THE ATTORNEY GENERAL (SUED ON BEHALF OF THE CHIEF LAND REGISTRAR - BUSIA) ..... 15TH DEFENDANT

SUED ON BEHALF OF THE CHIEF LAND REGISTRAR - BUSIA ..... 16TH DEFENDANT

JUDGMENT

1. Basco Okhubedo Wasike (the Plaintiff herein) moved to this Court vide his plaint dated 22nd June 2020 and filed on 24th June 2020 suing as the legal representative of the Estate of his late father Cornelius Oundo Wasike (hereafter Cornelius). He impleaded Hillary Emmanuel Ohala, Robert Were Ohala, Raymond Wandera Ohala, Dennis Robins Ohala, William Wanzala Ohala, Benard Oye Ashioya and the Attorney General (the 1st to 8th Defendants respectively) and sought judgment against them in the following terms with respect to the land parcel No South Teso/angoromo/320 (hereafter the suit land):

    a. A declaration against the 1st to 7th Defendants that the deceased Cornelius Oundo Wasike is the legal owner of all that parcel of land known as No South Teso/angoromo/320.

    b. A declaration that the transfer of the land parcel No South Teso/angoromo/320 by way of transmission to the 1st to 7th Defendants is unlawful and fraudulent and an order of cancellation of their title deeds.

    c. An order of eviction be issued against the 1st to 7th Defendants in respect of the land parcel No South Teso/angoromo/320.

    d. A permanent injunction be issued restraining the Defendants whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property and right of occupation, quiet possession and use of all that parcel of land described as title number No South Teso/angoromo/320.

    e. Damages and mesne profits.

    f. Costs of this suit.

    g. Any other relief the Honourable Court deems fit and just to grant.

2. The basis of this claim is that Cornelius his deceased father was, and still is, the registered and beneficial owner of the suit land having purchased the same from one John Ohala (hereinafter Ohala) the father to the 1st Defendant sometimes in August 1983. That the requisite fees were paid and the consent of the Land Control Board was obtained after which the suit land was registered in the names of Cornelius on 14th November 1983. That Cornelius took possession of the suit land which he started cultivating and planting crops thereon until his demise on 15th August 2016 and at no time did he transfer the same to either of the Defendants or to Ohala.

3. Sometime on or about 16th March 2016, the 1st Defendant went and obtained a letter from Chief of Mudembi Sub-location for purposes of filing for the Grant of Letters of Administration in respect of the Estate of his late father Ohala and fraudulently included the suit land as part of the Estate of Ohala yet it belonged to Cornelius. The 1st Defendant then went ahead and fraudulently applied as the Administrator of the Estate of Cornelius In Busia Chief Magistrate Succession Cause No 170 of 2016. The application was advertised vide Gazette Notice NO. 4367 on 10th June 2016 and on 20th July 2016, he was granted Letters of Administration in respect of the Estate of Cornelius on the basis of a

forged death certificate showing that the said Cornelius had died on 5th December 1983 when infact he had died on 15th August 2016 and was buried on 27th August 2016. On 24th April 2018, the 1st to 7th Defendants who are strangers to the Estate of Cornelius clandestinely and without any colour of right had the suit land registered in their names by way of transmission thus infringing on the right of the heirs to Cornelius's Estate. The Defendants therefore colluded to defraud the Estate of Cornelius and this Court should intervene and direct the Land Registrar to rectify the title to the suit land so that it can reflect the proprietor thereof as Cornelius.

4. Particulars of illegality and fraud on the part of the 1st Defendant are pleaded as follows:

   a. Trespassing into the property of the late Cornelius.

   b. Intermeddling with the Estate of a deceased person.

   c. Forcible entry.

   d. Fraudulently transferring the suit land to himself.

   e. Tendering forged documents to the lands office.

   f. Tendering forged documents to Court in Succession Cause No 170 of 2016 while filing for Letters of Administration intestate in respect of the estate of Cornelius Oundo Wasike.

   g. Acquiring the land parcel No South Teso/angoromo/320 by fraud.

   h. Tendering a forged title to the lands office.

   i. Transferring a parcel of land yet he had no proprietary interest to the suit land.

5. On the part of the 2nd to 7th Defendants, the particulars of illegality and fraud were pleaded as:

   a. Fraudulently transferring the suit land to themselves.

   b. Acquiring the suit land by fraud.

   c. Tendering a forged title deed to the Lands office.

   d. Transferring the suit land without conducting the necessary due diligence and requisitions of title and colluding with imposters to effect a fraudulent transfer.

6. And as against the 8th Defendant, the following particulars of illegality and fraud were pleaded:

   a. Transferring the suit land fraudulently.

   b. Accepting fraudulent and forged documents particularly the title deed to effect a fraudulent change of ownership and ignoring the rights of the legal owner.

   c. Conspiring with the other Defendants to defeat the legal rights of the owner, the late Cornelius Oundo Wasike.

   d. Purporting to transfer a parcel of land by one who had no proprietary interest in the suit land.

   e. Purporting to admit fraudulent records from the 1st Defendant.

7. The Plaintiff added that arising out of the said illegal and fraudulent activities involving the suit land, the Estate of Cornelius has suffered loss and damage. Particulars of the same have been set out in paragraph 24 of the plaint as:

a. The Plaintiff and the Estate of the deceased Cornelius Oundo Wasike has been deprived of the use and quiet enjoyment of the suit land.

8. The Plaintiff filed his statement dated 30th June 2021 in which he confirmed that he is the Administrator to the Estate of his late father Cornelius having taken out a Limited Grant of Letters of Administration authorizing him to file this suit. He added that at all material time relevant to this suit, the said Cornelius was and still is the registered proprietor of the suit land having purchased it in August 1983 from Ohala the deceased father to the 1st Defendant. That on 15th November 1983 before the title document could be issued to Cornelius Ohala made some payments in the registry ostensibly to have his names in the register corrected to read Andrew Okhala Bwire instead of John Ohala. However, Cornelius took possession of the suit land after the purchase and continued to cultivate crops thereon until his demise on 15th August 2016 and at no point in time did he transfer any part of the same to either of the Defendants or Ohala.

9. Sometime on or about 16th March 2016, the 1st Defendant obtained a letter from the area chief of Mudembi sub-location for purposes of applying for the Grant of Letters of Administration to the Estate of his late father Ohala and fraudulently included the suit land as part of the Estate of the late Ohala yet it belonged to Cornelius. Then on 20th July 2016 the 1st Defendant applied for and was subsequently granted Letters of Administration in respect to the Estate of Cornelius Vide Busia Chief Magistrate's Court Succession Cause No 170 of 2016 using a forged death certificate showing that Cornelius had died on 5th December 1983 yet he had died on 15th August 2016 and was buried on 27th August 2016. Using the Confirmed Grant of Letters of Administration issued in Busia Chief Magistrate's Court Succession Cause No 170 of 2016, the suit land was fraudulently transmitted to the 1st to 7th Defendants and was thereafter sub-divided into several portions. Meanwhile, no Grant of Letters of Administration is yet to be issued in respect to the Estate of the late Cornelius whose Estate has not yet been distributed.

10. He added that at no time did Cornelius sell or transfer to any person the suit land and that the 1st to 7th Defendants disguised themselves as the heirs to Cornelius and illegally and fraudulently registered themselves as the proprietors of the suit land. They therefore infringed upon the Plaintiff's rights to his property by intermeddling with the Estate of a deceased person. That conduct calls for this Court's intervention by ordering the Land Registrar to rectify the records of the suit property to reflect Cornelius as the proprietor thereof so that his Estate can commence the succession process.

11. The Plaintiff also called as his witness Mr Nicholas Obiero (pw2) the Land Registrar Busia. Being an expert witness, he did not record a statement. He however testified before Omollo J on 9th June 2022. He confirmed that the title deed issued to Cornelius on 15th November 1983 in respect to the suit land was legitimate. He also confirmed that the suit land was properly transferred by Ohala to Cornelius and the statutory payments were made. He produced as part of the Plaintiff's documentary evidence a copy of the Land Certificate for the suit land issued on 15th November 1983 in the names of Cornelius as well as the payment receipts.

12. The witness referred to the various cancellations captured in the Green Card in regard to the ownership of the suit land and clarified that the entry dated 19th June 2008 purporting to be a transfer of the suit land back to Ohala was cancelled as it was found to be irregular. The same had been made pursuant to orders issued in a Succession Cause whereby a Grant of Letters of Administration had been issued to Hillary Emmanuel Ohala as personal representative to the Estate of Cornelius.

13. Susan Wasike (pw3) is a sister to the Plaintiff and therefore a daughter to Cornelius. She recorded a statement dated 30th June 2021. The said statement is a replica of the Plaintiff's statement also dated

30th June 2021 which I need not rehash suffice it to state that she too confirmed that the suit land was registered in the name of Cornelius on 15th November 1983 after he had purchased it from Ohala in August 1983 and took possession of the same. That at no time did Cornelius transfer the suit land to any other person but that in July 2016, the 1st Defendant who is a son to Ohala fraudulently petitioned the Chief Magistrate's Court Busia In Succession Cause No 170 of 2016 and obtained Grant of Letters of Administration in respect of the Estate of Cornelius and proceeded to sub-divide the suit land among the 1st to 7th Defendants herein. That in applying for the said Grant, the 1st Defendant used a forged death certificate showing that Cornelius died on 5th December 1983 when infact he had died on 15th August 2016 and was buried on 27th August 2016. That no Grant of Letters of Administration has ever been issued in respect to the Estate of Cornelius and the Defendants committed a serious fraud by registering themselves as the proprietors of the suit land.

14. The Plaintiff filed the following lists of documents:

    1. List dated 30th June 2021.

    2. Supplementary list dated 1st February 2022.

    The lists contained the following documents:

    1. Copy of the Plaintiff's Identity Card.

    2. Copy of Limited Grant of Letter of Administration issued to the Plaintiff in respect to the Estate of Cornelius In Busia High Court P & A Cause No. 213 of 2019 for purposes of filing this suit.

    3. Copy of a Land Certificate for the land parcel No South Teso/angoromo/320 issued to Cornelius Oundo Wasike on 15th November 1983.

    4. Copy of consent of the Land Control Board and receipts.

    5. Copy of receipt issued to Ohala for correction of names.

    6. Copy of payment receipt and letter by District Surveyor Busia/Teso District.

    7. Copy of letters from area chief Mudembi sub-location addressed to the Deputy Registrar Busia High Court for Estate of Okhala.

    8. Copy of Gazette Notice NO 4367 in respect to Estate of Cornelius Oundo Wasike.

    9. Copy of Grant of Letters of Administration issued to the 1st Defendant in respect to the Estate of Cornelius.

    10. Copy of forged death certificate presented to Court indicating that Cornelius died on 5th December 1983.

    11. Copy of death certificate for Cornelius and burial programme showing that he died on 15th August 2016.

    12. Copy of Grant issued in Busia Chief Magistrate's Succession Cause No 170 of 2016.

    13. Copy of Letter by the Land Registrar Busia dated 2nd August 2019 and addressed to Balongo & Co. Advocates.

    14. Survey map for the suit land.

15. The 1st to 6th Defendants filed their joint amended defence and counter-claim dated 7th February 2022. They denied all the averments by the Plaintiff and put him to strict proof thereof. They added that they hold good titles to their parcels of land obtained through a valid process of the Court in Busia Chief Magistrate's Court Succession Cause No 170 of 2016.

16. The 1st to 6th Defendants pleaded further that Cornelius, the Plaintiff's father, transferred the suit land into his names fraudulently and without following due process. The particulars of fraud were pleaded in paragraph 5 of the amended defence and counter-claim as follows:

    a. Failure to engage the 1st to 6th Defendants' father in the transfer of title to Plaintiff's father.

    b. Purporting to cause the change of the name of the 1st to 6th Defendants' father without his consent.

    c. Purporting to transfer the land from the Defendants' father to the Plaintiff's father without following due process.

    d. Purporting to cause alteration of the register at the lands office.

    e. That the Plaintiff's suit is not merited and should be dismissed.

17. In their counter-claim, the 1st to 6th Defendants pleaded that the restrictions placed on the land parcels No South Teso/angoromo/12941 – 12949 by the Plaintiff are unlawful and actuated by malice.

18. They therefore sought judgment in their counter-claim as follows:

    1. A declaration that the 1st to 6th Defendants hold valid titles to the land parcels No South Teso/angoromo/12941-12949.

    2. An order be issued for the removal of the restriction placed in the land parcels No South Teso/angoromo/12941-12949.

    3. Costs of the suit and counter-claim.

19. The 1st to 6th Defendants filed the following witness statements in support of their case:

    1. Eunice Anyango (dw1).

    2. George Omondi (dw2).

    3. Philemona Ohala (dw3).

    4. Hillary Emmanuel Okhala – 1st Defendant (DW4).

    5. Robert Were Ohala – 2nd Defendant – (DW5).

    6. Raymond Wandera Ohala – 3rd Defendant (DW6).

    7. William Wandera Ohala – 5th Defendant (DW7).

    8. Benard Juma Ohala – 6th Defendant (DW8) and

    9. Denis Robins Ohala – 4th Defendant (DW9).

    10. Washington Migunde (DW10)

20. In her statement dated 31st January 2022, Eunice Anyango (dw2) stated that she is a widow to one Ojuma Okinyang the original owner of the land parcel No South Teso/angoromo/320 which the deceased sold to one Andrew Okhala prior to the adjudication process. That her son one Joseph Okuku resides on the suit land although she has since moved out of the said land. That during her stay on the land, she never met Cornelius and is not aware that he (Cornelius) purchased the suit land which to her knowledge, is the property of Andrew Okhala.

21. George Omoding (dw2) swore an affidavit dated 28th September 2021 in which he deposed, inter alia, that he met Andrew Okhala in 1974 when he went to visit his father Ojuma Okinyang with the intention of purchasing land. His father later sold a portion of his land measuring 9 acres to Andrew Okhala. It is therefore not true that his father Ojuma Okinyang sold his land to any other person other than Andrew Okhala.

22. Philemona Okhala Amuke (DW3) also swore an affidavit dated 2nd February 2022 in which she confirmed that she is the first child of Andrew Okhala Bwire who prior to his demise was the proprietor of the land parcel No South Teso/angoromo/320 – the suit land. That her deceased father had purchased it from Ojuma Okinyang. That prior to his demise, her late father was preparing to put up a family home on the suit land but he became very ill and passed away on 5th December 1983 before he could do so. She added that her father Andrew Okhala Bwire had lost his memory during the illness and could not have engaged any person in any transaction including sale of land. That the Defendants are the rightful owners of the suit property having obtained it through a succession process in Busia Court Succession Cause No 170 of 2016. That during his life time, Andrew Okhala Bwire had intended to exhume the remains of his wife from Bunyala and bury them on the suit land since that is where he had intended to settle his family.

23. Hillary Emmanuel Okhala the 1st Defendant swore an affidavit dated 28th September 2021 in which he deposed that his late father Andrew Okhala who passed away in 1993 owned the following properties:

    1. L.r No South Teso/angoromo 320 (the suit land).
    2. Bukhayo/mundika/1112.
    3. Bunyala/mudembi/1286.
    4. Bunyala/mudembi/722.
    5. Bunyala/mudembi/1730.

24. Following the demise of his father, his family elected him to be the Administrator to his Estate and so he filed Busia Chief Magistrate Court Succession Cause No 170 of 2016 whereupon he was issued with a Confirmed Grant on 14th December 2017 and distributed the Estate to the beneficiaries.

25. He added that neither the Plaintiff herein nor Cornelius were beneficiaries to the said Estate and further, the late Andrew Okhala did not have any agreement of sale in respect to the suit land. That this suit is incompetent and the Plaintiff has no cause of action against him or any of the Defendants. He deposed further that Andrew Okhala had purchased the suit land from one Ojuma Okinyang and that the Plaintiff had made an attempt to have the Grant of Letters of Administration issued to him in Busia Chief Magistrates Court Succession No 170 of 2016

revoked but the Court dismissed the application vide a ruling delivered on 12th November 2019.

26. The Plaintiff's suit is therefore misconceived and should be dismissed with costs.

27. Robert Were Ohala (DW5) who is the 2nd Defendant also filed an affidavit dated 31st January 2022 in which he deposed, inter alia, that he is the son of Ohala who, prior to his demise, was the registered proprietor of the suit land. Upon his demise, the family appointed the 1st Defendant to apply for the Grant of Letters of Administration in respect to their father's Estate. The 1st Defendant filed Busia Chief Magistrate's Court Succession Cause No 170 of 2016 which was confirmed and he was registered as the proprietor of the portion No South Teso/angoromo/12942.

28. He therefore seeks for an order of permanent injunction against the Plaintiff by himself, workers or anyone claiming through him from interfering with the said portion of land as well as an order for the eviction of the Plaintiff therefrom.

29. Raymond Wandera Okhala is the 3rd Defendant and testified as DW6. In his affidavit also dated 31st January 2022, he too deposed that the suit land belonged to his deceased father and upon his demise, the family appointed the 1st Defendant to apply to be the Administrator to the Estate. The 1st Defendant filed at the busia chief magistrate's court succession cause NO 170 of 2016 and was appointed as the Administrator to the said Estate.

30. Upon confirmation of the said Grant, the suit land was sub-divided and he was registered as the proprietor of the land parcel No South Teso/angoromo/12944. He too seeks an order injuncting the Plaintiff from interfering with the said portion and also an order for the eviction therefrom of the Plaintiff or any one claiming through him.

31. William Wanzala Ohala (DW7) who is the 5th Defendant similarly filed an affidavit dated 31st January 2022 confirming that he is the son of OHALA who prior to his demise was the proprietor of the suit land.

32. That upon the death of his father, the family appointed the 1st Defendant to apply as Administrator to the Estate. The 1st Defendant filed Busia Chief Magistrate's Court Succession Cause No 170 of 2016 and upon confirmation of the Grant, he was registered as the proprietor of a portion of the suit land being parcel No South Teso/angoromo/12943. That no objection was filed during the succession proceedings and this Court should therefore issue an order for the eviction of the Plaintiff, his servants or anyone acting through him from the said portion of land and evict the Plaintiff or anyone claiming through him from the said portion.

33. Bernard Juma Okhala (DW8) is the 6th Defendant and also a son to the late Ohala. He too confirmed that the suit land belonged to his late father and upon his demise, the 1st Defendant filed for succession in Busia Chief Magistrate's Court Succession Cause No 170 of 2016. No objection was filed in those proceedings and upon the Grant being confirmed, he was registered as the proprietor of the land parcel No South Teso/angoromo/12945. He therefore seeks an order for the eviction of the Plaintiff, or anyone claiming through him, from the said parcel of land and that the Plaintiff or any person claiming through him be permanently injuncted from interfering with his possession of the said land.

34. Dennis Robins Ohala the 4th Defendant herein filed an affidavit dated 8th February 2023 in which he averred that he is the registered proprietor of the land parcel No South Teso/angoromo/12941 having obtained it following the succession process in Busia Chief

Magistrate's Succession Cause No 170 of 2016. He asked this Court to restrain the Plaintiff or his servants from using it.

35. The 1st to 6th Defendants filed the following documents as per their list dated 4th February 2022:

    1. Copy of Official Search for the land parcel No South Teso/angoromo/320 issued on 24th February 2016 in the name of Andrew Okhala Bwire.
    2. Copy of Grant issued to the 1st Defendant in Busia Chief Magistrate Court Succession Cause No 170 of 2016 on 20th July 2016 in respect to the Estate of Andrew Okhala Bwire.
    3. Copy of Confirmed Grant issued to the 1st Defendant in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 on 14th December 2017.
    4. Kenya Gazette Notice NO 4367.
    5. Mutation Form.
    6. Copy of Green Card for the land parcel NO SOUTH TESO/ANGOROMO/320.
    7. Letter dated 6th November 2019 addressed to BALONGO & COMPANY ADVOCATES.
    8. Ruling in BUSIA CHIEF MAGSITRATE'S COURT SUCCESSION CAUSE NO 170 of 2016.
    9. Summons for revocation of Grant and the supporting affidavit of the 1st Defendant sworn on 18th October 2019.
    10. Grant issued in Busia Chief Magistrate's Court Succession Cause No 170 of 2016.
    11. Further affidavit of the 1st Defendant in Busia Chief Magistrate's Court Succession Cause No 170 of 2016.
    12. Plaint and other documents in Busia Chief Magistrate's Court Civil Case No 35 of 2020.
    13. Letter from Ashioya & Company Advocates dated 22nd July 2016 and addressed to the Land Registrar.
    14. Letter from Ashioya & Company Advocates dated 7th July 2016 and addressed to the Chief Magistrate Busia Court.

36. David Oye Ashioya the 7th Defendant is an Advocate of this Court practicing under the name and style of Ashioya & Company Advocates.

37. He filed his affidavit dated 4th February 2022 in which he deposed that on or about 7th July 2017, he received instruction from the 1st Defendant to represent him in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 which had already been filed. At that time, the suit land was registered in the names of Andrew Okhala Bwire the father to the 1st Defendant. He therefore filed a Notice of Appointment in the matter and subsequently, the Confirmed Grant was issued in the names of the 1st Defendant. An objection to revoke the said Grant was dismissed. In view of the fact that the 1st Defendant did not have funds to meet his costs, he asked the 7th Defendant to pursue the Succession Cause to a conclusion with a promise to give him one (1) acre of land to meet his legal costs. The 7th Defendant was therefore registered as

the proprietor of the land parcel No South Teso/angoromo/12951. He too therefore seeks and order for the eviction of the Plaintiff from his land and an order permanently injuncting the Plaintiff from interfering with the said portion of land.

38. The Attorney General the 8th Defendant, was sued on behalf of the Land Registrar Busia. He filed a brief statement of defence denying all the allegations of fraud levelled against him.

39. The 8th Defendant filed a list of documents dated 7th February 2022 to which was annexed the following documents:

    1. Copy of Green Card for the land parcel No South Teso/angoromo/320.
    2. Copy of Green Cards for the land parcels No South Teso/angoromo/12941 to 12951.
    3. A copy of application for correction of name.
    4. A copy of application for consent to transfer from Andrew Okhala Bwire To Cornelius Oundo Wasike.
    5. A copy of death certificate for Cornelius Oundo Wasike dated 13th August 1987 showing date of death as 5th December 1983.
    6. A copy of Grant of Letters of Administration issued in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 dated 20th July 2016.
    7. A copy of application to be registered as proprietor by transmission dated 10th January 2017.
    8. A copy of transfer by personal representative to a person entitled under a will or intestacy dated 24th April 2018.
    9. A copy of application and letter of consent for portioning land parcel No South Teso/angoromo/320 dated 13th April 2018.
    10. A copy of Mutation Form for the land parcel No South Teso/angoromo/320 dated 29th May 2018.

40. The 8th Defendant did not file any witness statement. It is instructive to note at this point that infact the Land Registrar Busia Mr Obiero testified as a witness for the Plaintiff.

41. The Defendants also called as their witness Washington Migunde (dw10) a Senior Court Assistant attached to the Busia Chief Magistrate's Court who produced as part of the Defendant's documentary evidence, the original file in respect to Busia Chief Magistrate's Court Succession Cause No 170 of 2016.

42. The Plaintiff filed a defence to the 7th Defendants counter-claim on 8th February 2022 reiterating that the 7th Defendant did not get a good title since the proceedings in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 were borne out of serious misrepresentations.

43. Meanwhile the 1st to 7th Defendants withdrew their earlier defence and counter-claim filed dated 4th February 2022 having subsequently filed defences and counter-claim dated 7th February 2022.

44. The plenary hearing commenced on 8th February 2022 before Omollo J who heard the Plaintiff's case. Following her transfer, I heard the Defendant's case on 8th February 2023.

45. The witnesses adopted as their testimonies the contents of their respective statements and affidavits which I have already summarized above. The Land Registrar Busia Mr Nicholas Obiero (pw2) and the Senior Court Assistant Mr Washington Migunde (dw10) did not record any statements or affidavits but their testimony is on record.

46. Submissions were thereafter filed both by the firm of Nyongesa Nafula & Company Advocates for the Plaintiff, D. K. Nabulindo & Company Advocates for the 1st to 6th Defendants and Ashioya & Company Advocates for the 7th Defendant. The 8th Defendant did not call any witnesses in support of their case although their counsel Mr Juma was present and also filed submissions.

47. I have considered the evidence by all the parties including the documents filed as well as the submissions by counsel.

48. I must start by pointing out that the deceased father to the 1st to 6th Defendant has been referred to by the parties as either Ohala or Okhala. However, as I stated at the beginning of this judgment, this Court will refer to him as Ohala.

49. I consider the following issues to be germane to the determination of this dispute:

    1. Whether Cornelius obtained a valid title to the suit land.

    2. Whether the 1st to 7th Defendants obtained a good title to the suit land and the subsequent sub-divisions being No South Teso/angoromo/12941 to 12951.

    3. Whether fraud was proved against the 7th Defendant.

    4. If the Plaintiff is entitled to the orders sought.

    5. If the 1st to 7th Defendants are entitled to their counter-claim.

    6. Whether fraud was proved against the 8th Defendant.

    7. Who shall bear the costs?

50. It is the Plaintiff's case that his late father Cornelius was and still is the registered proprietor of the suit land. In support of that claim, the Plaintiff produced a copy of the land certificate to the suit land in the name of Cornelius dated 15th November 1983. He added that Cornelius purchased it from OHALA in August 1983 having paid the requisite fees and obtained the necessary consent. He then took possession of the same until his demise on 15th August 2016.

51. It is common ground that the Plaintiff did not produce as part of his documentary evidence any agreement for the purchase of the suit land entered into between his father Cornelius and Ohala in 1983. The Green Card to the suit land shows that Ohala was the first registered proprietor of the suit land on 7th November 1973. He was issued with the land certificate on 8th April 1976 although on 15th November 1983, there was a correction of name to read Andrew Okhala Bwire otherwise known as John Ohala which was however later cancelled by the Land Registrar and the name of Cornelius Oundo Wasike was inserted following a transfer on 14th November 1983 and certificate issued on 15th November 1983. Then on 19th June 2008 the name of Andrew Okhala Bwire was inserted following a transfer and on 10th January 2017, the land was registered in the name of the 1st Defendant following the succession proceedings in Busia Chief Magistrate's Court Succession Cause No 170 of 2016. The Land Registrar Nicholas Obiero (PW2) gave a clean bill of health to all the documents produced by

the Plaintiff in support of his case that Cornelius purchased the suit land from Ohala in August 1983. These include the Land Certificate issued on 15th November 1983. This is what he said in respect to the said Land Certificate and other supporting documents when he testified in his evidence in chief on 9th June 2022 before Omollo J:

> "I confirm that the document cert. of title issued on 15/11/1983 (PEX 3) ino of CORNELIUS OUNDO WASIKE was issued on this day. The documents in support of the registration is MFI 4 Letter of Consent dated 18/8/1983 for S. TESO/ANGOROMO/320. The transferor was ANDREW OHALA was transferring to CORNELIUS WASIKE. From my record, this document is legitimate now produced as PEX 4. I have a receipt dated 14/11/1983 for registration of the transfer. The receipt bears the name of Cornelius Wasike. The receipt produced PEX 5."

52. It cannot therefore be correct for counsel for the 1st to 6th Defendants to submit, as she has done, that:

> "It is our humble submission that the entry of Cornelius Oundo Wasike as the proprietor of the suit land is not supported by any document. The Land Registrar did come to testify in Court and he did not furnish any document to the Court to defend the title of the late Cornelius Oundo Wasike but only the Green Card entry of the suit land. The Land Registrar and the Plaintiff could not tell how L.r No South Teso/angoromo/320 was transferred into the names of the Plaintiff's father."

53. However, as is now clear from the testimony of the Land Registrar himself, Cornelius obtained a good title to the suit land and the documents filed were legitimate. Being an expert witness, this Court has no basis to doubt the veracity of his evidence.

54. It has also been submitted by the Defendants that infact there was no contract for the sale of the suit land between Cornelius and Ohala because no such contract or agreement has been produced. This is how Ms Nabulindo has submitted on that issue on behalf of the 1st to 6th Defendants:

> "Your Lordship, the Plaintiff asserts that the late Cornelius Oundo Wasike bought the suit property from the late Andrew Ohala. No sale of land agreement was presented to Court, no transfer forms, letter of consent and application to the Land Control Board for transfer and Land Control Board minutes was presented to Court by the Plaintiff."

55. On his part, Mr Ashioya made the following submission on the same issue at page 11:

> "Your Lordship, the Plaintiff herein has failed to produce before Court any such agreement; we have not yet been told how much money the property was purchased for and whether the fundamental terms of such an agreement was fulfilled; that is to say payment of the agreed full purchase price was fulfilled or not; no evidence so far has been adduced regarding if at all there was a sale agreement whereof Andrew Ohala Bwire received his pound of flesh in full; we have a host of authorities on the three issues mentioned above; one authority on lack of a written agreement we have

here – below cite the case the case of Daudi Ledama Morintat -v- Mary Christine Karie & 2 Others 2017 eKLR ...

56. While it is true that the Plaintiff did not produce as part of his documentary evidence any sale agreement between Cornelius and Ohala for the purchase on the suit land, it is also correct, as submitted by Mrs Nyongesa counsel for the Plaintiff, that the transaction between Cornelius and Ohala took place in 1983. The Law of Contract Act prior to the amendment made in 2003 required that any disposition in land be in writing. However, counsel for the Plaintiff has correctly also the cited case of Peter Mbiri Michuki -v- Samuel Mugo Michuki 2014 eKLR where the Court of Appeal stated thus on that issue:

> " Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act exclude the application of Section 3(3) of the said Act to contracts made before the commencement of the sub-section. Section 3(3) of the Law of Contract came into effect on 1st June 2003 ... Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the sub-section read as follows:
>
> (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or not thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; provided that such suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
>
> (i) Has in part performance of the contract taken possession of the property or any part thereof; or
>
> (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

57. It is clear from the affidavits and statements of the 1st to 7th Defendants that the Plaintiff and his family are in possession of the suit land. That is why in their affidavits and statements they seek that the Plaintiff be restrained permanently from using the suit land and be evicted therefrom although that order was not specifically sought in their counter-claim. In paragraph 10 of his affidavit dated 4th February 2022, the 7th Defendant deposed as follows:

> 10. "That I seek that the Plaintiff be restrained permanently from use of my land and that an order of eviction do issue on any part that is occupied by the Plaintiff." Emphasis mine.

58. That averment is replicated in the affidavits of the 2nd to 6th Defendants other than that of the 1st Defendant. As a party in possession of the suit land, therefore, the Plaintiff is protected by the proviso that a claim to land can be made where the claimant is in possession of the land in dispute even in the absence of written agreement.

59. On that issue, Mr Ashioya cited the case of Daudi Ledama Morintat -v- Mary Christine Karie (supra). I have looked at the ruling of Mutungi J delivered on 28th April 2017 where the judge up-held a preliminary objection to the Plaintiff's suit on the basis that the sale agreement to

land was not in writing. However, that authority does not aid the Defendants in this case because the sale agreement therein had been entered into in November 2008. And as is clear from the case of Peter Mbiri Michuki -v- Samuel Mugo Michuki (supra), an oral contract for the sale of land could be enforced.

60. Taking all the above into account and particularly the evidence of the Land Registrar confirming the legitimacy of the title deed to the suit land issued to Cornelius on 15th November 1983, I have no doubt that the said title is valid and that Cornelius obtained a good title.

61. As to whether the 1st to 7th Defendants obtained a good title to the suit land and the subsequent sub-divisions being South Teso/angoromo/12941 to 12951, counsel for the Defendants have placed much emphasis on the proceedings in Busia Chief Magistrate's Succession Cause No 170 of 2016 as the basis for the legitimacy of the titles of the 1st to 7th Defendants.

62. In paragraph 3 of their amended defence, the 1st to 6th Defendants have pleaded as follows:

3: "The Defendants contend that they hold good titles obtained through a valid process of the Court in BUSIA CMC SUCC. NO 170 of 2016."

The 7th Defendant has pleaded similarly also in paragraph 3 of his amended defence.

63. In paragraph 15 of his plaint, the Plaintiff pleaded thus:

15: "The Plaintiff avers that the grant of letters of administration intestate in Busia Chief Magistrate's Court Succession Cause number 170 of 2016 was confirmed by the Court where land parcel No South Teso/angoromo/320 was erroneously distributed between the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants herein."

64. And among the allegations of fraud and illegality pleaded against the 1st Defendant in paragraph 21(f) of the plaint are:

21(f): "Tendering forged documents to Court in Succession Cause No 170/2016 while filing for letters of administration intestate in respect to the Estate of Cornelius Oundo Wasike."

65. Counsel for the 1st to 6th Defendant they submitted as follows:

> "Your Lordship, the 1st Defendant did file for letters of Administration to the Estate of his late father Andrew Ohala Bwire vide Busia Chief Magistrate Succession Cause No. 170 of 2016. The late Andrew Ohala Bwire was the registered proprietor of land parcel NO South Teso/angoromo/320. A copy of certificate of death for Andrew Ohala Bwire, a Chief's letter dated 16/3/2016 and an official search from the Land Registry of Land parcel number South Teso/angoromo/320 was duly furnished to the Court. A Grant in relation to the Estate of the late Andrew Ohala Bwire was duly issued to the 1st Defendant as the Administrator of the Estate of the late Andrew Ohala Bwire. The succession cause was duly gazette vide Gazette notice number 4367 at page 3434 on 10th June 2016 and a grant was confirmed and Certificate of Confirmation of grant was issued on 14th December 2017 by Honourable W. K. Chepseba the then Chief Magistrate Busia Law Court."

66. On his part, Mr Ashioya made the following submission on the same issue at page 4:

> "Your Lordship, from the above mentioned statement, admission is made by the Plaintiff that L.r No South Teso/angoromo/320 underwent a lawful Probate and

Administration procedure and that the title deeds held by the 7th Defendant herein is as a result of a Court order P&A NO 170 of 2016; this file is before Court as an exhibit in this matter; the attempt by the Plaintiff to set aside the grant and the confirmed grant was dismissed; a subsequent appeal (Busia High Court Succession Appeal No. 1 of 2019) against the ruling was withdrawn by the Plaintiff himself on the 4th September 2020; as we prepare our submissions, there is therefore no challenge of the ruling of HON. AMBASI the gist of which reads in part as follows on page 5 ..."

67. This Court is not sitting on an appeal over the orders made by the Chief Magistrate Busia in Succession Cause NO. 170 of 2016. Indeed I would be acting out of jurisdiction if I attempted to do so.

68. That notwithstanding, this is a Court of justice and I cannot shut my eyes and pretend not to see a glaring fraud when it is presented to me. The following issues stick out like a sore thumb.

69. To begin with the 1st to 6th Defendants are not children of Cornelius and are therefore not heirs to his Estate.

70. The Green Card to the suit land, as I have already stated above, shows that it was first registered in the name of Ohala on 7th November 1973 before being transferred to Cornelius on 14th November 1983. He was then issued with the Land Certificate on 15th November 1983. Thereafter, there is an entry dated 19th June 2008 in the name of Ohala but which was cancelled. Then on 10th January 2017, there is an entry in the name of the 1st Defendant made pursuant to the orders issued in Busia Chief Magistrate's Court Succession Cause No 170 of 2016. In his evidence in chief, the Land Registrar Mr Nicholas Obiero (PW2) made it clear that such cancellation is made when his office receives information that a particular entry ought not to have been made. Most significantly, among the documents produced herein is a letter by MR WILFRED NYABERI. Land Registrar Busia dated 2nd August 2019 and addressed to Balongo & Company Advocates with regard to the entries made in the Green Card to the suit land. It is a short letter and in view of it's relevance on this issue, I will reproduce it in extenso. It reads:

> " Re: S. Teso/angoromo/320
>
> I refer to your letter of B & Co. Advocates/gen/19.
>
> Please kindly note that his (sic) property was registered on 14th November 1983 in the name of Oundo Wasike. Later on, an entry was made on 19th January 2017 returning the land back to Andrew Okhola Bwire who initially had transferred the land to Cornelius Oundo Wasike. There are no documents to support this entry under my custody hence all entries following that are suspect and hence its validity is in question.
>
> To enable me respond to your request, kindly advise your clients or yourself to visit our office for more clarification."
>
> Wilfred N. Nyaberi
>
> Land Registrar
>
> Busia"

71. Clearly therefore, the Land Registrar Busia and who is the custodian of all documents relating to land transactions in the Land Registry Busia could not vouch for the authenticity of the entries made to the Green Card of the suit land after 19th January 2017. The correct date is actually 10th January 2017 because that is when the entry of Hillary Emmanuel Ohala, the 1st Defendant, was made, not 19th January 2017 as suggested in the said letter.

72. With regard to the succession proceedings, in Busia Chief Magistrate's Court Succession Cause No 170 of 2016, several anomalies are clearly evident in the manner in which the application for Grant of Letters of Administration was made by the 1st Defendant. There are two contradictory applications both under Gazette Notice No. 4367 dated 10th June 2016 and signed by H. N. Ndungu District Registrar Busia on 13th April 2016. They are both in respect to Busia Chief Magistrate's Court Succession Cause No. 170 of 2016. The first one reads application by:

> " Hillary Emmanuel Ohala Of P. O. Box 920 Busia in Kenya the deceased's son for a grant of letters of administration intestate to the Estate of Cornelius Oundo Wasike who died at District Hospital Busia in Kenya on 5th December 1983."

73. The second one reads:

> " By Hillary Emmanuel Ohala of P. O. Box 920 Busia in Kenya the deceased's son, for a grant of letters of administration intestate to the estate of Andrew Okhala Bwire Alias Andrew Khamala Bwire alias Joseph Andrew Ohala alias A. J. Ohala who died at District Hospital at Busia on 5th December 1983."

74. There can be no valid application for a Grant of Letters of Administration in respect to two separate Estates under the same Succession Cause. Further, the 1st Defendant had no capacity to apply for the Grant of Letters of Administration in respect to the Estate of Cornelius with whom he had no relationship and in any event, the said Cornelius died on 15th August 2016 and not on 5th December 1983. The fraud in the succession process is as glaring as the full moon on a clear night. If the 1st Defendant was pursuing the succession process in good faith, surely he could not file two applications in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 as the son of Cornelius in one application and as son of OHALA in another application. Perhaps the 1st Defendant has read the book "Son Of Two Fathers By Jacqueline Park And Gilbert Reid" which is a tale of suspense and adventure espionage and intrigue. This suit certainty has it's own share of frauds and intrigues!

75. To add to the intrigues, there are of course two certificates of death for Cornelius. One is NO. 474988 dated 30th September 2016 indicating the date of death as 15th August 2016 and a second dated 6th December 1983 showing the date of death as 5th December 1983. People do not die twice although I have watched James Bond Movie "you Only Live Twice" starring Sean Cornery.

76. It must now be clear, beyond peradventure that forged documents were used to obtain the confirmed Grant issued in Busia Succession Cause No 170 of 2016 on 14th December 2017 leading to the subsequent registration of the suit land in the names of the 1st to 7th Defendant and the closure of the said title on 30th May 2018 when it was partitioned to create parcels No South Teso/angoromo/12941 to 12951. The transfer of the suit land to the 1st to 7th Defendants and it's subsequent sub-division was founded on a fraudulent and illegal process. I

am satisfied therefore that the 1st to 7th Defendants did not obtain good titles to their respective parcels of land.

77. As to whether fraud was prayed as against the 7th Defendants, it is common ground that he is an advocate of this Court and as he said at the commencement of his evidence in chief, he was instructed by the 1st Defendant to take over the prosecution of Busia Chief Magistrate's Court Succession Cause No 170 of 2016 in which the 1st Defendant was already acting in person. The allegations of fraud levelled against him and the 1st to 6th Defendants are captured in paragraph 21 of the plaint which I have already referred to above. There is nothing to suggest that the 7th Defendant was involved, either directly or indirectly, with the procurement of the death certificate or the other documents which were subsequently used in obtaining the Confirmed Grant that was used in fraudulently transferring the suit land to the 1st to 7th Defendants. This is what the 7th Defendant said:

> " I was instructed by the 1st Defendant to take over the Succession Cause No 170 of 2016 which had been filed earlier by the parties in person in regard to the Estate of Andrew Okhala.
>
> I came to Court, perused the file and I notice were filed in respect to that Estate which included the suit land among others. I also confirmed that there was a letter from the Assistant Chief Mudembi sub-location of Bunyala Sub-county. There was a filed Petition for letters of Administration in regard to the said Estate of Andrew Ohala Bwire Alias Andrew Khamala Bwire."

78. In paragraphs 2 and 3 of his affidavit dated 4th February 2022, the 7th Defendant deposed as follows:

2: "That in or about 7/7/2017, I received instructions from Hillary Emmanuel Okhala the 1st Defendant herein to represent them in Busia Cmc P&a No 170 of 2016, these instructions were given after the Succession Cause had already been filed."

3: "That at the time of receiving instructions, L.r No South Teso/angoromo/320 was in the names of Andrew Okhala Bwire who was father to the 1st to 6th Defendants."

79. A perusal of the proceedings in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 shows that they were filed on 30th March 2016 by the 1st Defendant in person more than a year before the 7th Defendant took over the brief on behalf of the 1st to 6th Defendants. When he was cross-examined by Mr Omondi counsel for the Plaintiff on 8th February 2023, the 1st Defendant said:

> " I filed the Succession Cause in the subordinate Court and was issued with the Grant in case NO 170 of 2016. I then took the Grant to the Lands office. I am the one who took the documents to Court."

80. It would be stretching the net of fraud too wide by imputing any illegality or fraud on the part of the 7th Defendant given the admission by the 1st Defendant that he was the one who presented he documents to the Succession Court. Unless it can be demonstrated by clear evidence that the 7th Defendant, acting as counsel, had reasons to believe that any of the documents filed by the 1st Defendant in support of his application in the Succession Cause were forgeries, it would be unfair for this court to impute fraud upon the 7th Defendant. However, that does not protect the 7th Defendant's title to the land parcel NO SOUTH TESO/

ANGOROMO/12951 as it was similarly obtained through an illegal or fraudulent process. Once an illegality is proved, a Court will not allow any party to benefit from it – Mistry Amar Signh -v- Serwarno Wofunira Kulobya 1963 E.A. 408.

81. This Court finds that fraud and illegality were proved as against the 1st to 6th Defendants only. Considering the role of the 7th Defendant in the succession cause, there is nothing to suggest he was involved in any fraudulent or illegal activities.

82. I shall now consider whether the parties are entitled to their respective claims. I shall start with the counter-claim by the 1st to 7th Defendant.

83. In their counter-claims, the 1st to 7th Defendants seek the main remedy that they hold valid title deeds to their respective land parcels No South Teso/angoromo/12941 to 12951. This Court has already found that the transfer of the suit land to the 1st to 7th Defendants and it's subsequent sub-division to create the land parcels No South Teso/angoromo/12941 to 12951 was through an illegal and fraudulent process. Their titles are not protected by the provisions of Article 40(1) of the Constitution which provides that every person has the right to acquire and own property. This is because, the same Article in sub-Article (6) states that:

> " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

84. Counsel for the 1st to 6th Defendants sought solace in Section 26 of the Land Registration Act which reads:

26(1) "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

85. With regard to the 1st to 6th Defendants, the fraudulent process was perpetrated on their behalf by the 1st Defendant who was the main architect of the succession proceedings. And they were all aware of the fact that the suit land was always the property of Cornelius from 1983. And as for the 7th Defendant, it is clear from Section 26(b) of the Land Registration Act that he need not have been a party to the illegal, unprocedural or corrupt scheme through which his title was acquired. The Plaintiff having proved fraud and illegality on the part of the 1st to 6th Defendants, their titles cannot be allowed to stand. As for the 7th Defendant, his role in the succession process was limited to that of a counsel pushing forward the case of his clients the 1st to 6th Defendants. However, he benefited from an illegality. An illegality can only beget another illegality. None of their titles can be protected by the law. Their counter-claims are therefore for dismissal.

86. But that is not all. The 1st to 7th Defendants' counter-claims are statute barred. Section 7 of the Limitation of Actions Act provides that:

7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it first occurred to some person through whom he claims, to that person."

87. In their defence and counter-claim, the 1st to 6th Defendants have pleaded in paragraph 5 as follows:

5: "The Defendants aver that the Plaintiff's father unlawfully transferred this land into his names without following due procedure and fraudulently."

88. A similar claim was made by the 7th Defendant also in paragraph 5 of his defence and counter-claim. The 1st to 7th Defendants all pleaded among their allegations of fraud as against the Plaintiff that he failed to engage the 1st to 6th Defendant's father in the transfer of the suit land to the Plaintiff's father. As is now clear, the transfer of the suit land from the 1st to 6th Defendant's father Ohala to the Plaintiff's father Cornelius happened on 14th November 1983 after which the Land Certificate was issued on 15th November 1983. This suit was filed on 24th June 2020 some 37 years later. This was long after the statutory 12 years within which a claim to land can be pursued. There is nothing to suggest that the 1st to 7th Defendants only became aware of the fraud later so as to avail them of the protection provided in Section 26(c) of the Limitation of Actions Act which provides that 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. The 1st to 7th Defendants did not state when they discovered the fraud if any by Cornelius. It is clear however, that with due diligence they could have discovered it earlier and filed their suit within the statutory 12 years period.

89. The 1st to 7th Defendants' counter-claim is therefore without merit and must be dismissed for the aforestated reasons.

90. With regard to the Plaintiff's case, they pleaded fraud against the Defendants in the manner in which the suit land was registered in the names of the 1st to 7th Defendants. I have earlier in this judgment referred to the particulars of fraud. The Plaintiff was not obliged to prove all the allegations of fraud levelled against the Defendants. It is enough if even only one ground is proved as that is enough to vitiate the titles obtained by the 1st to 7th Defendants. I have already made reference to some of the allegations of fraud by the 1st to 6th Defendants in the manner in which they acquired titles to the suit land and subsequently to the sub-divisions thereof.

91. As is clear from the Green Card to the suit land, it shows that on 19th June 2008 it was transferred from Cornelius to Ohala by way of transfer. However, Cornelius passed away on 15th August 2016. If he had transferred the suit land prior to his death, there would have been something to show for it. The 1st to 6th Defendants knew that there was nothing to show for that transfer and that is why they resorted to filing forged documents in the Succession Cause. When they filed Busia Chief Magistrate's Court Succession Cause on 30th March 2016, Cornelius was still alive. By the time they obtained the Grant and proceeded to file an affidavit by the 1st Defendant dated 3rd August 2017 indicating how the suit property was to be distributed, they were basically inter meddling with the Estate of Cornelius. That is not only prohibited by Section 45(1) of the Law of Succession Act but is also a criminal offence and the person doing so is not only liable to a five and/or imprisonment but shall also, under sub-section (b) of the said Act:

(b) "be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in due cause of administration."

When CORNELIUS died on 15th August 2016, he was still the proprietor of the suit land and since his heirs including the Plaintiff has not commenced the succession process, all that happened with regard to it was illegal. The law takes a very serious view of persons who purport to alienate the property of a deceased person without lawful authority which can only be donated by a grant of representation.

92. The 1st to 7th Defendants cannot therefore wave to this Court the titles to the land parcels No South Teso/angoromo/12941 to 12951 and plead sanctity of title. After all, Section 26(1) of the Land Registration Act makes it clear that such title is only "prima facie evidence that the person names as proprietor of the land is the absolute and indefeasible owner ..." such a title can be impeached and it becomes the responsibility of the person seeking refuge in the document to demonstrate through congent evidence that indeed he is the absolute and indefeasible owner and without any blemish whatsoever. This was affirmed by the Court of Appeal in the case of Munyu Maina -v- Hiram Gathiha Maina C.a. Civil Appeal No 239 Of 2009 [2013 eKLR] where the judges said:

> "We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the title and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

The court went on to add that in such circumstances, the person holding the impugned title must go the "extra mile" and lead evidence to rebut the testimony of the person challenging the title.

93. From the proceeding paragraphs in this judgment, it is clear that the Defendants were unable to rebut the Plaintiff's testimony and that of the Land Registrar Mr Nicholas Obiero (pw2) That Cornelius had obtained a good title to the suit land way back in 1983. The Plaintiff was therefore also able to satisfy the threshold of fraud as set out in various authorizes including Kinyanjui Kamau -v- George Kamau 2015 Eklr, Ndolo -v- Ndolo 2008 I Klr [g&f] 742 among others.

94. It is also worthy of note that prior to his demise on 5th December 1983, Ohala made no attempt to evict Cornelius from the suit land. The plaintiff's case is that the said Cornelius continued cultivating the suit land until his demise on 15th August 2016. If Cornelius was a trespasser on the suit land, it would have been expected that Ohala would have sought orders to evict him therefrom. Since Cornelius was in possession of the land, Section 116 of the Evidence Act required the defendant to prove that he, and by extension the plaintiff, had no interest in the suit land – see John Kariri Mucheke –v- M'itabari M'arunga C.a Civil Appeal No 15 Of 2003 (nyeri And Also Jennifer Nyambura Kamau –v- Humphrey Mbaka Nandi C.a. Civil Appeal No 342 Of 2010 Nyeri). It was upto the defendant's to dislodge the claim that Cornelius was not the owner of the suit land and explain how he came to be in occupation and possession of the same. The fact that the defendants are filing their counter-claim long after the demise of Ohala raises more questions than answers.

95. The Plaintiff is therefore entitled to the order that the suit land is the property of CORNELIUS and the transfer thereof by way of transmission to the 1st to 7th Defendants was unlawful and fraudulent and the Court must cancel the titles to land parcels No South Teso/angoromo/12941 to 12951 issued to the 1st to 7th Defendants and injunct them from the suit land.

96. With regards to the claim for mesne profits and damages, the Plaintiff has himself stated that Cornelius took possession of the suit land in 1983. In any event the 1st to 7th Defendants have themselves also sought orders for the eviction of the Plaintiff from the suit land in their affidavits and statements. My view is that in order to pre-empt any other applications, given the fact that the 1st to 7th Defendants are also claiming for eviction, albeit not in the proper manner, this Court must issue orders for the eviction of the 1st to 7th Defendants in addition to orders injuncting them from the suit land.

97. The prayer for mesne profits is not available because, as was held in Peter Mwangi Mbuthia & Another -v- Samson Edin Osman 2014 eKLR, such a claim must be specifically pleaded and proved as they are in the nature of special damages claim. The Plaintiff did not specifically plead for mesne profits.

98. On the material before me, I am not inclined to make any award in the Plaintiff's favour for damages.

99. Finally, allegations of fraud were also levelled against the 8th Defendant. They were denied by the 8th Defendant via a defence dated 29th July 2020. However, although the 8th Defendant listed the Land Registrar Busia as their witness, they did not call him and as is now clear, the said Land Registrar testified as a witness for the Plaintiff. The 8th Defendant's averments in the defence are now mere allegations because pleadings are not evidence.

100. Having said so, however, the allegations of fraud and illegality levelled against the Attorney General on behalf of the Land Registrar Busia are set out in paragraph 21 of the plaint and which I have already referred to in this judgment. But for purposes of completeness, I shall refer to them again. They are:

    a. Transferring the suit land fraudulently.

    b. Accepting fraudulent and forged documents particularly the title deed to effect a fraudulent change of ownership and ignoring the rights of the legal owner.

    c. Conspiring with the other Defendants to defeat the legal rights of the owner the late Cornelius Oundo Wasike.

    d. Purporting to transfer a parcel of land by one who had no proprietary inters tint he suit land.

    e. Purporting to admit fraudulent records from 1st Defendant.

101. I have considered the role played by the Land Registrar Busia particularly in the manner the suit was transferred from Cornelius to the 1st Defendant on 10th January 2017 and subsequently to the 1st to 6th Defendants following its partition to create the land parcels No South Teso/angoromo/12941 to 12951. I have also taken note of the law with regard to the standard of proof of fraud in civil cases as set out in many cases including Ndolo -v- Ndolo (supra) where the Court of Appeal said such proof must be on the standard "higher than that required in

ordinary civil cases namely proof upon a balance of probabilities". As is now clear, the prime mover of the fraud in this case was the 1st Defendant who procured forged documents to use in the succession cause. That is what he used in that Court to obtain the Grant of Letters of Administration which he presented to the Land Registrar. It would have been difficult for the Land Registrar Busia to know that the documents emanating from the Court were infact forgeries. Indeed when he was led by MR JUMA Senior State Counsel in his evidence in chief on 9th June 2022, the Land Registrar Mr Nicholas Obiero (PW2) said:

> " We did not participate in fraudulent transfer because the Registration of Hillary were backed by documents which we could not tell on their face that it was fraudulent. The documents included R. L 19, grant of Letters of Administration, Certificate of death and Gazette Notice."

And when he was cross-examined by Mr Omondi counsel for the Plaintiff, the same witness said:

> " As a Lands Office, we do not have expertise of determining a Court order that is forged."

On her part, Susan Wasike (PW3) said the following when cross-examined by Mr Ashioya:

> " The genuine Gazette Notice is also dated 10/6/2016 while the forged one is the one at the Lands Office which had Cornelius Wasike as the deceased."

102. It is obvious from the evidence of the Land Registrar Busia Mr Nicholas Obiero (PW2) that his office was only a victim of misrepresentation by the 1st to 6th defendants who, having obtained a Grant of Letters of Administration through forged documents used them to fraudulently transfer the suit land in their names. It is not, therefore, a surprise that the said Mr Nicholas Obiero (PW2) testified as a witness for the plaintiff yet his office was in the dock. Indeed the Land Registrar Busia must be commended for discovering the fraud way back on 19th June 2008 when he cancelled the name of Andrew Okhala Bwire from the register to the suit land. However, when the Land Officers was served with the Grant of Letters of Administration issued in Busia Chief Magistrate's Court Succession Cause No 170 of 2016 and whose authenticity they had no reason to doubt, there was very little that the Land Registrar could have done. Failure to act in accordance with the Court order could infact have exposed the Land Registrar to contempt of Court proceedings.

103. Clearly therefore, just like in the case of the 7th defendant who simply took over from the 1st defendant in pushing the succession process to it's conclusion relying on documents provided by the 1st to 6th defendants, I am equally not persuaded that the plaintiff has made out a case to hold the 8th defendant liable in fraud.

104. I would dismiss the case against the 8th defendant.

105. On the issue of costs, Section 27 of the Civil Procedure Act provides that they follow the event but are nonetheless at the disposal of this Court. I shall make appropriate orders as to costs in my final disposal orders.

106. Ultimately therefore and having considered all the evidence herein, I proceed to make the following orders in disposal of this dispute:

    1. The 1st to 7th defendants' counter-claims are dismissed with costs to the Plaintiff.

2. The costs of the dismissed counter-claims will only be borne by the 1st to 6th defendants. The 7th defendant is exonerated from the order of costs given his role in the matter and which I have already highlighted in this judgment.

3. Judgment is entered for the plaintiff against the 1st to 7th defendants in the following terms:

    a. A declaration is issued that the deceased COrnelius Ounod Wasike is the legal owner of that land parcel known as South Teso/angoromo/320.

    b. A declaration is issued that the transfer of the land parcel No South Teso/angoromo/320 by way of transmission to the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants was unlawful and fraudulent and the title deeds to the land parcels No South Teso/angoromo/12941 to 12951 are hereby cancelled.

    c. An order is issued that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants do vacate the land parcel No South Teso/angoromo/320 and the subsequent sub-divisions within 45 days from today or be evicted therefrom.

    d. A permanent order of injunction is hereby issued restraining the Defendants whether by themselves, their agents and/or servants or any one acting through them from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's right of occupation and quiet possession and use of all that parcel of land parcel No South Teso/angoromo/320 or any sub-division thereof.

    e. The claim for damages and mesne profits is declined.

    f. The 1st, 2nd, 3rd, 4th, 5th and 6th Defendants shall meet the Plaintiff's costs of his suit.

BOAZ N. OLAO - JUDGE

25TH SEPTEMBER 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF SEPTEMBER BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 11TH JULY 2023.

Right of Appeal.

BOAZ N. OLAO - JUDGE

25TH SEPTEMBER 2023

Explanatory notes;

This Judgment was due on 10th July 2023 but it was not ready as I was engaged in official assignments in Mombasa and Nairobi. Counsel were informed accordingly on 10th July 2023 when they attended Court for the judgement and were informed it would be delivered today by way of electronic mail. That explains the delay which is regretted but was un-avoidable in the circumstances as the vacation followed soon thereafter.

BOAZ N. OLAO - JUDGE

25TH SEPTEMBER 2023