



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL CASE NO. 22 OF 2003

PETER WANJALA WABWILE.....1ST PLAINTIFF

CHARLES MUSUMBA KEYA

(Substituted by SHADRACK MUNYIGULA KEYA.....2ND PLAINTIFF

VERSUS

PETER MAELO LUBAKAYA

(Substituted by PHILIP MASINDE LUBAKAYA.....1ST DEFENDANT

THE LAND REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

DAVID W. MAELO.....4TH DEFENDANT

BENEDICT W. MAELO.....5TH DEFENDANT

VINCENT BARASA MAELO.....6TH DEFENDANT

MAURICE M. MAELO.....7TH DEFENDANT

ELIUD WAFULA MAELO.....8TH DEFENDANT

MANUEL SIMIYU MAELO.....9TH DEFENDANT

ABRAHAM MAINA MAELO.....10TH DEFENDANT

WILFRED WAFULA MAELO.....11TH DEFENDANT

DANIEL BARASA BABIKINA.....12TH DEFENDANT

MOSES SIRENGO MAELO.....13TH DEFENDANT

JOSEPH NYONGESA MAELO.....14TH DEFENDANT

J U D G M E N T

1. By a plaint dated 7th April 2003 and subsequently amended twice first on 22nd June 2005 and lastly on 22nd February 2010, the plaintiffs sought for Judgment against the defendants jointly and severally in the following terms: -

(a) Cancellation of the title to land parcel NO EAST BUKUSU/WEST SANG'ALO/957 and 958 and restoration of the original title NO EAST BUKUSU/WEST SANG'ALO/551 in the names of the plaintiffs.

(ba) An order for the cancellation of the registration of the land parcel NO EAST BUKUSU/WEST SANG'ALO/958 in the names of the 1st defendant.

(bb) Alternatively, an order for the cancellation of the new titles created out of title NO EAST BUKUSU/WEST SANG'ALO/958 namely EAST BUKUSU/WEST SANG'ALO/2970 to 2979.

(bc) An order that the parcel of land known as EAST BUKUSU/WEST SANG'ALO/958 or the new titles created out of it be registered in the joint names of the plaintiffs.

(b) Costs of this suit.

(c) Other reliefs that this Honourable Court may deem fit to grant.

The basis of the plaintiffs' claim is that they are the legal representatives of the Estate of the late **OBWIRE MURUNGA BUNOMBA aka WAWIRE MURUNGA** (hereinafter **MURUNGA**) who was the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** (now **957** and **958**). That on diverse dates between 1958 and 1975, the 1st defendant **PETER MAELO LUBAKA** (now substituted with **PHILIP MASINDE LUBAKAYA**) alleged that he had bought 24.31 Hectares out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** from one **MURUNGA MASULIA** and one **OBWIRE MURUNGA BUNOMBA** who were holding the same in trust for other family members. That the alleged transaction was fraudulent as it was not supported by any sale documents. That subsequently in 1979, the 1st defendant fraudulently and secretly caused the subdivision of the original land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** into parcels **NO EAST BUKUSU/WEST SANG'ALO /957** and **958** and, in collaboration with the 2nd defendant, he registered the parcel **NO EAST BUKUSU/WEST SANG'ALO/958** in his own name. That the sub – division and transfer documents were allegedly signed by the proprietor of the original land parcel **NO EAST BUKUSU/WEST SANG'ALO /551** who died in 1979 long before the sub – division of the said parcel of land. That the 1st defendant had notice, actual or constructive of the rights of the plaintiffs and/or their family members. That the 2nd defendant in collaboration with the 1st defendant fraudulently caused the transfer without proper documents more particularly when the registered proprietor was already dead and all the fraud was within the 2nd defendant's knowledge. The registration of the 1st defendant as the sole owner of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** measuring 24.31 Hectares was fraudulent and ought to be cancelled.

2. The particulars of fraud as against the 1st defendant were pleaded in paragraph 11 of the amended plaint as follows: -

(a) Caused subdivision and registration of EAST BUKUSU/WEST SANG'ALO/958 secretly.

(b) Forgery of the signature of the registered proprietor who died in 1958.

(c) Absence of documents.

(d) The mutation which led to the sub – division was not signed and if signed, was a forgery.

(e) Obtained consent without the signature of those who allegedly sold the land.

(f) Used Consent and Land Control Act as instrument of fraud.

(g) Allegedly purchased land from non – registered person.

(h) Collaboration with the Land Registrar who caused the registration.

(i) Mutation does not tally with six (sic) purchased.

(j) Transfer is alleged to have taken place in 1976.

In a bid to defeat the ends of justice, the 1st defendant with the full knowledge of the existence of this suit secretly and in collusion with the 2nd defendant caused the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** to be sub – divided to create new titles **NO EAST BUKUSU/WEST SANG'ALO/2970** to **2979** which he thereafter transferred to the 4th to 14th defendants respectively in that order. That the said sub – division and creation of new titles was fraudulent and calculated to defeat the due process of justice. The particulars of fraud are pleaded in paragraph 12 as follows: -

(i) Causing sub – division of the suit land illegally.

(ii) Failing to obtain the consent of the Land Control Board and using irregular means to create new titles.

(iii) Failing to adhere to legal provisions for sub – division and creation of new titles.

(iv) **Causing the suit land to be created with full knowledge that the suit herein was pending.**

(v) **The plaintiffs will rely on the doctrine of res – ipsa logutor.**

Together with the amended plaint, the plaintiffs filed their respective statements, list of documents dated 14th March 2011 and a further list of documents dated 19th October 2018.

3. At the time of the plenary hearing which commenced before **A. OMOLLO J** on 19th March 2014, the 1st plaintiff **PETER WANJALA WABWILE** was already deceased and had been substituted with **SHADRACK MUNYIGULA KEYAH**.

4. The plaintiffs also filed their witness statements in addition to that of their witness **MAKHANU OMARI**.

5. In his statement dated 26th October 2015, **SHADRACK MUNYIGULA KEYAH (PW 2)** states that the late **PETER WANJALA WABWILE** was his cousin and that **MURUNGA** the proprietor of the original land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** which measured 79.1 acres or thereabout and which devolved to him following the succession of the Estate of his late father **MASULIA LUSALAKALA** who held it in trust for his siblings **PAUL WANYAMA, BITA LUBEKHO** and **DANIEL FWAMBA** and which originally belonged to their father **MASULIA LUSALAKALA**. That prior to his death on 17th September 1978, the late **PETER WANJALA WABWILE** had only sold 15 acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** to one **NAMANDA MAKHUBULI** in 1975 but had not sold any land to **PETER MAELO LUBAKAYA** the 1st defendant herein and who was later substituted by **PHILIP MASINDE LUBAKAYA**. He was therefore surprised when, during the succession proceedings of the Estate of the late **PETER WANJALA WABWIRE**, he discovered that the title to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** had been sub – divided to create land parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958**. Further, that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/957** measuring 19 acres had been registered in the names of late **PETER WANJALA WABWIRE** and the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** measuring 60.8 acres had been registered in the names of the 1st defendant. That sub – division was allegedly done in 1979 yet the late **PETER WANJALA WABWIRE** had died on 17th September 1978.

6. Upon discovering the above, he and his Co – Administrator instituted a claim at the **KANDUYI LAND DISPUTES TRIBUNAL (THE TRIBUNAL)** but their claim and the subsequent appeal at the **PROVINCIAL APPEAL COMMITTEE** were both dismissed. However, the decision of the **TRIBUNAL** was quashed by the **HIGH COURT** in **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 191 of 1999**. The purported purchase of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** by the 1st defendant and it's subsequent sub – division to create land parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958** was illegal unlawful and was not sanctioned nor consented to by **MURUNGA** the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** and who had already died when the transaction was done. That the 1st defendant who alleges to have purchased the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** from the late **MURUNGA** has no documents to support that transaction and there was no way in which part of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/ 551** could have been sold because it was held in trust for the four brothers as follows: -

1. **PAUL WANYAMA – 12 acres**
2. **DANIEL FWAMBA – 12 acres**
3. **JOHN LUSALAKA – 12 acres**
4. **WABWILE MURUNGA – 43.1 acres**

So it was not possible for **MURUNGA** to have sold more than 56 acres of land to the 1st defendant when his share was only 43.1 acres out of which in 1975, he sold 15 acres to **NAMADA MAKHUBULI**. That the consent to sub – divide and transfer the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was unlawful and if it is true, then why is the 1st defendant in occupation of more than 42 acres of land? That the true position is that the 1st defendant only purchased 36 acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551**. That in **BUNGOMA DISTRICT MAGISTRATE'S SUCCESSION CAUSE No 15 of 1974**, the 1st defendant alleged to have bought another 36 acres from **WABWIRE MURUNGA, PAUL WANYAMA, DANIEL FWAMBA** and **JOHN LUSALAKALA** yet he has not exhibited the sale agreements nor explained where **WABWIRE MURUNGA** got the land to sell to him. That according to the minutes of the Land Control Board, the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** is indicated as measuring 197.8 acres but the correct position is that the land measures 79.1 acres as shown on the Green Card. That the 1st defendant did not produce any Certificate of search showing that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** measures 197.8 acres. Therefore, all the transactions undertaken by the defendants in respect to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** should be cancelled and the land restored in the name of the plaintiffs for distribution to the Estate of the late **PETER WANJALA WABWILE**.

7. **CHARLES MUSUMBA KEYA (PW 1)** and who is the 2nd plaintiff recorded a statement dated 14th March 2011. He also gave oral testimony when he testified before **OMOLLO J** on 19th March 2014. In his statement, he confirms that he and **PETER WANJALA WABWIRE** (the then 1st plaintiff now deceased) were the Co – Administrators to the Estate of the late **MURUNGA** also known as **OBWIRE MURUNGA** the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** measuring 79.1 acres which land devolved to him following the succession of the Estate of his late father **MURUNGA MASULIA** (the 2nd plaintiff's uncle) who died in 1976. That the said land was held in trust for the benefits of the siblings of **MURUNGA MASULIA's** who included **PAUL WANYAMA** (the father to the 2nd plaintiff), **BITA LUBEKHO** and **DANIEL FWAMBA** who were in Uganda at the time of the registration process. That the said land originally belonged to **MASULIA LUSALAKALA** the father to the four siblings although **DANIEL FWAMBA** sold his share to the 1st defendant. That by the time **MURUNGA** died on 17th September 1978, he had only sold 15 acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** to one **NAMANDA MAKHUBULI** in 1975.

8. That the said **MURUNGA** never sold any land to the 1st defendant and so when the 2nd plaintiff instituted succession proceedings, he was surprised to discover that the title to the land parcel **NO EAST BUKUSU/WEST SANG'ALO /551** had been sub – divided to create land parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958** and that the latter parcel measuring 60.8 acres or thereabout had been registered in the names of the 1st defendant **PETER MAELO LUBAKAYA** and the portion **NO EAST BUKUSU/WEST SANG'ALO/957** measuring 19 acres or thereabout had been registered in the names of **MURUNGA**. That the said sub – division was done in 1979 whereas **MURUNGA** had died on 17th September 1978.

9. The 2nd plaintiff therefore instituted a claim at the then **KANDUYI LAND DISPUTES TRIBUNAL** which dismissed it and so too was the appeal at the **PROVINCIAL APPEALS COMMITTEE**. That decision was however quashed in **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 191 of 1999**. That the purported purchase of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** by the 1st defendant from **MURUNGA** is suspect and should be cancelled since at the time of the purported transfer, **MURUNGA** was already deceased. Further, that **MURUNGA** could not have sold any land to the 1st defendant since it was family land held by him in trust for his siblings **PAUL WANYAMA, DANIEL FWAMBA** and **JOHN LUSALAKALA**. That there was no way **MURUNGA** could have sold to the 1st defendant more than 56 acres of land when he (**MURUNGA**) had already sold 15 acres to **NAMANDA MAKHUBILI** in 1975. That the consent to sub – divide the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** shows that it measures 197.8 acres yet the acreage is infact 79.1 acres and even the consideration of Kshs. 45,750/= is also suspect.

10. **MAKHANU MAURICE (PW 3)** also recorded a statement dated 14th March 2011 in which he stated that he knows both the plaintiffs and the 1st defendant and is familiar with the transactions involving the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551**. He adds that to the best of his knowledge, **MURUNGA** never sold any land to the 1st defendant and that the person who sold land to the 1st defendant was infact **DANIEL FWAMBA** who sold him a portion measuring 7 acres for the consideration of Kshs. 2,100/= being Kshs. 200/= per acre. That it was him who informed the 1st defendant that **DANIEL FWAMBA** wanted to sell the said 7 acres and he even witnessed the drawing of the sale agreement together with **PETRO WABWILE** the village elder, **LAZARO WABWILE KAITANO WANYAMA** and **CHARLES KEYA**. That if **MURUNGA** intended to sub – divide the land parcel **NO EAST BUKUSU/ WEST SANG'ALO/551** and sell it to purchasers, there was no reason why he could not include the portion sold to **NAMANDA MAKHUBILI** who had fully paid for his share earlier. That the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** is marred with suspicion and the resultant titles should be cancelled so that it can be restored to the names of **WABWILE MURUNGA** for a proper distribution to his Estate.

11. The plaintiffs filed a list of documents dated 14th March 2011 containing the following: -

1. **Grant of Letters of Administration to the Estate of MURUNGA.**
2. **Green Card for the land parcel NO EAST BUKUSU/WEST SANG'ALO/551.**
3. **Green Card for the land parcels NO EAST BUKUSU/WEST SANG'ALO/957 and 958.**
4. **Certificate of Official Search for the land parcels NO EAST BUKUSU/WEST SANG'ALO/2970 to 2979.**
5. **Certificate of Official Search for the land parcel NO EAST BUKUSU/WEST SANG'ALO/958.**
6. **Proceedings and pleadings in BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 191 of 1999.**
7. **Proceedings and award in KANDUYI LAND DISPUTES CASE No 2 of 1997.**
8. **Proceedings and verdict in KAKAMEGA PROVINCIAL LAND DISPUTES APPEAL COMMITTEE in appeal N0 55 of 1998.**
9. **Copies of MINUTES in LAND CONTROL BOARD CONSENT to sub – divide land parcel NO EAST BUKUSU/WEST SANG'ALO/551.**
10. **Copy of agreement dated 10th July 1979 allegedly entered into between MURUNGA and PETRO MAELO.**
11. **Copy of proceedings in BUNGOMA DISTRICT MAGISTRATE COURT SUCCESSION CAUSE No 15 of 1974.**
12. **Copy of transfer of land form dated 13th July 1976.**
13. **Copy of land Certificate for land parcel NO EAST BUKUSU/WEST SANG'ALO/958.**

The plaintiffs filed a further list of documents dated 19th October 2018 containing the following: -

1. **KENYA GAZETTE VOL C11 – No 50 dated 25th August 2000.**
2. **Certified proceedings in KITALE CHIEF MAGISTRATE'S COURT CRIMINAL CASE No 1401 of 2007.**
3. **Certified proceedings in BUNGOMA CHIEF MAGISTRATE COURT CRIMINAL CASE No 2297 of 2004.**

The defendants filed separate defences.

12. In his defence dated 28th May 2003, **PETER MAELO LUBAKAYA** (the deceased 1st defendant now substituted with **RICHARD MWANGA MAELO** following the application dated 24th June 2019) simply denied all the allegations of fraud levelled against him. He added that he obtained the title to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** for valuable consideration and without any fraud as the sub – division of the land parcel **NO EAST BUKUSU/ WEST SANG'ALO/551** to create the land parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958** was done by the registered proprietor prior to his death. That the plaintiffs occupy the land parcel **NO EAST BUKUSU /WEST SANG'ALO/957** and have never occupied his land parcel **NO EAST BUKUSU/WEST SANG'ALO/958**. He further denied that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was ever held in trust for the plaintiffs as alleged. He also denied any knowledge, actual or constructive, of any rights by any persons known in law insisting that his registration as proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** was genuine and that other claims against him had been determined in his favour.

13. However, **RICHARD MWANGA MAELO** the deceased 1st defendant's substitute did not testify during the trial.

14. The 2nd and 3rd defendants filed a joint amended defence dated 14th July 2014 in which they denied all the averments of fraud levelled against them adding that they are strangers to the same. They added further that they would raise a Preliminary Objection that the plaintiffs' suit is fatally defective and time barred and contravenes **Section 13A** of the **Government Proceedings Act** and should therefore be dismissed with costs.

15. No witness statements were filed by the 2nd and 3rd defendants but during the trial, they called as their witness **ALLAN ONYANGO BABU (DW 2)** the **LAND REGISTRAR BUNGOMA**. They did not file a list of documents although they attached to their defence the following documents: -

1. Green Cards to land parcels NO

- (a) **EAST BUKUSU/WEST SANG'ALO/551**
- (b) **EAST BUKUSU/WEST SANG'ALO/957**
- (c) **EAST BUKUSU/WEST SANG'ALO/958**
- (d) **EAST BUKUSU/WEST SANG'ALO/2970**
- (e) **EAST BUKUSU/WEST SANG'ALO/2971**
- (f) **EAST BUKUSU/WEST SANG'ALO/2972**
- (g) **EAST BUKUSU/WEST SANG'ALO/2973**
- (h) **EAST BUKUSU/WEST SANG'ALO/2974**
- (i) **EAST BUKUSU/WEST SANG'ALO/2975**
- (j) **EAST BUKUSU/WEST SANG'ALO/2976**
- (k) **EAST BUKUSU/WEST SANG'ALO/2977**
- (l) **EAST BUKUSU/WEST SANG'ALO/2978**
- (m) **EAST BUKUSU/WEST SANG'ALO2979**

2. Certificate of Official Search for the land parcel NO EAST BUKUSU/WEST SANG'ALO/958.

3. Transfer of land form in respect of land parcel NO EAST BUKUSU/WEST SANG'ALO/958.

4. Receipt for Kshs. 50/= being NO A 935921.

5. Letter of Consent for transfer of land parcel NO EAST BUKUSU/ WEST SANG'ALO/551 for OBWIRE MURUNGA to PETRO MAELO LUBAKAYA dated 3rd May 1976.

6. Adjudication Register for land parcel NO EAST BUKUSU/WEST SANG'ALO/551 in the name of MURUNGA MASULIA dated 24th February 1967.

7. Certificate of Succession Form RL 20 for land parcel NO EAST BUKUSU/WEST SANG'ALO/551.

The 4th to 14th defendants also filed a joint statement of defence dated 24th April 2014 in which they also denied all the allegations of fraud levelled against them and put the plaintiffs to strict proof thereof. They added that they had obtained their titles by way of valid transfers from the then registered owner and the same cannot be questioned by the plaintiffs. They pleaded further that if there was any fraud, they were not privy to the same and are entitled to the use and enjoyment of their parcels of land. They gave notice that during the hearing, they would seek the striking out of the plaintiffs' suit on the grounds, inter alia: -

- (a) **That it is defective as it offends the Limitation of Actions Act.**
- (b) **That the suit is res – judicata.**
- (c) **That the suit is bad in law and a gross abuse of the due process of this Court.**
- (d) **That the suit is a gross violation of the 4th – 14th defendants Constitutional right to own and use property as guaranteed by the Constitution.**

The 4th to 14th defendants pleaded that in the year 1976, one **WABWILE MURUNGA alias OBWIRE MURUNGA alias OBWIRE MURUNGA** sold a portion of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** to one **PETRO MAELO LUBAKAYA** (deceased) which transaction received the consent of the **KAVUJAI LAND CONTROL BOARD**. Subsequently, the land was sub – divided into two parcels namely **EAST BUKUSU/WEST SANG'ALO/957** and **958**. The land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** was transferred to **PETRO MAELO LUBAKAYA** for value while **WABWILE MURUNGA** retained the land parcel **NO EAST BUKUSU/WEST SANG'ALO /957**. In the exercise of his rights, **PETRO MAELO LUBAKAYA** sub – divided his portion and transferred the resultant sub – divisions to his children who are the 4th to 14th defendants save for the 12th defendants. That in so doing, the said **PETRO MAELO LUBAKAYA** neither colluded nor acted fraudulently as alleged and the plaintiffs' suit is brought in bad faith, is vexatious and ought to be dismissed.

16. The 4th to 14th defendants filed statements of **ELIUD WAFULA MAELO** (the 8th defendant), **DANIEL CHENGASIS MAELO**, **VINCENT BARASA LUBAKAYA**. However, only **ELIUD WAFULA MAELO** testified on behalf of the 4th to 14th defendants. They also filed their list of documents dated 24th April 2013 and a further list of documents dated 18th February 2021.

17. In his statement dated 24th April 2013 and made on behalf of the 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, 13th and 14th defendants who are his brothers and also on his own behalf, the 8th defendant stated that their later father **PETRO MAELO LUBAKAYA**, the deceased 1st defendant, was the proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958**. That prior to his death in the year 2005, their father had sub – divided and transferred the following portions to his children: -

- (a) **DAVID W. MAELO (4th defendant) - EAST BUKUSU/WEST SANG'ALO/2970.**
- (b) **BENEDICT MAELO (5th defendant) - EAST BUKUSU/WEST SANG'ALO/2971.**
- (c) **VINCENT B. MAELO (6th defendant) - EAST BUKUSU/WEST SANG'ALO/2972.**
- (d) **MAURICE M. MAELO (7th defendant) – EAST BUKUSU/WEST SANG'ALO/2973.**
- (e) **ELIUD W. MAELO (8th defendant) - EAST BUKUSU/WEST SANG'ALO/2974.**
- (f) **MANUEL S. MAELO (9th defendant) - EAST BUKUSU/WEST SANG'ALO/2975.**
- (g) **ABRAHAM M. MAELO (10th defendant) - EAST BUKUSU/WEST SANG'ALO2075.**
- (h) **WILFRED MAELO (11th defendant) - EAST BUKUSU/WEST SANG'ALO/2975.**
- (i) **DANIEL BARASA (12th defendant) - EAST BUKUSU/WEST SANG'ALO/2976.**
- (j) **MOSES SIRENGO MAELO (13th defendant) - EAST BUKUSU/WEST SANG'ALO/2978.**
- (k) **JOSEPH NYONGESA MAELO (14th defendant) - EAST BUKUSU/WEST SANG'ALO/2977.**
- (l) **DANIEL CHENG'AISA - EAST BUKUSU/WEST SANG'ALO/2979.**

That the transactions leading to the creation of those parcels of land were done above board culminating in the above titles. That the allegations that their late father **PETRO MAELO LUBAKAYA** obtained the registration of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** fraudulently are malicious falsehoods as there is documentation showing how the land was purchased from **MURUNGA** and subsequently transferred to the 4th to 14th defendants who have peacefully settled on their respective portions. This suit should therefore be dismissed.

18. The 4th to 14th defendants filed the following as their documents: -

1. **Acknowledgement of sale dated 10th July 1976.**
2. **Minutes of KAVUJAI LAND CONTROL BOARD.**
3. **Certified copy of the Register for the land parcel NO EAST BUKUSU /WEST SANG'ALO/551.**
4. **Proceedings in the SUCCESSION CAUSE No 15 of 1974 at the BUNGOMA DISTRICT MAGISTRATE'S COURT.**

And although not indicated in the list of documents dated 24th April 2013, the 4th to 14th defendants also filed the registers to the land parcels **NO EAST BUKUSU/ WEST SANG'ALO/957, 958, 2970, 2971, 2972, 2973, 2974, 2975, 2776, 2977, 2978 and 2979.**

19. The plaintiffs filed a reply to the defence in which they joined issues with the defendants and reiterated all the averments contained in the plaint and sought Judgment as prayed therein.

20. The trial commenced before **OMOLLO J** on 19th March 2014 when the 2nd plaintiff **CHARLES MUSUMBA KEYA (PW 1)** testified. He said that **MURUNGA** was his cousin and had inherited the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** measuring 79.1 acres from his father but prior to his death on 17th September 1978, he had sold 15 acres to one **NAMANDA MAKHUBULI** in 1975. He however denied that the deceased 1st defendant had purchased any land from **MURUNGA**. When he commenced the succession process for the Estate of **MURUNGA** who was his cousin, he discovered that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** had been sub – divided to create land parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958** with the latter parcel being registered in the names of the 1st defendant. That the parcel **NO EAST BUKUSU/WEST SANG'ALO/957** measures 19 acres and **EAST BUKUSU/WEST SANG'ALO/958** measures 60.1 acres and the sub – divisions were done in 1979 after the death of **MURUNGA**. He therefore moved to the **KANDUYI LAND DISPUTES TRIBUNAL** where he filed a claim and later to the **APPEALS COMMITTEE** in **KAKAMEGA** but lost the case. He then filed a case at **BUNGOMA HIGH COURT** for **JUDICIAL REVIEW**.

21. It was his testimony that the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was done fraudulently and secretly. That the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** was subsequently sub – divided into parcels **NO EAST BUKUSU/WEST SANG'ALO/2970** to **2979** which are registered in the names of the 4th to 14th defendants. He produced the various documents filed herein as part of the plaintiffs' documentary evidence and added that he also blames the Land Registrar for the conflicting details appearing in the Green Card to the land parcel **NO EAST BUKUSU/WEST SANG'ALO /958** which shows that on 13th July 1976, the 1st defendant was registered as the proprietor of the said land as entry **No 2** yet the same card shows that **MURUNGA** was registered as the proprietor on 20th November 1979 as entry **No 1**. He also questioned why the Minutes of the Land Control Board showed that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** measured 197.8 acres which was divided into two parcels measuring 155.8 acres and 42 acres yet the said land measures only 79.1 acres of which consent was sought to sell 42 acres to the 1st defendant. He therefore sought the cancellation of the titles to the land parcels **NO EAST BUKUSU/WEST SANG'ALO/2070** to **2979** as well as **EAST BUKUSU/WEST SANG'ALO/957** and **958** and the title **NO EAST BUKUSU/ WEST SANG'ALO/551** be reinstated and registered in his names as the Administrators of the Estate of **MURUNGA**.

22. **SHADRACK MUNYIGULA KEYAH (PW 2)** told the Court that he is a cousin to **PETER WANJALA WABWIRE** the deceased 1st plaintiff and obtained a Grant of Letters of Administration to represent his Estate. He added that **MURUNGA** was his uncle and was the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** measuring 79.1 acres and which was family land held in trust originally by his grandfather **MURUNGA MASULIA** in trust for his siblings **PAUL WANYAMA, BITA LUBEKHO** and **DANIEL FWAMBA**. In 1976, the said land was registered in the name of **MURUNGA** who still held it in trust before he died on 17th September 1978. Prior to his death, **MURUNGA** had sold 15 acres thereof to one **NAMANDA MAKHUBULI** as per a sale agreement dated 11th November 1975. When they did the succession in respect to the Estate of **MURUNGA**, they discovered that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** had been sub – divided into two parcels **NO EAST BUKUSU/WEST SANG'ALO/957** and **958**. That parcel **NO EAST BUKUSU/WEST SANG'ALO/958** had been registered in the names of the 1st defendant before being sub – divided to create parcels **NO EAST BUKUSU/ WEST SANG'ALO/2970** to **2979** which were registered in the names of the 4th to 14th defendants. He said he was not aware that the 1st defendant had bought any land from **MURUNGA**. Upon making that discovery, **CHARLES MUSUMBA KEYA** moved to the **TRIBUNAL** and filed a case against the 1st defendant claiming that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** had been illegally sub – divided. He added that there was nothing to show that the 1st defendant paid any consideration for the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** and even the Minutes of the **LAND CONTROL BOARD** indicated that it measured 197.8 acres which was not the case. He testified further that the purported sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was illegal since **MURUNGA** the registered proprietor was already deceased. He therefore asked that the titles created out of the title **NO EAST BUKUSU/WEST SANG'ALO/551** be cancelled.

23. The plaintiffs called as their witness **MAKHANU OMARI (PW 3)** who testified before me on 25th July 2018 and adopted as his testimony the statement dated 14th March 2011 contents of which I have already summarized above.

24. Although the 1st defendant had died and been substituted by **PHILIP MASINDE LUBAKAYA** who also passed away and was substituted by **DANIEL BARASA BABIKINA** following a consent recorded on 27th July 2010, no witness testified on behalf of the 1st defendant. The 1st defendant's case was therefore not prosecuted.

25. The 4th to 14th defendants' case was prosecuted by the 8th defendant **ELIUD WAFULA MAELO**. He told the Court that he had the authority of the other defendants who are his brothers to represent them. Indeed, their authority was duly filed in this Court on 24th April

2013 and is part of the record herein. He told the Court that the deceased 1st defendant **PETER MAELO LUBAKAYA** was their father. And although he told the Court that **PHILIP MASINDE** who had substituted their late father had not himself been substituted, the record as I have already indicated above shows that he was in fact substituted with **DANIEL BARASA BABIKINA** following a consent order recorded on 27th July 2016.

26. The 8th defendant adopted as his evidence his statement dated 24th April 2013 and also produced the list of documents dated the same day as their documentary evidence. He denied that their late father had obtained the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** fraudulently. He added that their late father had subsequently sub – divided the land among his sons who all live thereon. He urged the Court to dismiss the plaintiffs' case with costs.

27. The 2nd and 3rd defendants called as their witness **ALLAN ONYANGO BABU** the Land Registrar Bungoma. He produced the list of documents dated 14th March 2016 and told the Court that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was first registered in the names of **MURUNGA MASULIA** on 2nd August 1969 and the second registration was 27th April 1976 in the name of **MURUNGA**. That the acreage of the land is 79.1 acres. He added that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** measures 24.31 acres and the 1st entry on the Green Card is dated 20th November 1979 while the 2nd entry is dated 13th July 1976. He explained that anomaly by stating that the transfer of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** to **PETRO MAELO** may have been presented earlier than the Mutation closing the title **NO EAST BUKUSU/WEST SANG'ALO/551** and that is why there is a date of 29th July 1985 against that entry. He added that the transfer of the title **NO EAST BUKUSU/WEST SANG'ALO/958** to **PETRO MAELO** was presented to their office on 13th July 1976 and was duly signed and registered on 13th July 1985. He denied that his office colluded with the plaintiffs.

28. Submissions were thereafter filed both by **MS ASHITSA** instructed by the firm of **SHITSAMA & COMPANY ADVOCATES** for the plaintiffs, **MR OCHARO** instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the 1st, 4th to 14th defendants and by **MR TARUS SENIOR STATE COUNSEL** instructed by the **HON ATTORNEY GENERAL** for the 2nd and 3rd defendants.

29. I have considered the evidence of the parties both oral and documentary as well as the submissions by Counsel.

30. It is not in dispute that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** was first registered in the name of **MURUNGA MASULIA** on 2nd August 1969 as the first proprietor before being registered in the name of **OBWIRE MURUNGA BUNOMBA aka WABWILE MURUNGA (MURUNGA)** on 27th April 1976. Thereafter, that title was closed upon sub – division to create two parcels being **EAST BUKUSU/WEST SANG'ALO/957** and **958** which were both registered in the names of **MURUNGA** on 20th November 1979 as per the copies of the Green Cards produced herein. The land parcel **NO EAST BUNGOMA/WEST SANG'ALO/958** was subsequently transferred to the deceased 1st defendant **PETRO MAELO LUBAKAYA** on 13th July 1976. The anomaly in dates of 20th November 1979 being the first registration and 13th July 1976 being the second registration is what the Land Registrar Bungoma **ALLAN ONYANGO BABU (DW 2)** tried to explain when he testified. The 1st defendant was then issued with a Land Certificate in respect of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** by the Land Registrar Bungoma on 21st August 1985. That title was subsequently closed on 12th May 2004 to create parcels **NO EAST BUKUSU/WEST SANG'ALO/2970 – 2979** which are registered in the names of the following defendants: -

- 1: **EAST BUKUSU/WEST SANG'ALO/2970 – DAVID MAELO (4th defendant).**
- 2: **EAST BUKUSU/WEST SANG'ALO/2971 – BENEDICT MAELO (5th defendant).**
- 3: **EAST BUKUSU/WEST SANG'ALO/2972 – VINCENT MAELO (6th defendant).**
- 4: **EAST BUKUSU/WEST SANG'ALO/2973 – MAURICE MAELO (7th defendant).**
- 5: **EAST BUKUSU/WEST SANG'ALO/2974 – ELIUD MAELO (8th defendant).**
- 6: **EAST BUKUSU/WEST SANG'ALO/2975 – MANUEL SIMIYU MAELO and ABRAHAM MAINA MAELO (9th and 10th defendants respectively).**
- 7: **EAST BUKUSU/WEST SANG'ALO/2976 – DANIEL BARASA BABIKINA and MOSES SIRENGO MAELO (12th and 13th defendants respectively)**
- 8: **EAST BUKUSU/WEST SANG'ALO/2977 – RICHARD M. MAELO (He is not a party in this suit).**
- 9: **EAST BUKUSU/WEST SANG'ALO/2978 – JOSEPH NYONGESA MAELO (14th defendant).**
- 10: **EAST BUKUSU/WEST SANG'ALO/2979 – DANIEL CHENGASIA (He too is not a party in this suit).**

It is also clear from the Green Cards to the above parcels of land that cautions were registered against all those titles by **PETER WANJALA WABWILE** the deceased 1st plaintiff on 28th September 2007. Further, that **MURUNGA MASULIA** the first registered proprietor of the land parcel **NO EAST BUKUSU/ WEST SANG'ALO/551** and the plaintiffs are related.

I consider the following to be the key issues for my determination: -

(a) Whether the sub – division of the land parcel NO EAST BUKUSU/ WEST SANG’ALO/551 to create parcels NO EAST BUKUSU/WEST SANG’ALO/957, 958 and the resultant other titles was fraudulent.

(b) Whether the land parcel NO EAST BUKUSU/WEST SANG’ALO/551 was family land held in trust.

Before I delve into the evidence, there are several issues raised by the defendants and which this Court must first determine because they touch on the jurisdiction of this Court. It is trite law that jurisdiction is everything and without it, the Court must down it’s tools – **OWNERS OF THE MOTOR VESSEL ‘LILLIAN S’ .V. CALTEX OIL KENYA LIMITED 1989 KLR 1.**

31. I must therefore first dispose of the following jurisdictional issues pleaded by the defendants: -

1. FAILURE TO COMPLY WITH SECTION 13 (A) OF THE GOVERNMENT PROCEEDINGS ACT: -

The 2nd and 3rd defendants pleaded in paragraph 7 of their amended defence that the plaintiffs’ suit is fatally defective for failure to comply with the mandatory provisions of **Section 13A** of the **Government Proceedings Act**. The relevant provision being **Section 13A (1)** of that Act reads: -

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

The Court was not shown any such notice as served by the plaintiffs prior to the institution of this suit at least as against the 2nd and 3rd defendants. However, that provision has been declared to be un – constitutional for being an impediment to Justice – **KENYA BUS SERVICE LTD & ANOTHER .V. MINISTER FOR TRANSPORT & OTHERS**. I am equally persuaded that that is a proper interpretation of that provision. This suit is therefore not fatally defective as pleaded by the 2nd and 3rd defendants.

2. THE SUIT OFFENDS THE LIMITATION OF ACTIONS ACT: -

In his submissions, Counsel for the 4th to 14th defendants has stated that the plaintiffs’ suit is caught up by the provisions of **Section 7** of the **Limitation of Actions Act** which provides that no action may be brought by any person to recover land after the end of twelve years. While it is true that the allegations of fraud levelled against the defendants in regard to parcel **NO EAST BUKUSU/ WEST SANG’ALO/958** occurred as far back as 1978 and 1979 and this suit was filed in 2003, it is also clear from the amended plaint particularly paragraphs 5 and 9 that the plaintiffs have also hinged their claim on trust. The **Limitations of Actions Act** does not apply in an action to recover trust property. In **STEPHENS & 6 OTHERS .V. STEPHENS & ANOTHER C.A CIVIL APPEAL No 18 of 1987**, the Court of Appeal held that: -

“..... the period of limitation as prescribed in the Limitation of Actions Act CAP 22 Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use.”

And in the case of **MACHARIA KIHARI .V. NGIGI KIHARI C.A CIVIL APPEAL No 170 of 1993**, the same Court said: -

“We are unable to accept Mr Thiongo’s contention that the suit was time – barred. Limitation prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has occurred, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law.”

As will become clear later on in this Judgment, the 1st, 4th to 14th defendants are essentially constructive trustees with respect to part of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/958** and the resultant sub – divisions being land parcels **EAST BUKUSU/WEST SANG’ALO/2970 to 2979**. They hold those parcels in trust for the family of **MURUNGA** which includes the plaintiffs herein.

32. Further, the plea of limitation cannot be sustained with respect to the land parcels **NO EAST BUKUSU/WEST SANG’ALO/2970 to 2979** which were created on 14th May 2004 one year after the filing of this suit on 7th April 2003.

33. The plea of Limitation is not well found. It is for rejection.

RES – JUDICATA: -

34. The 4th to 14th defendants have also pleaded that this suit is bad in law for being res – judicata. This is provided for in **Section 7** of the **Civil Procedure Act** as follows: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

For a plea of res – judicata to be up – held, the following conditions must be proved: -

1. **The matter in issue in the former suit must be directly and substantially in issue in the suit where the doctrine of res – judicata is pleaded.**
2. **The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**
3. **The former suit must have been heard and finally decided.**
4. **The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA .V. ATTORNEY GENERAL 2005 1 E.A 83**. The party pleading that res – judicata applies must of course lead evidence to prove the fact. Other than plead that the plaintiffs’ suit is res – judicata, the 4th to 14th defendants did not in paragraph 7 of their defence make any reference to the previous suits which render this suit res – judicata. Nonetheless, it was clear in the course of the trial that there have been previous litigation involving some of the parties herein which proceedings were among the documents filed as documentary evidence. I shall now consider those cases to see whether indeed they render this suit res – judicata.

35. The first suit was a claim filed by **CHARLES MUSUMBA KEYA** the 2nd plaintiff herein against **PETRO MAELO LUBAKAYA** the deceased 1st defendant herein and another at the **KANDUYI LAND DISPUTES TRIBUNAL** being case **No 2 of 1997** in which the matter in dispute was the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551**. The claim was dismissed and so too was **CHARLES MUSUMBA KEYA**’s appeal at the **PROVINCIAL APPEALS COMMITTEE** in **KAKAMEGA** being appeal No 55 of 1998. Those proceedings were however quashed on 29th January 2000 in **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 191 of 1999** with the consent of the parties. However, those cases cannot be invoked to support the plea of res – judicata because the **TRIBUNAL** had no jurisdiction to determine a dispute over the ownership of registered land – **JONATHAN AMUNAVI .V. CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No 256 of 2002**. Further, a reading of the proceedings in the **TRIBUNAL CASE** shows that the dispute was founded on a claim that the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551** was family land held in trust. Part of the evidence of **CHARLES MUSUMBA KEYA** who was the Claimant therein and is the 2nd plaintiff in this case reads: -

*“This land in dispute used to be for my grandfather who had 4 sons including my father. The eldest son was known as **MURUNGA MASULIA** followed by **PAUL WANYAMA MASULIA**, **LUBEKHO MASULIA** and then lastly **FWAMBA MASULIA**. The land was divided amongst the sons in 1964 where by the elder son **MR MURUNGA MASULIA** got the upper part of it followed by the last born **MR FWAMBA MASULIA** hence the two sons got theirs starting from **FWAMBA MASULIA**’s land running straight towards the river – side. The 3 sons behind **OMUNGA** had left for Uganda as far back as 1953, they were infact allocated their portions of land in absentia and all of them were registered in the names of **MR MURUNGA MASULIA** to hold the same in trust of their behalf i.e. parcel **NO EAST BUKUSU/WEST SANG’ALO/551** which was originally 79.1 acres when adjudication was done in this area in 1966 and after which he died in 1969.” Emphasis added.*

Since the dispute filed in the **TRIBUNAL** was founded on trust, the **TRIBUNAL** had no jurisdiction to determine it – **JOSEPH MALAKWEN LELEI & ANOTHER .V. RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL No 82 of 2006 [2014 eKLR]**. It follows therefore that the award of the **TRIBUNAL** which had dismissed the claim by **CHARLES MUSUMBA KEYA** and the subsequent decision by the **APPEALS COMMITTEE** confirming that dismissal were all made without jurisdiction. Indeed, that was the reason why those orders were quashed by the **HIGH COURT BUNGOMA** in **MISCELLANEOUS CIVIL APPLICATION No 191 of 1999**. A Judgment made without jurisdiction cannot sustain a plea of res – judicata. In **MULLA THE CODE OF CIVIL PROCEDURE 18TH EDITION** page 285, it is stated thus: -

“A Judgment delivered by a Court not competent to deliver it cannot operate as res – judicata since such Judgment is not of any effect. It is well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit does not operate as res – judicata between the same parties in subsequent proceedings.” Emphasis added.

See also **CLEMENT WEKESA MUNYI & ANOTHER .V. PATRICK WEKESA OKUMU** (sued as representative of the Estate of **OKUMU MASAI (deceased) 2019 eKLR**).

36. The last suit is **BUNGOMA DISTRICT MAGISTRATE’S COURT SUCCESSION CAUSE No 15 of 1974** which was in respect to the Estate of **MURUNGA MASULIA** and in which **MURUNGA** was appointed as the Administrator. A Succession cause cannot determine issues of fraudulent disposition of land or trust which are the subject in this suit. The **Law of Succession Act CAP 160 LAWS OF KENYA** deals with Intestate and Testamentary Succession and Administration of Estates of deceased persons. The Act is not meant to deal with disputes relating to trust or contractual obligations which is now the preserve of this Court. This dispute could not therefore have been determined in the Succession Cause.

37. The plea of res – judicata cannot therefore be sustained and I must reject it.

38. The 4th to 14th defendants similarly pleaded in paragraph 7 of their defence that this suit is bad in law for being a gross abuse of the due process and is a violation of their Constitutional right to own and use property. The 4th and 14th defendants have not demonstrated in which manner this suit is a gross abuse of the due process of the Court. In the case of **JETLINK EXPRESS LTD .V. EAST AFRICAN SAFARI AIR EXPRESS LTD 2015 eKLR**, the Court of Appeal adopted the following definition of abuse of due process in **BEINOSI .V. WILEY 1973 S.A 721 SCA** where it was stated thus: -

“What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all – encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective.”

Abuse of Court process must therefore include filing a suit which is essentially frivolous, vexatious and lacking in bona fides. An improper use of the judicial machinery mainly geared at vexing and annoying the opposing party. Looking at the plaint herein, it cannot be true that the suit is an abuse of the process of this Court.

39. This suit is therefore neither barred by the provisions of the Government Proceedings Act, the Limitation of Actions Act nor is it res – judicata or an abuse of the Court process as pleaded by the defendants.

40. Having dispensed with those jurisdictional issues, I shall now consider whether the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551** to create the land parcel **NO EAST BUKUSU/WEST SANG’ALO/958** and the resultant further sub – divisions to create titles **NO EAST BUKUSU/WEST SANG’ALO/2970** to **2979** was fraudulent and whether those titles ought to be cancelled. That is really the thrust of the plaintiffs’ case.

41. As stated above, it is common ground that the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551** was previously registered in the names of **MURUNGA MASULIA** since 2nd August 1969 before it was registered in the names of **MURUNGA** on 27th April 1976. It is the case of the plaintiffs who are the Co – Administrators to the Estate of **MURUNGA** that the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551** in 1979 to create parcels **NO EAST BUKUSU/WEST SANG’ALO/957** and **958** was procured fraudulently by the 1st defendant in collusion with the 2nd defendant. Particulars of the fraud have been pleaded in paragraph 11 of the plaint and they include the allegation that the signature of **MURUNGA** as well as other documents were forged and infact, **MURUNGA** had died in 1978. The plaintiffs’ case was prosecuted by **CHARLES MUSUMBA KEYA (PW 1)**, **SHADRACK MUNYIGULA KEYA (PW 2)** and **MAKHANU OMARI (PW 3)** whose testimonies have been captured elsewhere in this Judgment. The 1st defendant **PETER MAELO LUBAKAYA** was already deceased by the time this trial commenced. He was first substituted with **PHILIP MASINDE LUBAKAYA** who also passed away and was substituted with **DANIEL BARASA BABIKINA** who, however, did not testify during the trial for reasons which are not clear. Therefore, the deceased 1st defendant’s defence that he acquired the land parcel **NO EAST BUKUSU/WEST SANG’ALO/958** for valuable consideration and that there was no fraud or collusion involving him and the 2nd defendant remain mere allegations and have not rebutted the testimonies of the plaintiffs. This is because, pleadings are not evidence. In **CMC AVIATION LTD .V. CRUISE AIR LTD (1) 1978 KLR 103, MADAN J** (as he then was) said: -

“The Pleadings contain averments of the parties concerned. Until they are proved or disapproved, or there is admission of any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of ‘evidence’ in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disapproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of ‘evidence’ in CASSELL’S ENGLISH DICTIONARY page 394:

‘Anything that makes or obvious; ground for knowledge, indication or testimony; that which makes truth evident or renders evident to the mind that it is truth.’

However, from an exhaustive consideration of the evidence herein in it’s totality, and whereas the 1st defendant’s substitutes did not testify, I am satisfied that although the 1st defendant was not entitled to the whole 24.3 Hectares (60 acres) comprised in the land parcel **NO EAST BUKUSU/WEST SANG’ALO/958**, he was certainly entitled to a portion measuring only 36 acres out of the land parcel **EAST BUKUSU/WEST SANG’ALO/551**. This is because, in his own testimony as contained at page 13 of the plaintiffs’ bound documents filed on 1st August 2017, **SHADRACK MUNYIGULA (PW 2)** says: -

“The true position is that PETRO MAELO only purchased 36 acres forming part of land parcel number EAST BUKUSU/WEST SANG’ALO/551 from my grandfathers which he is entitled to from them not my uncle.”

Most significantly, however, during the proceedings in **BUNGOMA DISTRICT MAGISTRATE SUCCESSION CAUSE No 15 of 1974** held on 16th April 1975 in respect to the Estate of **MURUNGA MASULIA**, his son **MURUNGA** said the following: -

“PW 1 WAWIRE MURUNGA D/S STATES: -

I am the son of the deceased. He had 79.1 acres. I know PETRO MAYO (sic). I know that my three uncles sold him land 36 acres form 79.1 acres as they were shearing (sic) with my father. They had already been registered. The title deed bore the name of my father. The three uncles have migrated to Uganda. I have no objection if the land is sub – divided to give MAYO his portion (36 acres). I have been selected by the relatives to be the legal heir (sic) of the remaining portion of the land. After giving MAYO his portion. The deceased had only one wife. I am the only son of the deceased.” Emphasis added.

I have no doubt in my mind that the person being referred to above as **PETRO MAYO** is infact **PETER** or **PETRO MAELO LUBAKAYA** the deceased 1st defendant herein. And in the same succession proceedings, the said **PETER** or **PETRO MAELO LUBAKAYA** and whose name is recorded as **PETRO MAHERO** testified as **PW 6**. I shall also reproduce his evidence in extensor due to it’s relevance in this matter: -

“PW 6 PETRO MAHERO D/S STATES: -

I bought land from WABWIRE MURUNGA, PAUL WANYAMA and DANIEL BWABWA and JOHN LUSALAKALA. The three of them were the brothers of the deceased and they are in Uganda. I bought 36 acres only and there is a boundary visible now. We made an agreement and it was agreed that if the acres will be left then 36 acres they will refund the money for the acres and if the acres will be more I will pay them from ours which will be mine. The land survey (sic) did not survey the land I bought. We did not inform the Land Board because they are waiting the succession. I bought the whole acres of three people 36 acres and the Land Board will come and survey it properly.” Emphasis added.

So here we have the evidence of the deceased 1st defendant himself on oath confirming that his entitlement was 36 acres. There is of course the sale agreement dated 10th July 1976 between MURUNGA and the deceased 1st defendant PETER MAELO LUBAKAYA. It is in Kiswahili language with no English interpretation as would be required. However, Kiswahili is our **“National Language”** as is provided in **Article 7 (1)** of the **Constitution**. And given the pedestal upon which Kiswahili language is placed in the Constitution, it has never been clear to me why **Section 23 (1)** of the **Environment and Land Court Act** reads: -

“The language of the Court shall be English.”

I am glad, however, that among the amendments which this Court is proposing to the Act is to include Kiswahili as the language of the Court. I take the view nonetheless, that in a situation such as this where the document produced is in Kiswahili language which the Court is familiar with, as I am, it can be admitted notwithstanding the lack of interpretation. That was the position which I took in the case of **SIMON KHAEMBA MWANJA** (deceased substituted with his son **KENNEDY WAKOTO KHAEMBA**) **.V. JAMIN WASIKE KHAEMBA & ANOTHER (2020 eKLR)**. The agreement was nonetheless admitted without objection and the relevant portions thereof indicates that MURUNGA first sold to **PETRO MAELO LUBAKAYA** 42 acres and thereafter 14 acres making a total of 56 acres. However, it must be remembered that the said **PETRO** or **PETER MAELO LUBAKAYA**, the deceased 1st defendant did not testify, and neither did **DANIEL BARASA BABIKINA** who was substituted to prosecute the deceased 1st defendant’s case. In the circumstances, and given the fact that the said agreement is among the documents alleged by the plaintiffs to have been forged which evidence was not rebutted and, most significantly, in view of the sworn testimony of the deceased 1st defendant in the succession proceedings confirming the acreage which he actually bought from MURUNGA, this Court must make a finding, which I hereby do, that indeed the 1st defendant was only entitled to a portion of land measuring 36 acres, and not more, out of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551**. However, as is clear from the Land Certificate for the land parcel **NO EAST BUKUSU/WEST SANG’ALO/958** which was issued to the 1st defendant on 21st August 1985, he ended up with 24.3 Hectares which is (24.3 x 2.47) 60.021 acres. The 1st defendant therefore ended up getting 24 acres more in addition to what he had bargained for and was justly entitled to. That was clearly an unjust enrichment which, for purposes of this Judgment, is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“1 –

2 A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. Unjust enrichment is a basis of civil liability involving a claim for recovery that sometimes also goes by the name restitution.”

Of course the plaintiffs did not plead un – just enrichment. However, this is a Court of equity. Equity frowns upon un – just enrichment and among the guiding principles which this Court is entitled to apply under **Section 18 (a) (iv)** of the **Environment and Land Court Act** include: -

“the principles of intergenerational and intragenerational equity.”

This shall become clear as I interrogate the plaintiffs’ claim in trust.

42. Following my determination that the 1st defendant was only entitled to 36 acres yet he was registered as the proprietor of land parcel **NO EAST BUKUSU/WEST SANG’ALO/958** measuring 60.021 acres, I must now consider whether the plaintiffs have proved their claim in trust.

43. As I have already stated above, other than pleading fraud, the plaintiffs also pleaded that the land parcel **NO EAST BUKUSU/WEST SANG’ALO/551** was held by MURUNGA in trust for the family of MURUNGA MASULIA, Counsel for 1st, 4th to 14th defendants has submitted that their titles are protected by the provisions of **Sections 24, 25 and 26** of the **Land Registration Act**. However, **Section 25(2)** of the said Act states that the registration of a proprietor of land does not relieve him of any duty or obligation to which he is subject to as a trustee. Counsel for the 1st, 4th to 14 defendants also made the following submission at paragraph 14 while referring to **Section 20** of the **Law of Limitation Act**: -

“The plaintiff on his part seeks refuge in the provisions of Section 20 of the said Act. Our humble submission is that the said Section does not avail the plaintiffs as there is no trust/beneficiary relationship in existence between the plaintiff and the 4th – 14th defendants. The suit herein is caught by the provisions of Section 7 of the Limitation of Actions Act.”

Section 20(1) (a) of the **Limitation of Actions Act** provides that: -

“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or.”

Section 7 of the Same Act bars a suit to claim land after twelve years. But as is now clear from the preceding paragraphs of this Judgment, the 1st defendant testified on oath during the Succession proceedings in the Subordinate Court on 16th April 1975 that he bought only 36 acres from MURUNGA and his siblings who were entitled to the land parcel NO EAST BUKUSU/WEST SANG’ALO /551. Therefore, when he obtained the title to land parcel NO EAST BUKUSU/ WEST SANG’ALO/958 measuring 60.021 acres ten years later on 21st August 1985, that was not only fraudulent but he became a constructive trustee holding the extra 24 acres in trust for the plaintiffs and their families.

44. Counsel for the 1st, 4th to 14th defendants further submitted that there was **“no trust/beneficiary relationship in existence”** between the plaintiffs and his clients. It is true that plaintiffs and defendants have no family relationship. However, a Constructive trust is usually imposed by the law. A Constructive trustee is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as follows: -

“One whom the law makes liable to hold property for the use or benefit of another, usu. On account of his or her own wrongful conduct. One who benefits from a breach of a trust to a great enough degree to become liable as a trustee.”

In **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED AL HEIDY 2015 eKLR**, the Court of Appeal said the following with regard to a Constructive trust: -

“If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A Constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.” Emphasis added.

Therefore, the parties need not have a trustee – beneficiary relationship before such a trust is said to exist. A Constructive trust will be **imposed and enforced by the Court** and it is of no consequence that there was no intention to create a trust. It arises automatically from the circumstances of each case where the tenets of equity demand that it be imposed. Equity, as defined in **BLACK’S LAW DICTIONARY 10TH EDITION**, is about: -

“Fairness, impartiality, even handed dealing ……”

Therefore, when the 1st defendant admitted on oath that his entitlement to the land parcel **EAST BUKUSU/WEST SANG’ALO/551** was only 36 acres yet he proceeded to acquire 60.021 acres which he then sub – divided and transferred to the 4th to 14th defendants, this Court must intervene and impose a Constructive trust. It is clear from the circumstances of this case that the 1st defendant basically stole the extra 24 acres and he could not purport to transfer any interest therein to the 4th to 14th defendants beyond what was justly entitled to him. As was held in **JANE GACHOKI GATHECA .V. PRISCILLA NYAWIRA GITUNGU & ANOTHER 2008 eKLR**: -

“A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property traceable.” Emphasis added.

It is clear therefore that the land parcels **NO EAST BUKUSU/WEST SANG’ALO/2970 – 2979** which are registered in the names of the 4th – 14th defendants are therefore traceable.

45. Were the 4th – 14th defendants innocent by – standers in the process who did not know what their father the 1st defendant was entitled to? The evidence of the 8th defendant who represented them suggests otherwise. In his statement dated 24th April 2013 and which he adopted as his evidence during the trial, he was categorical that the 1st defendant purchased the land parcel **NO EAST BUKUSU/ WEST SANG’ALO/958** above board and subsequently sub – divided and transferred it to his sons. In paragraph 5 of the said statement, he says: -

“That I know of my own knowledge that the said transactions were done above board as the consents culminating in each of the persons named obtaining his title deed without any objection from any corner.”

When he was cross – examined by **MS ASHITSA** Counsel for the plaintiffs however, he said: -

“The land parcel was sub – divided into new number after the plaintiffs had filed this case. My father was sickly. He sub – divided the land to his sons. It is true that my father sub – divided the land when the case was in Court.”

And when he was led by his Counsel **MR MAKALI** in his evidence in chief, he said: -

“It is not true that my late father obtained the land fraudulently as alleged by the plaintiffs. The history of the land is contained in the affidavit of my late father which is part of the documents herein.”

That means that the 8th defendant and his siblings, with whose authority he testified, were privy to the previous litigation which surrounded the land in dispute. That obviously includes their late father’s concession in the Succession proceedings that he only purchased 36 acres from MURUNGA. That means he could not therefore be issued with the title to the whole land parcel **NO EAST BUKUSU/ WEST SANG’ALO/958** whose acreage is 60.021 acres. Further, the 1st, 4th to 14th defendants flouted the well-known rule of **Lis Pendes** which is

a common law doctrine that prohibits the transfer of any property during the pendency of a suit. The transfer of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/2970 – 2979** from the 1st defendant to the 4th – 14th defendants was done on 14th May 2004 during the pendency of this suit which fact the said defendants were well aware of. It is also instructive to note that the land parcels **NO EAST BUKUSU/WEST SANG'ALO/2970 – 2979** are ten (10) in number each measuring 2.35 acres thus making a total of 23.5 acres just 0.5 acres short of the 24 acres which the 1st defendant obtained through an un – just process. The only inevitable conclusion which this Court can arrive at is that the transfer of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/2970 – 2979** to the 4th – 14th defendants during the pendency of this suit was made deliberately to defeat the plaintiffs' claim. Certainly it was not done in good faith. The Land Registrar Bungoma **MR ALLAN ONYANGO BABU (DW 2)** was also hard pressed to explain the glaring anomalies. For instance, it is strange that the first entry on the Green Card for the land parcel **NO EAST BUKUSU/WEST SANG'ALO/958** was made on 20th November 1979 in the names of **OBWIRE MURUNGA** while the second entry was made on 13th July 1976 in the name of **PETRO MAELO LUBAKAYA**. That is illustrative of something fishy about the whole process. Something pervasive like the smell of a skunk.

46. With regard to fraud against the 4th to 14th defendants, their Counsel has made the following submission in paragraph 11: -

“In the instant case, there are no specific particulars of fraud particularized as against the 4th to 14th defendants. The plaintiffs have alleged fraud as against the 1st defendant (now deceased). The plaintiffs aver that the 1st defendant never bought any land or that if he bought, then it was contrary to a trust that existed whereby OBWIRE MURUNGA was holding the land in trust for his brothers.”

As Counsel has rightly submitted, citing the case of **VIJAY MORJARIA .V. NANSINGH MADHUSING DABAR & ANOTHER 2000 eKLR**, fraud must be specifically pleaded and the particulars thereof stated. It is clear from the amended plaint that the particulars of fraud against the defendants were pleaded in paragraphs 11, 12A and 12B thereof. While the pleadings could have been more elegantly drafted, it is obvious from the above paragraphs that the allegations of fraud clearly referred to all the defendants in this case even if there was no specific paragraph with the heading **“PARTICULARS OF FRAUD ON THE PART OF THE 4TH TO 14TH DEFENDANTS”** as was the case with the 1st defendant as pleaded in paragraph 11 thereof. Nonetheless, there is no doubt that the 4th to 14th defendants were well aware of the case which they were required to meet. I say so because in paragraphs 3, 4, 5, 6 and 8 of their defence, they have specifically denied those allegations of fraud and put the plaintiff to strict proof thereof. In particular, in paragraph 4 of their defence, they have pleaded thus: -

“The 4th to 14th defendants deny all and singular particulars of fraud pleaded in paragraph 11 and 12B of plaint and shall demand strict proof thereof notice of which is hereby given. The 1st defendant makes no admission to the contents of paragraph 4 of the plaint and shall at the hearing hereof put plaintiff to strict proof thereof notice of which is hereby given.”

Then in paragraphs 5 and 6, the 4th to 14th defendants pleaded **“that they obtained their titles by way of valid transfers from the hitherto registered proprietor”** and further, **“that if there was any fraud, which is specifically denied, they were never party, privy or accessory to any of the purported allegations.”** The purpose of pleadings is to enable the other party to fully understand the case which they have to meet so that it can adequately be responded to. They also aid the Court in understanding what the parties dispute is about. In the circumstances of this case, there is no doubt that the 4th to 14th defendants fully understood the case against them and they responded to the same both through their defence and the testimony of their witness **ELIUD WAFULA MAELO (DW 1)**. They could not have elaborately denied the allegations of fraud levelled against them if they did not understand them. And if that was the case, nothing would have been easier than to seek further and better particulars. Therefore, the creation of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/2970 to 2979** was fraudulent because the 1st defendant was not entitled to the extra 23.5 acres comprised therein and further, that fraud was perpetuated in 2004 and cannot be caught up by the Statute of Limitation.

47. The plaintiffs have sought several remedies including the restoration of the title **NO EAST BUKUSU/WEST SANG'ALO/551** in their names. That is not possible because during his life time, **MURUNGA** the then registered owner thereof admitted on oath to have sold 36 acres to the 1st defendant who similarly conceded on oath that indeed that was his entitlement out of that land. To revert the whole land parcel **NO EAST BUKUSU/WEST SANG'ALO/551** to the plaintiffs would also be un – justly enriching them in the same way that it will be if the resultant sub – divisions **NO EAST BUKUSU/WEST SANG'ALO/2970 to 2979** were to remain in the names of the 4th to 14th defendants. This Court shall therefore be making appropriate disposal orders shortly.

48. Having considered all the evidence in this case, I am satisfied that the plaintiffs have proved their case. However, before I make my final orders in disposition of this case, I must point out that according to the Certificates of Searches produced by the plaintiffs, the land parcel **NO EAST BUKUSU/WEST SANG'ALO/2977 and 2979** which are part of the subject in this suit are registered in the names of one **DANIEL CHENGASIA** who was not among the 4th to 14th defendants. It is not clear why he was not enjoined in this suit. What is clear however is that no adverse orders can be made against him as the registered proprietor of the parcels **NO EAST BUKUSU/WEST SANG'ALO/2977 and 2979** without hearing him. That would be an affront to the provisions of **Article 40(1)** of the **Constitution** which protects the right to property and also **Article 50(1)** which guarantees a fair hearing. There is no doubt of course that the land parcels **NO 2970 to 2979** were all obtained in the same process. However, in accordance with the rules of natural justice, it was imperative that **DANIEL CHENGASIA** be enjoined in these proceedings. He was not. That may have been an over – sight which the plaintiffs will have to live with. Those two parcels of land will therefore not be the subject of the disposal orders which I shall make.

49. Ultimately therefore, there shall be Judgment for the plaintiffs against the defendants jointly and severally in the following terms: -

1. PETER or PETRO MAELO LUBAKAYA the 1st defendant herein held 24 acres out of the land parcel NO EAST BUKUSU/WEST SANG'ALO/ 551 in trust for MURUNGA.

2. The titles to the land parcels NO EAST BUKUSU/WEST SANG'ALO/ 2970, 2971, 2972, 2973, 2974, 2975, 2976 and 2978 registered in the names of the 4th to 14th defendants are equally held in trust and were obtained fraudulently.

3. The titles NO EAST BUKUSU/WEST SANG'ALO/2970, 2971, 2972, 2973, 2974, 2975 and 2976 are hereby cancelled.
4. The 4th to 14th defendants shall within 30 days of this Judgment execute all the necessary documents to facilitate the registration of the land parcels NO EAST BUKUSU/WEST SANG'ALO/2970, 2971, 2972, 2973, 2974, 2975 and 2976 totalling 18.8 acres in the names of SHADRACK MUNYIGULA KEYA and CHARLES MUSUMBA KEYA to hold in trust for the family.
5. In default of (4) above, the Deputy Registrar of this Court shall execute all the necessary documents on behalf of the 4th to 14th defendants.
6. The titles to the land parcels NO EAST BUKUSU/WEST SANG'ALO /2977 and 2979 shall not be affected by this Judgment and will remain in the names of DANIEL CHENGASIA the registered proprietor thereof.
7. The plaintiffs have succeeded in only part of their claim and they will therefore have only half of the costs.

Boaz N. Olao.

J U D G E

17TH FEBRUARY 2022.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

RIGHT OF APPEAL EXPLAINED.

BOAZ N. OLAO.

J U D G E

17TH FEBRUARY 2022.