



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. E011 OF 2021**

**JANEFER LUBANGA RECHA (Suing**

**as legal and personal representative and**

**beneficiary of the estate of the late**

**ISMAIL KONG'ANI alias ISHMAEL**

**KONG'ANI NABAJENJA - DECEASED).....PLAINTIFF**

**VERSUS**

**FESTUS WANONYI KONG'ANI.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, BUNGOMA.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. In the book of **GENESIS [RSV] 6:5 – 6** it is written: -

*“The Lord saw that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually. And the Lord was sorry that he had made man on the earth, and it grieved him to his heart.”*

**FESTUS WANONYI KONG'ANI** (the 1<sup>st</sup> defendant) fits that description. He has treated his step – mother **JANEFER LUBANGA RECHA** (the plaintiff) in such an in – human manner. I have no qualms describing him as the epitome of wickedness. He chose not to defend this suit so we all lost the opportunity to observe what real wickedness looks like. What we only saw in Court was the plaintiff narrating her tribulations in tears. The full results of wickedness and man’s inhumanity to the mother.

2. The plaintiff is the only surviving wife of **ISMAIL KONG'ANI alias ISMAEL KONG'ANI NABAJENJA** (the deceased) who had two other wives namely **MARITA NAMUKWANA** (the 1<sup>st</sup> defendant’s mother) and **ELIZABETH NAMBANDE**. During his life time, the deceased who died on 14<sup>th</sup> September 1976 aged 70 years was the proprietor of the land parcel **NO EAST BUKUSU/EAST SANG'ALO/631** (the suit land) measuring 85.3 acres.

3. Following the death of her husband, the 1<sup>st</sup> defendant chased her and her two daughters **CATHERINE** and **ROSE** from the suit land. She first sought refuge at her father’s home but upon his death, her brothers too chased her away. She now earns her living by leasing and ploughing on people’s land while living at the **LUMANI MARKET** in **KAKAMEGA**.

4. On 21<sup>st</sup> January 2018, and before doing any succession in respect to the deceased’s Estate, the 1<sup>st</sup> defendant in cahoots with the 2<sup>nd</sup> defendant had the suit land registered in the 1<sup>st</sup> defendant’s name after which it was fraudulently sub – divided to create land parcels **NO EAST BUKUSU/EAST SANG'ALO/4139** to **4142**.

5. The plaintiff therefore moved to this Court vide her plaint dated 22<sup>nd</sup> January 2021 and filed on 7<sup>th</sup> September 2021 seeking Judgment against the defendants in the following terms: -

**1. An order directing the 2<sup>nd</sup> defendant to reverse the entries effected on 21<sup>st</sup> September 2018 and 22<sup>nd</sup> January 2018 respectively cancelling entries numbers 2 and 3 on the registry of land parcel NO EAST BUKUSU/EAST SANG'ALO/631 and to reinstate ISMAIL KONG'ANI (Deceased) as the registered owner.**

## **2. Costs of the suit.**

The basis of the claim is as already summarized above. The plaintiff has alleged fraud on the part of the 1<sup>st</sup> defendant and the **LAND REGISTRAR** (the 2<sup>nd</sup> defendant) in paragraph 8 of her plaint to include: -

- (a) Secretly transferring the suit land without the knowledge of the beneficiaries of the deceased's Estate.**
- (b) Receiving and registering the documents in respect of the suit property without requiring the attendance of the transferor.**
- (c) Fraudulently issuing a new title to the suit land without requiring the production of the original title deed.**

The plaintiff filed her witness statement and also the following documents in support of her claim: -

- 1. Copy of Limited Grant.**
- 2. Copy of Death Certificate for ISMAIL KONG'ANI alias ISHMAEL KONG'ANI NABAJENJA.**
- 3. Copy of letter dated 6<sup>th</sup> April 2012.**
- 4. Copy of letter dated 10<sup>th</sup> February 2020.**
- 5. Copy of Green Card for the land parcel NO EAST BUKUSU/EAST SANG'ALO/631.**
- 6. Copy of Certificate of Official Search for the land parcel NO EAST BUKUSU/EAST SANG'ALO/631.**
- 7. Copy of Mutation Form for land parcel NO EAST BUKUSU/EAST SANG'ALO/631.**

The record shows that on 28<sup>th</sup> September 2021, the 1<sup>st</sup> defendant was served with summons to enter appearance, the plaint and other documents by one **DAVID IMO** a process server of this Court at his home in **KIMUGUI**. He did not enter appearance nor file a defence. The 2<sup>nd</sup> defendant was similarly served and entered appearance and also filed it's defence on 15<sup>th</sup> December 2021 in which it denied all the allegations of fraud levelled against it and put the plaintiff to strict proof thereof. However, though served, the 2<sup>nd</sup> defendant did not attend the trial on 23<sup>rd</sup> February 2022 and neither did the 1<sup>st</sup> defendant who, as I have already stated, neither entered appearance nor filed any defence. The plaintiff's case therefore proceeded ex – parte.

6. I have considered the plaintiff's case, un – controverted as it is, and which is well captured both in her statement dated 22<sup>nd</sup> January 2021, her oral testimony and the documents filed.

7. Before moving to this Court, the plaintiff obtained a Limited Grant of Letters of Administration Ad Litem issued to her in **BUNGOMA CHIEF MAGISTRATE'S SUCCESSION CAUSE No 116 of 2021** authorizing her to file this suit. It is clear from the copy of the Green Card that the suit land was first registered in the names of her deceased husband on 7<sup>th</sup> November 1969 and on 21<sup>st</sup> September 2018, it was transferred into the names of the 1<sup>st</sup> defendant. The plaintiff's testimony that there has been no succession carried out in respect of the Estate of the deceased remains un – controverted and therefore, what happened in 2018 when the suit land was transferred into the names of the 1<sup>st</sup> defendant and sub – divided to create land parcels **NO EAST BUKUSU/EAST SANG'ALO/4139 to 4142** was an act of intermeddling with the Estate of a deceased person. That is indeed a criminal offence. In the circumstances, it was fraudulent on the part of the defendants to accept Mutation Forms signed by the 1<sup>st</sup> defendant describing him as the proprietor of the suit land yet the proprietor thereof had died way back in 1976. In the process, the plaintiff was denied of her rightful inheritance. This is well captured in the letter dated 6<sup>th</sup> April 2012 written by the Chairman of the **BACHEWHILE** which suggests that prior to his death, the deceased had in fact allocated the plaintiff 6½ acres out of the suit land. That letter is further proof of the wickedness and inhumanity of the 1<sup>st</sup> defendant towards his step – mother. Due to its relevance, I shall reproduce it in extensor: -

**“REF: LAND PROBLEM (DISPUTED) PLOT NO 631**

***Dear Sir, I would like you to assist Mama JENIFER LUBANGA KONGANI wife to the late ISHMAEL KONGANI to get her share of land. Mama JENIFER has two daughters namely CATHERINE NALIKA KONG'ANI and ROSE NABWILE KONG'ANI.***

***The late ISHMAEL KONG'ANI had allocated her 6 ½ acres of land which the sons seem to deny her. As Chairman, we have tried with the clan to solve it but have not bear (sic) fruits.***

***Therefore, I seek your help to her according to the Law of Kenya.***

***Thanks in advance.***

*Yours faithfully*

**JOHN S. WASIKE.”**

The exact addressee of the letter is not very clear but what I can see reads: -

**“E/BUKUSU LOCATION**

**P. O. Box \_\_\_\_**

**BUNGOMA SOUTH.”**

From that address and the contents thereof, it can only be concluded that the letter was addressed to the area **CHIEF** or other **ADMINISTRATOR**.

**8.** It is not clear who are the current registered proprietors of the resultant parcels following the sub – division of the suit land. And when I enquired from **MR MALOBA** Counsel for the plaintiff if he knew who they were, his response was that he could not get any further information from the Lands Office.

**9.** Having considered the evidence of the plaintiff un – controverted as it is, I am satisfied that she has established her case as required in law. Although the 1<sup>st</sup> defendant transferred the suit land into his names in 2018, he does not enjoy the protection afforded by **Article 40 (1)** of the **Constitution** or **Sections 25 and 26** of the **Land Registration Act** the same having been procured fraudulently.

**10.** Judgment is therefore entered for the plaintiff against the defendants jointly and severally as sought in the plaint.

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> February 2022.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF FEBRUARY 2022.**

Mr Maloba for plaintiff present

Plaintiff present

Court Assistant – Joy

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> February 2022.**