



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.69 'B' OF 2012

BENJAMIN WAFULA BARASA.....PLAINTIFF

VERSUS

1. JOSEPH NYONGESA BUYELA.....1ST DEFENDANT

2. ALFRED JUMA MASINDE.....2ND DEFENDANT

3. PHAUSTINE NAFULA MASINDE.....3RD DEFENDANT

4. WINSTONE C. JONDI.....4TH DEFENDANT

5. M/S OMKUNDA & CO. ADVOCATES.....5TH DEFENDANT

6. M/S ONYANDO & CO. ADVOCATES.....6TH DEFENDANT

7. JUDICIARY.....7TH DEFENDANT

8. M/S OKILE & CO. ADVOCATE.....8TH DEFENDANT

9. TABITHA MAURICE WASWA.....9TH DEFENDANT

10. EDWARD MULIRO.....10TH DEFENDANT

11. M/S AMASAKHA & CO. ADVOCATES.....11TH DEFENDANT

JUDGEMENT

I must state from the start of this judgement that I have had considerable difficulties trying to comprehend the pleadings in this suit. That is not entirely surprising bearing in mind the fact that the Applicant is acting in person and his pleadings are therefore what is commonly referred to in Judicial parlance as “home made”.

By an amended Originating Summons dated 12th September 2013 and predicated under Sections 3 and 3A of the Civil Procedure Act, Sections 7, 9, 17, 23, 24, 25, 26 and 38 of the Limitation of Actions Act, Section 28 of the Registered Land Act (now repealed) and Orders 37 and 51 of the Civil Procedure Rules, **BENJAMIN WAFULA BARASA** (the Applicant herein) suing as the Administrator of the Estate of the deceased **MOSES BARASA CHENG’OLI** framed the following issues to be determined by the Court:

1. That the 1st Respondent didn’t purchase land parcel title number NDIVISI/MUCHI/2138 from the deceased MOSES BARASA CHENGOLI who was the registered proprietor.

2. The 1st Respondent agreed to surrender land parcel NDIVISI/MUCHI/5827 and land parcel NDIVISI/MUCHI/5829.

3. The Applicant in trust of the deceased’s family is entitled to land parcel title number NDIVISI/MUCHI/5827 upto 5829 since the Parties have failed to fulfil Order 37 Rule 1f of the Civil Procedure Rules Cap 21.

4. The 1st Respondent unlawfully transacted to be registered for land parcel title number NDIVISI/MUCHI/2138.

5. *The transaction carried out after death of the deceased contravened the limitation of Actions Act Cap 22 Section 26(a) – (c).*
6. *The Respondent have neither occupied nor developed the suit plots.*
7. *The 5th Respondent herein transacted L.R. No. NDIVISI/MUCHI/2138 into new numbers L.R. No. NDIVISI/MUCHI/5827 upto 5829 while he was aware of the dispute.*
8. *The 5th and 6th Respondents herein colluded and removed our encumbrances in the said title to allow the 1st upto 4th Respondents transact the disputed property.*
9. *The 6th and 7th Respondents colluded and denied the Applicant herein freedom of expression on the 20th June 2011.*
10. *The 7th Respondent herein allowed the 6th Respondent herein to act for the Applicant herein on 20th June 2011 without notice of appointment.*
11. *The action by the 6th and 7th Respondents was based on tribalism consideration.*
12. *The 5th upto 7th Respondents be convicted for failing to say NO to CORRUPTION (fraud).*
13. *The 5th upto 7th Respondents herein must pay for damages due to fraudulently transacting LR No. NDIVISI/MUCHI/2138 into new numbers NDIVISI/MUCHI/5827 upto 5829.*
14. *The 6th Respondent be convicted and pay damages due to filing replying affidavit for the 4th Respondent without land transaction agreement between the 1st Respondent and the Applicant's deceased father.*
15. *The 8th Respondent be convicted and pay damages due to stopping acting for the 1st upto 3rd Respondent without notifying the Court as well as the Applicant.*
16. *The 1st upto 3rd Respondents be convicted and pay damages due to failing monitoring their Counsel for better progress in this suit.*
17. *Whether the 9th upto 12th Respondents were rights to maneuver the L.R. No. NDIVISI/MUCHI/4080 registered and got the title deed in the names of the 9th and 10th Respondents on 2nd May 2013 prior to settling the sale agreements terms and conditions.*
18. *Whether the 9th upto 12th Respondents are right to grab and fence the disputed L.R. No. NDIVISI/MUCHI/2138 and its new numbers 5827 upto 5828 without the Applicant's consent.*
19. *Whether in total, the 9th upto 12th Respondents have stolen from the Applicant herein L.R. No. NDIVISI/MUCHI/5827, 5828 and 4080.*
20. *Whether the 9th and 10th Respondents can't use the licensed surveyors within Webuye rather than bringing EDWARD MULILO from MUMIAS who had earlier on then said he works with M/s KIVEU & CO. ADVOCATES WEBUYE BRANCH OFFICE.*
21. *Whether the Webuye Police Station OCS is right to provide the 9th and 10th Respondents with Government security to grand a property which is neither bought nor owned by the letter.*
22. *Whether the 9th and 10th Respondent as well as the 12th Respondent do use the 11th Respondent to maneuver land and Court documents for their personal instigations.*
23. *The Applicant herein proved the 11th Respondent's characters on 27th April 2013 vide M-PESA Code No. DK 27XD628.*
24. *Whether the 13th Respondent was right to allow the 9th upto 12th Respondents process L.R. No. NDIVISI/MUCHI/4080 ownership in the names of the 9th and 10th Respondents.*
25. *Whether the 13th Respondent was right to force the Applicant herein to collect the agreement balance for the property they had fraudulently processed without the former's consent.*
26. *The 11th upto 13th Respondents forged land sale agreement dated 3rd May 2013 on behalf of the 9th and 10th Respondents.*
27. *Whether the 13th Respondent is right to consider the 9th and 10th Respondents as his only clients in regard to the Land Sale agreement dated 3rd May 2013.*

28. *Whether the 13th Respondent is right to support the 9th and 10th Respondents to grab and fence L.R. No. NDIVISI/MUCHI/5827 and 5828 instead of L.R. No. NDIVISI/MUCHI/4080.*

29. *The 9th upto 12th Respondent must come clear through this Honourable Court about what they told the Applicant herein that they are money obtainers.*

30. *The Applicant herein suspects that under prominent politicians, the 9th upto 12th Respondents have a Kenya Money Laundry Machine within Muslim Estate in the home of the 12th Respondent and may be similar business in ELDORET, NAIROBI and MOMBASA.*

31. *The public is warning the Applicant's family that the Webuye Police Officers are aware of the 9th upto 12th Respondents money laundry business.*

32. *The 9th and 10th Respondent as well as the 12th Respondents came to the Applicant's home on 29th May 2013 in a group of 10 people to threaten the latter.*

33. *The Applicant herein prays to this Honourable Court that the 9th and 10th Respondents must be charged in accordance to land sale agreement dated 7th December 2012 as per the 8th statement.*

34. *That the 9th and 10th Respondents have contravened Kenya Land Transaction Rules, agreement dated 7th December 2012 as well as 3rd May 2013 forged, are null and void.*

35. *The 9th and 10th Respondents herein must come clear to this Honourable Court as to why they have a contact postal addresses at NAIROBI but not WEBUYE.*

36. *The 14th Respondent was compromised by the 9th upto 12th Respondents to allow trespass, grabbing and fencing of L.R. No. NDIVISI/MUCHI/5827 and 5828 in terms of L.R. No. NDIVISI/MUCHI/4080 at their Professional responsibilities ignorance.*

Having framed the above thirty six (36) issues for determination, the Applicant sought orders in the following terms:

(a) (i) *That the 2nd, 3rd and 4th Respondents of land parcels NDIVISI/MUCHI/5827 and 5828 be cancelled and revert the same to the names of the Applicant in trust of the deceased MOSES BARASA CHENG'OLI's family.*

(ii) *That the 1st, 2nd, 3rd and 4th Respondents registration of land parcels NDIVISI/MUCHI/2138 and its new numbers 5827 upto 5829 be cancelled and revert the same in the names of the Applicant herein.*

(iii) *That the 9th and 10th Respondents forged registration of L.R. No. NDIVISI/MUCHI/4080 be amended in the names of the Estate Administrator/Applicant herein.*

(b) (i) *Alternatively, the 1st Respondent be ordered by this Honourable Court to compensate the Applicant of Plot NDIVISI/MUCHI/5827.*

(ii) *This Honourable Court be pleased to charge the 1st upto 14th Respondents herein for maneuvering ownership of land parcels L.R. No. NDIVISI/MUCHI/2138 and its new numbers for 5827 upto 5829 in the names of 1st upto 4th Respondents as well as L.R. No. NDIVISI/MUCHI/4080 in the names of the 9th and 10th Respondents.*

(iii). *The 14th Respondent be charged for allowing development on L.R. No. NDIVISI/MUCHI/5827 and 5828 in terms of L.R. No. NDIVISI/MUCHI/4080.*

c) (i) *An order condemning the Respondents to pay costs of this suit.*

(ii) *An order condemning the 1st upto 14th Respondents to pay costs of this suit.*

(d) *Any other Penal this Honourable Court may find just and expedient to grant.*

From the record herein, out of the fourteen (14) Respondents named in the amended Originating Summons, only the 1st, 2nd, 3rd and 4th Respondents filed responses in respect to the Applicant's claim.

JOSEPH NYONGESA BUYELA the 1st Respondent filed a replying affidavit on behalf of ALFRED JUMA MASINDE, PHAUSTINE NAFULA MASINDE and WINSTONE C. JONDI (the 2nd, 3rd and 4th Respondents respectively) dated 13th March 2008. In that replying affidavit, the 1st Respondent deponed, inter alia, that the Originating Summons is fatally and incurably defective and a Preliminary Objection would be taken to have it struck out with costs. The 1st Respondent added that he purchased land parcel No. NDIVISI/MUCHI/2138 measuring one quarter of an acre from the late MOSES BARASA CHENG'OLI in 1981 and he took possession of the same and in 1999, he sold a portion thereof to the 2nd and 3rd Respondents being NDIVISI/MUCHI/5828 which was registered in the joint names of the 2nd and

3rd Respondents. Thereafter, he sold another portion being **NDIVISI/MUCHI/5829** to one **Mr. MULUPI** and in 2007, he sold yet another portion being **NDIVISI/MUCHI/5827** to the 4th Respondent. Therefore, the late **MOSES BARASA CHENG'OLI** ceased to have any proprietary interest in parcel No. **NDIVISI/MUCHI/2138** when he transferred it to the 1st Respondent and even if the Applicant is the Administrator of the Estate of the late **MOSES BARASA CHENG'OLI**, Parcel No. **NDIVISI/MUCHI/2138** ceased to be part of that Estate since the said **MOSES BARASA CHENG'OLI** died in 1995 having transferred the parcel No. **NDIVISI/MUCHI/2138** to the 1st Respondent in 1984. Therefore, land parcels No. **NDIVISI/MUCHI/5827, 5828 and 5829** do not form part of the Estate of the late **MOSES BARASA CHENG'OLI** and neither is it true that the 1st Respondent fraudulently transferred parcel No. **NDIVISI/MUCHI/2138** to himself as alleged by the Applicant and that the transaction between the 1st Respondent and the late **MOSES BARASA CHENG'OLI** was lawful, regular and above board. There is therefore no lawful cause why the title deeds in respect of land parcels No. **NDIVISI/MUCHI/5827 5828 and 1529** should be cancelled. The Originating Summons should therefore be dismissed with costs.

The 4th Respondent also swore his own replying affidavit dated 17th December 2008 in which he deponed, inter alia, that the Applicants Originating Summons is full of falsehoods. That he is the absolute registered proprietor of land parcel No. **NDIVISI/MUCHI/5827** having purchased it from the 1st Respondent for valuable consideration without notice as per the annexed copy of sale agreement (see annexures JC-1 and JC-2).

That the 1st Respondent was the registered proprietor of land parcel No. **NDIVISI/MUCHI/1238** long before the death of the Applicant's father and it is therefore strange that the Applicant is questioning a transaction that took place during the life time of his father. The Applicant cannot purport to administer land parcel No. **NDIVISI/MUCHI/5827** which does not form part of the Estate of the late **MOSES BARASA CHENG'OLI**. That the Originating Summons is an abuse of the Court process and should be dismissed with costs.

The other Respondents, including the JUDICIARY which is named as the 7th Respondent, did not file any responses to the Originating Summons as far as I was able to glean from the record. According to the record, the suit as against the 4th, 6th, 10th and 12th Respondents was withdrawn with no order as to costs as per the consent letter dated 1st July 2015. When the suit came up before me for hearing on 27th June 2018, the Applicant indicated that he had withdrawn this claim against the 4th, 6th, 7th, 9th upto 14th defendants and waited only be proceeding as against the 1st, 2nd, 3rd, 5th and 8th Respondents who though served, did not attend. The Applicant informed the Court that he would be relying on his supporting affidavit dated 10th November 2011 together with the documents filed with the Originating Summons which was subsequently amended on 12th September 2013.

I have considered the amended Originating Summons dated 12th September 2013 and the Supporting Affidavit together with the other documents filed by the Applicant. I have also considered the replying affidavits by the 1st, 2nd, 3rd and 4th Respondents.

I have already indicated the difficulties that I have encountered in this not so elegant pleading. However, a Court is enjoined to determine, as best as it can, the complaint placed before it because not all parties can afford to instruct Counsel yet they are entitled to their day in Court as enshrined under Article 50 of the Constitution.

I can see from the record herein, that on 8th May 2008, the Applicant filed a Notice of Motion seeking directions that the Originating Summons be deemed as the Plaintiff and the replying affidavit as the defences. He also sought Orders that this suit be heard by way of **viva voce** evidence. That application was allowed by **MUCHEMI J** on 12th May 2009 although on the hearing date, the Applicant chose to rely on his pleadings only. This Court will therefore, as much as practicable, refer to the statutory provisions and the issues as framed by the Applicant in resolving what is before me.

1. The first prayer sought by the Applicant is that the registration of the 2nd, 3rd and 4th Respondents as proprietors of the land parcels No. NDIVISI/MUCHI/5827 and 5828 be cancelled and the same to revert to his names in trust for the family of the deceased MOSES BARASA CHENG'OLI. The Respondent's response to this is that the deceased MOSES BARASA CHENG'OLI transferred one quarter acre out of the land parcel No. NDIVISI/MUCHI/2138 to the 1st Respondent in 1981 and that the same land was subsequently sub-divided into parcels No. NDIVISI/MUCHI/5828 and 5827 which were then transferred to the 2nd, 3rd and 4th Respondents. The Respondent's case therefore is that they acquired their registered parcels of land during the life time of MOSES BARASA CHENG'OLI. If the Applicant's claim is that such transfer was done fraudulently, then he was required by law to specifically plead and prove fraud to the required standard. In ARTHI HIGHWAY DEVELOPERS LTD V WEST END BUTCHERY LTD C.A. CIVIL APPEAL NO.246 of 2013, the Court affirmed the following passage from BULLEN & LEAKE PRECEDENTS OF PLEADING 13TH EDITION at Page 427:

“It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud which any Court ought to take notice.”

And in R.G. PATEL V LALJI MAKANJI 1957 E.A. 314, the Court of Appeal stated thus:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

Whereas Section 26(1) of the Land Registration Act empowers the Court to cancel a title on grounds of fraud, misrepresentation or where it is shown to have been acquired illegally, un-procedurally or through a corrupt scheme, this Court has not been shown evidence to that effect and to the required standard. I must therefore decline any invitation to cancel those titles.

2. The second prayer is that the 1st, 2nd, 3rd and 4th Respondent's registration of land parcel No. NDIVISI/MUCHI/2138 and its new

numbers 5827 upto 5829 be cancelled and the same to revert in the names of the Applicant. Again and for the same reasons as in (1) above, there is no evidence placed before this Court to warrant that order.

3. The third prayer is that the 9th and 10th Respondents forged registration of **L.R. No. NDIVISI/MUCHI/4080** and that it be amended in the names of the Applicant. Since the Applicant withdrew the claim against the 4th, 6th, 7th, 9th upto 14th Respondents, this claim does not fall for any consideration.

Alternatively, the Applicant sought an order that the 1st Respondent compensates him for plot No. **NDIVISI/MUCHI/5827**.

However, in view of my findings in (1) above, there would be no basis for this Court to order any such compensation. In any event, such compensation would ordinarily be in the nature of a special damage which must be specifically pleaded and proved. Even if the Court were to find that such compensation is available, there is no evidence placed before me as a guide with regard to the amount of compensation that can be awarded.

4. With regard to the prayer that this Court charges the 1st upto 14th Respondents for “**maneuvering**” (sic) ownership of land parcel No. **NDIVISI/MUCHI/2138** and its new numbers for **5827 upto 5829** in the names of the 1st upto 4th Respondents as well as **L.R. No. NDIVISI/MUCHI/4080** in the name of the 9th and 10th Respondents, I must confess I did not comprehend what this prayer sought. If the Applicant had in mind that Criminal charges be preferred against those Respondents, then this is not the right forum.

5. With regard to the prayer that the 14th Respondent be charged for allowing development on **L.R. No. NDIVISI/MUCHI/5827 and 5828** in terms of **L.R. No. NDIVISI/MUCHI/4080**, again it is not clear what exactly the Applicant meant but if he was referring to Criminal charges, he will have to approach the correct forum.

I shall now examine the statutes that the Applicant has cited to see if they are of any assistance to him.

Sections 3 and 3A of the Civil Procedure Act simply provide for the inherent jurisdiction and powers of the Court to enable it make Orders that are necessary for the ends of justice or to prevent the abuse of its process. Such powers can only however be properly exercised in pursuit of a remedy anchored in the Law. In this case there are clear legal procedures setting out how a party seeking to recover land that has been fraudulently acquired should approach the Court for any remedy. That has not been done as I have already demonstrated above.

Sections 7,9,17,23,24,25,26 and 38 of the Limitation of Actions Act have also been cited by the Applicant. **Section 7** is clear that no action may be brought to recover land after twelve(12) years from the date on which the cause of action accrued. **Section 9** refers to accrual of right of action in case of present interest in land while **Section 17** reiterates that after the limitation period, title to land becomes extinguished. **Sections 23, 24, 25 and 26** provide for the extension of time. **Section 38** empowers the Court to grant Orders that a person in adverse possession of land can be registered as owner thereof in place of the registered proprietor. All the above provisions do not really aid the Applicant herein. If anything, **Section 7 of the Limitation of Actions Act** supports the Respondents Case in that the Applicant’s claim is statute barred since the transaction involving land parcel No. **NDIVISI/MUCHI/2138** took place, according to the replying affidavit of **JOHN NYONGESA BUYELA the 1st Respondent** herein, in 1981.

The Applicant is not seeking any Orders in adverse possession and so it is not clear why the provisions of **Section 38 of the Limitation of Actions Act** have been invoked.

Section 28 of the repealed Registered Land Act has also been cited. It protects the rights of the registered proprietor subject only to encumbrances and other overriding interests including obligations under a trust.

If the Applicant’s Case was that the Respondents are registered as proprietors of the suit land in trust for him as the Administrator of the deceased’s Estate, that evidence was not placed before the Court. The onus is by a party alleging a trust to place before the Court evidence to prove such trust. As was held in **MWANGI MBOTHU & OTHERS V GACHIRA WATIMU & OTHERS 1986 KLR 171**

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the Parties. The intention of the Parties to create a trust must be clearly determined before a trust will be implied”

In paragraph 3(b) of the amended Originating Summons, the Applicant has raised this issue for determination:

“The Applicant in trust of the deceased’s family is entitled to land parcel title number NDIVISI/MUCHI/5827 upto 5829 since the parties have failed to fulfil Order 37 Rule (1f) of the Civil Procedure Act Cap 21.”

Other than that fleeting reference to a trust, there is nothing in the Originating Summons or the supporting affidavit to show the circumstances under which the alleged trust arose and as is now clear from the **MWANGI MBOTHU Case** (supra) the Court will not imply a trust except in clear cases. I do not consider this case to be such a clear case in which to imply any trust.

Having considered all the evidence herein, I find no merit in the Applicant’s amended Originating Summons. It is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents only.

BOAZ N. OLAO

JUDGE

26TH JULY 2018

Judgement dated, delivered and signed in open Court at Bungoma this 26th day of July 2018.

Applicant present

Respondents Absent

Right of Appeal

BOAZ N. OLAO

JUDGE

26TH JULY 2018