



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 21 OF 2016

PHARIS WEKESA MASIBO.....PLAINTIFF

VERSUS

BEATRICE MANYONGE.....1ST DEFENDANT

PETER OKUMU.....2ND DEFENDANT

DAVIS MUTORO.....3RD DEFENDANT

BENARD CHEMAO.....4TH DEFENDANT

ANTONY MAFURA.....5TH DEFENDANT

J U D G M E N T

1. By an amended plaint dated 30th May 2017 and filed on 2nd June 2017, **PHARIS WEKESA MASIBO** (the plaintiff) impleaded **BEATRICE MANYONGE, PETER OKUMU, DAVID MUTORO, BENARD CHEMAO** and **ANTONY MAFURA** (the 1st to 5th defendants respectively) seeking the following remedies with respect to the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4106** (the suit land): -

1. **That the defendants be evicted out of the plaintiff's land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
2. **That the defendants be restrained permanently from interfering with the plaintiff's land parcel NO EAST BUKUSU/SOUTH KANDUYI/ 4106.**
3. **That the body of the late MANYONGE WASWA be exhumed form the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 to be buried elsewhere.**
4. **The defendants be condemned to pay mesne profits.**
5. **Costs of the suit.**
6. **Any other relief this Honourable Court may deem fit to grant.**

The 2nd defendant could not be traced and on 24th May 2021, the case against him was withdrawn.

2. The basis of the plaintiff's claim is that he is the registered proprietor of the suit land measuring approximately 0.84 Hectares which he purchased from the 1st defendant's father – in – law one **MANYONGE WASWA WAMAYEYE** in 1974 after which he took possession and has been cultivating by planting maize and beans until 28th February 1989 when the 1st defendant's deceased husband unlawfully and without any colour of right entered the suit land, started ploughing and constructed houses thereon. That the 1st defendant's deceased husband purported to have sold the suit land to the 2nd, 3rd, 4th and 5th defendants who proceeded to take possession of the suit land thus denying the plaintiff of the use of his land and causing him to suffer loss.

3. The plaintiff filed his statement and list of documents both dated 30th May 2017.

4. In his statement, he states that in 1974, the father - in - law to the 1st defendant one **DANIEL WASWA WAMAYEYE** who is now deceased sold him a portion of land measuring 3 acres out of the suit land which is 9 acres in size. The transaction was reduced in writing and was approved both by the then **BUNGOMA COUNTY COUNCIL** and the **LAND CONTROL COMMITTEE** in its meeting held on 19th November 1975. He then obtained the title deed on 4th January 1989. He says that he transacted with the 1st defendant's father – in – law because her husband had not attained the age of 18 years. He then proceeded to put up structures and to do farming of maize which earned him Kshs. 40,000/= per year. However, in 1989, the 1st defendant's husband prevented him from utilizing the land on the ground that it had been sold without his knowledge. He sought the intervention of the **DISTRICT COMMISSIONER BUNGOMA** and the **DISTRICT OFFICER BUNGOMA** in vain. He then filed suits No 120 of 1989 and 154 of 2007 which ended up as Appeals No 82 of 2010. He therefore seeks an order to evict the defendants and the exhumation of the deceased (**MANYONGE WASWA**) from the land.

5. The plaintiff filed two lists of documents dated 30th May 2017 and 10th May 2019 both of which he produced as his documentary evidence during the trial.

The list dated 30th May 2017 contains the following documents: -

1. **Minutes of the Land Control Board meeting of 19th November 1975.**
2. **Title deed for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
3. **Green Card for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
4. **Certificate of Search for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**

The list of documents dated 10th May 2019 contains the following documents: -

1. **Letter dated 17th March 1989 from the DISTRICT COMMISSIONER BUNGOMA and addressed to the DISTRICT OFFICER KANDUYI in respect to the suit land.**
2. **Green Card for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
3. **Mutation forms.**
4. **Transfer forms.**
5. **Agreement (in Kibukusu).**
6. **Agreement (translated into English).**
7. **Minutes of the Land Control Committee dated 19th November 1975.**
8. **Judgment in BUNGOMA HIGH COURT CIVIL APPEAL No 48 of 1998 PHARIS WEKESA MASIBO .V. DANIEL MANYONGE WASWA.**

The 1st, 3rd, 4th and 5th defendants filed a joint statement of defence and Counter – Claim on 25TH June 2021 in which they denied that the plaintiff had purchased land from **MANYONGE WASWA WAMAYEYE** in 1974 adding that during his life time, the said **MANYONGE WASWA WAMAYEYE** had denied having sold any land to the plaintiff and neither has the plaintiff ever produced a sale agreement between him and **MANYONGE WASWA WAMAYEYE**. The defendants pleaded further that the plaintiff has never utilized the suit land and if **MANYONGE WASWA DANIEL** sold land to the 1st, 3rd, 4th and 5th defendants, he did so as the legitimate owner of the land. In further answer to the plaintiff's claims, the defendants pleaded that this dispute had been heard by the **KANDUYI LAND DISPUTES TRIBUNAL** which found in favour of **MANYONGE WASWA DANIEL**. Therefore, the defendants pleaded that the plaintiff is the author of his own misfortune because he never purchased the suit land from **MANYONGE WASWA WAMAYEYE** in 1974 and instead fraudulently obtained the title thereto. Further that the 1st defendant's family is the one residing on the suit land and that the 4th defendant purchased two plots measuring 50 feet by 100 feet comprised in the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/ 4105** from **MANYONGE WASWA DANIEL** in 1977 which he occupies to date while the 3rd defendant purchased a portion of land measuring 0.05 Hectares comprised in the land parcel **NO EAST BUKUSU/SOUTH KANDUYI /14753** at a consideration of Kshs. 500,000/=. The 5th defendant purchased a portion measuring 60 feet by 42 feet comprised in the land parcel **NO EAST BUKUSU/ SOUTH KANDUYI/14753** at a consideration of Kshs. 150,000/= which he has fully developed and is in exclusive occupation thereof.

6. The defendants further pleaded that the remains of **MANYONGE WASWA DANIEL** were properly interred on the suit land and there is no justifiable reason why the same should be exhumed. That the 3rd, 4th and 5th defendants are bona fide purchasers for value without notice and are entitled to the portions which they occupy. The plaintiff cannot therefore benefit from a fraudulent transaction. The defendants added that a Preliminary Objection would be raised to have this suit struck out for being res – judicata.

7. In the Counter – Claim, the 1st defendant reiterated the contents of their defence and sought the following orders: -

1. A declaration that the sub – division of the land parcels NO EAST BUKUSU/SOUTH KANDUYI/9 & 4010 and the subsequent transfer of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 to the plaintiff was not only irregular unlawful but also fraudulent.

2. An order cancelling entries NO 2, 3, 4, 5 and 6 from the register of land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 and the same to revert to DANIEL WASWA WAMAYEYE.

3. Costs of the suit.

4. Any other suitable relief this Honourable Court will deem fit and just to grant.

The basis of the Counter – Claim is that the plaintiff never purchased any land from the late **DANIEL WASWA WAMAYEYE** and therefore the documents purported to be an agreement of sale of land are a forgery. Further, that the plaintiff fraudulently caused the sub – division of the land parcels **NO EAST BUKUSU/ SOUTH KANDUYI/9** and **4010** and the subsequent transfer of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4106** into his name was also fraudulent.

8. The particulars of fraud on the part of the plaintiff are pleaded in paragraph 15(a) to (i) of the Counter – Claim as follows: -

(a) Causing the sub – division of the land parcels NO EAST BUKUSU/ SOUTH KANDUYI/9 and 4010 without a valid application from the registered owner DANIEL WASWA WAMAYEYE.

(b) The plaintiff used his influence as the Chairman of the Land Control Board to irregularly and unlawfully approve the application for sub – division of land parcel NO EAST BUKUSU/SOUTH KANDUYI/9 without the consent and/or authority of DANIEL WASWA WAMAYEYE (now deceased).

(c) Altering the Mutation Form for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/9 to read 4010 without a corresponding application by the registered owner and consent from the Land Control Board.

(d) Causing the sub – division of the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/4010 without a valid application for sub – division and consent from the Land Control Board.

(e) Forging the signature of DANIEL WASWA WAMAYEYE on the Mutation Form for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/9.

(f) Forging the signature of DANIEL WASWA WAMAYEYE on the transfer form dated 20.12.1988.

(g) Misleading the Land Registrar to register land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 in his name without a valid letter of consent from the Land Control Board and application for consent of the land Control Board by DANIEL WASWA WAMAYEYE.

(h) Causing the sub – division of the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/4010 on paper without survey and confirmation of the actual ground measurements.

(i) Causing the District Surveyor to make alterations on the Mutation Form that gave rise to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 as at 12th April 1998 without following the procedure.

Arising out of the above, the plaintiff's title is tainted with fraud hence he never acquired a good title and pleads to him to surrender the title have not borne any fruits hence the Counter – Claim.

9. The 1st, 3rd, 4th and 5th defendants also filed their respective statements all dated 18th July 2017 and a list of documents also dated the same day.

10. In her statement BEATRICE MANYONGE the 1st defendant states that she is the wife of MANYONGE WASWA DANIEL who passed away in 2017 and that the late MANYONGE WASWA WAMAYEYE was her father – in – law. That prior to his demise, her husband had sued the plaintiff at the KANDUYI LAND DISPUTES TRIBUNAL over the ownership of the suit land and an award was made in his favour. The plaintiff appealed the decision at the WESTERN PROVINCE DISPUTES TRIBUNAL which upheld the TRIBUNAL's decision and the same was adopted as a Judgment of the BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT in MISCELLANEOUS APPLICATION No 86 of 1995.

11. On the other hand, the plaintiff also filed a suit against her husband being BUNGOMA CHIEF MAGISTRATE'S COURT CASE No 120 of 1989 which was transferred to the HIGH COURT as BUNGOMA HIGH COURT CIVIL CASE No 131 of 1999 but was again re – transferred to the Subordinate Court as BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL SUIT No 154 of 2007 and was determined in favour of the plaintiff. Aggrieved by the Judgment, her husband filed at the BUNGOMA HIGH COURT CIVIL APPEAL No 82 of 2010 which allowed the appeal. That in all those cases, the plaintiff failed to prove that he had purchased the suit land from MANYONGE WASWA WAMAYEYE. That it is within her knowledge that the plaintiff obtained the registration of the suit land in his name fraudulently and illegally and is not entitled to the orders sought and neither has he occupied the land in dispute. She therefore asked the Court to dismiss the plaintiff's suit.

12. **DAVIS HILLARY MUTORO** the 3rd defendant states in his statement that in 2013 he desired to purchase a plot measuring 50 x 100 feet out of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/14753** from **DANIEL MANYONGE WASWA**. Having done a search and confirming that the said land was not encumbered, he executed an agreement and fully paid the consideration of Kshs. 500,000/= and his portion is parcel **NO EAST BUKUSU/SOUTH KANDUYI/17291** which he has developed and put up residential houses since 2014. That the transaction was approved by the Land Control Board and his portion was carved out of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/14753** and not the suit land and there is no privity of contract between him and the plaintiff who is a stranger and the plaintiff's case should be dismissed.

13. **BENARD CHEMAO** (the 4th defendant) also states in his statement that on 3rd February 1997, he purchased a portion of land measuring 50 x 100 feet from **MANYONGE WASWA DANIEL** comprised in the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4105** at a consideration of Kshs. 80,000/= paid in two instalments. On 10th February 1997, he purchased an additional portion measuring 50 x 100 feet at Kshs. 80,000/= which he paid in four instalments and in total, he purchased ¼ acre from the said **MANYONGE WASWA DANIEL** although the land was registered in the names of **DANIEL WASWA WAMAYEYE** the father of the Vendor who had given his authority for the transaction. That he has extensively developed the said portion where he stays with his family. That **MANYONGE WASWA DANIEL** unfortunately passed on before transferring the portion into his name. That there is no privity of contract between him and the plaintiff who is a stranger. The plaintiff's suit should therefore be dismissed with costs.

14. **ANTONY MAFURA** (the 5th defendant) states that on 3rd December 2013 he purchased a portion of land parcel **NO EAST BUKUSU/SOUTH KANDUYI /17290** from **DANIEL MANYONGE WASWA** at a consideration of Kshs. 150,000/=. That he paid the purchase price in two instalments of Kshs. 139,000/= and Kshs. 11,000/=. That he has put up a residential house on the said portion where he lives with his family and the plaintiff is a stranger to him with no privity of contract between them. That this suit is unfounded and should be dismissed with costs and unfortunately, **DANIEL WASWA MANYONGE** passed away before transferring the portion to him.

15. The defendants also filed a list of documents comprising the following:-

1. **Proceedings and award of the KANDUYI LAND DISPUTES TRIBUNAL.**
2. **Affidavit of DANIEL WASWA WAMAYEYE.**
3. **Judgment in BUNGOMA CHIEF MAGISTRATE COUR CIVIL CASE No 154 of 2007.**
4. **Judgment in BUNGOMA HIGH COURT CIVIL APPEAL No 82 of 2010 as consolidated with MISCELLANEOUS APPLICATION No 70 of 2009.**
5. **Ruling in BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 55 of 1997.**
6. **Agreement dated 31st December 2013 between DANIEL MANYONGE WASWA and the 5th defendant.**
7. **Letter of Consent for the transfer of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/17291.**
8. **Application for consent of the Land Control Board for land parcel NO EAST BUKUSU/SOUTH KANDUYI/17291.**
9. **Letter of Consent for land parcel NO EAST BUKUSU/SOUTH KANDUYI/14753.**
10. **Agreement dated 3rd February 1997.**
11. **Agreement dated 10th February 1997.**

During the trial, the 1st defendant also produced a Limited Grant Ad Litem issued to her on 23rd June 2021 in **BUNGOMA CHIEF MAGISTRATE'S COURT MISCELLANEOUS SUCCESSION CAUSE No E076 of 2021** in respect of the Estate of **DANIEL WASWA WAMAYEYE**.

16. The trial commenced and ended on 1st November 2021. The plaintiff was the only witness in support of his case while the defendants were also the only witnesses who testified in support of their case. They all testified and also adopted their respective statements and produced their documentary documents which I have already referred to above.

17. I have considered the evidence by the parties both oral and documentary. I have also considered the submissions by **MR KUNDU** Counsel for the plaintiff and by **MR MURUNGA** Counsel for the defendants.

18. The following issues are the ones I identify for determination: -

1. **Whether the plaintiff holds a valid title to the suit land or if it is infact tainted with fraud.**
2. **Whether the plaintiff is entitled to the orders sought.**

3. Whether the 1st defendant is entitled to the orders sought in her Counter – Claim.

4. Who should meet the costs?

19. Before I do so, it is important to point out that in paragraph 10 of their amended defence, the defendants pleaded that the plaintiff's claim is barred by the statute of Limitation by dint of **Section 7 of the Limitation of Actions Act**. A Preliminary Objection was taken up but was dismissed vide my ruling delivered on 11th December 2019 against which no appeal was filed.

20. It is common ground that the plaintiff is the registered proprietor of the suit land. He holds a title thereto issued on 4th January 1989. Therefore, in terms of **Section 25(1) of the Land Registration Act**, he is entitled to enjoy all the rights and privileges that go with that registration. They include the right to eject trespassers and even exhume the bodies of any persons buried thereon without his consent and also to permanently injunct them from interfering with the suit land. That is the main remedy which the plaintiff seeks and which was also guaranteed to him by virtue of the provisions of **Sections 27 and 28 of the repealed Registered Land Act** under which the title to the suit land was issued. However, under **Section 143 of the repealed law**, a title could be cancelled if obtained by fraud or mistake. Similarly, **Section 26(1) of the new Land Registration Act** provides as follows: -

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor shall not be subject to challenge, except –

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

(b) where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” Emphasis added.

Therefore, whereas a title to land is evidence that the person named therein is *“the absolute and indefeasible owner”* thereof, that title is only *“prima facie evidence.”* The title can be impeached if it is established that it was obtained through fraud, misrepresentation, corrupt or any illegal means. This is the basis of the 1st defendant's Counter – Claim.

21. So how did the plaintiff obtain the title to the suit land? In his statement dated 30th May 2017 at paragraph 5, he stated that he purchased it in 1974 from **DANIEL WASWA WAMAYEYE**, the deceased father – in – law to the 1st defendant, at a consideration of Kshs. 4,000/= a claim that was disputed by the 1st defendant who alleges in her Counter – Claim that infact the plaintiff obtained the title to the suit land fraudulently. The particulars of which have been pleaded in paragraph 15 thereof. In support of his claim, the plaintiff produced a sale agreement between himself and **DANIEL WASWA** dated 12th February 1974. I have looked at the English translation of the sale agreement. It was initially for the purchase of one (1) acre out of the land parcel **No 9 SOUTH KANDUYI** at a consideration of Kshs. 1,300/=. However, the last entry on the agreement reads: -

“That on 11.7.1977, I have received Kshs. 100/=

DANIEL WASWA

3 acres fully paid.”

Most significantly, the title deed to the suit land shows that it was a sub – division of the land parcel described as plot No 4010. That is also what appears on the Green Card. There is no evidence placed before me to show that Plot No 9 and Plot No 4010 refer to one and the same parcel of land. The Court cannot assume. The Court relies on credible evidence led by the parties themselves unless it is a fact which is clearly obvious from the record or it is a matter which the Court can take Judicial notice of as prescribed under **Section 60(1) of the Evidence Act**.

22. It is also instructive to note that when he was cross – examined by **MR MURUNGA** on whether **DANIEL WASWA** signed the transfer form, he conceded that he did not sign it. This is what he said: -

“I can see the transfer form dated 20th December 1988. The signature is not that of DANIEL WASWA. I went to the Land Control Board but I don't recall the year.”

I have on my part compared the signature of **DANIEL WASWA** as appearing on the sale agreement dated 12th February 1974 and the one on the transfer form dated 20th December 1988. One does not need to be a handwriting expert to notice that their differences are like day and night. Credit must of course be given where it is due and in this case, it is due to the plaintiff for admitting that **DANIEL WASWA WAMAYEYE** did not sign the transfer document dated 20th December 1988 and which purported to transfer the suit land to him. That document is therefore a forgery which term is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

“(1) The act of fraudulently making a false document or altering a real one to be used as if genuine

(2) A false or altered document made to look genuine by someone with intent to deceive”

By his own admission therefore, the transfer form which he produced as part of his documentary evidence to prove his ownership of the suit land is a forged document. His title to the suit land is therefore impeachable on grounds of fraud and procedural impropriety. Clearly, the parcel of land which the plaintiff purchased vide the sale agreement dated 12th February 1974 could only have been another parcel of land. Otherwise, there would be no need to forge documents in the acquisition of the suit land. That explains why the plaintiff is not in occupation and possession of the suit land and has had, as far back as 17th March 1989, to seek the intervention of the **DISTRICT COMMISSIONER BUNGOMA** to intervene and stop the family of **MANYONGE WASWA** from interfering with the land.

23. Finally, it is of concern to this Court that the plaintiff who was then a Councillor chaired the **LAND CONTROL COMMITTEE** meeting of 19th November 1975 held at the **BUNGOMA TOWN COUNCIL** where among the applications which were approved was the transfer to him of plot No 9 by **DANIEL WASWA**. The fact that the plaintiff chaired that meeting reinforces the 1st defendant's allegation of fraud as pleaded in paragraph 15(b) and (c) of her Counter – Claim that: -

(b) “The plaintiff used his influence as the Chairman of the Land Control Board to irregularly and unlawfully approve the application for sub – division of land parcel NO EAST BUKUSU/SOUTH KANDUYI/9 without the consent and/or authority of DANIEL WASWA WAMAYEYE (now deceased).”

(c) “Altering the Mutation Form for land parcel NO EAST BUKUSU/SOUTH KANDUYI/9 to read 4010 without a corresponding application by the registered owner and consent from the Land Control Board.”

By chairing a meeting to approve the transfer of land in which he had an interest, the plaintiff became a Judge in his own cause. He violated the first rule of natural justice which is that no man shall be a Judge in his own cause. This is aimed at avoiding perceptions of bias, real or imagined. Indeed, proof of bias is a sufficient ground upon which a decision can be quashed. In **R. V. RAND 1966 L.R Q B 230**, a decision that has been followed in this country, it was held by **BLACKBURN J** that: -

“Any direct primary interest, however small, in the subject of inquiry, does disqualify a person from acting as Judge in the matter.”

The rule against bias is well captured in **HALSBURY’S LAWS OF ENGLAND 4TH EDITION VOL 1 (1)** paragraph 86 as follows: -

“It is fundamental principle (often expressed in the maxim MEMO JUDEX IN CAUSASUA) that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man may be a Judge in his own cause. Hence where persons having a direct interest of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the Court will grant an order of certiorari to quash a determination arrived at by it, or such other remedy (for instance an injunction or a declaration) as may be appropriate.”

Of course this is not a Judicial Review application seeking orders to quash the decision of the Land Control Committee which the plaintiff chaired on 19th November 1975. However, as is now clear, documents were forged pursuant to the resolutions made at that meeting resulting in the fraudulent transfer of the suit land to the plaintiff. He ought to have delegated the responsibilities of Chair to another person in view of his interest in a matter under discussion. He did not do so. The only inevitable conclusion is that he elected to chair the meeting in order to facilitate the particulars of fraud levelled against him in paragraph 15 of the Counter – Claim. Those allegations of fraud, in my view, have been proved to the standard set out in the case of **VIJAY MORJARIA .V. NANSINGH MADHUSING DARBAR & ANOTHER 2000 eKLR**. It follows therefore that the plaintiff's title to the suit land is tainted with fraud. It cannot be accorded the protection offered by **Section 25(1)** of the **Land Registration Act**. Accordingly, he is not entitled to the prayers sought in his plaint.

24. It is also not clear why the plaintiff impleaded the 3rd, 4th and 5th defendants in this case. His claim is confined to the ownership of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4106**. The land parcels owned and occupied by the 3rd, 4th and 5th defendants respectively are land parcels **NO EAST BUKUSU/ SOUTH KANDUYI/17291**, ¼ acre excised from the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4105** and a portion measuring 60 x 42 feet excised from the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/17290**. There is no evidence to suggest that the 3rd, 4th and 5th defendants occupy any portion of the suit land or that those portions were hived from the said land. Indeed, during the plenary hearing, the plaintiff said he did not know them. This is what he said in cross – examination: -

“I don’t know DAVIS MUTORO. I don’t know why he was sued in this case. I don’t know ANTONY MAFURA. I don’t know BENARD CHEMAO the 3rd, 4th and 5th defendants.”

The plaintiff cannot be seeking to evict from the suit land people whom he does not even know nor why they were sued.

25. The answer to issues **No (1)** and **(2)** above is that the plaintiff does not hold a valid title to the suit land and is not entitled to the orders sought in his amended plaint.

26. With regard to issue **No 3**, it follows that having found that the plaintiff's title to the suit land is tainted, the 1st defendant is entitled to the orders sought in her Counter – Claim.

27. The plaintiff's *“coupe de grace”* in this long standing dispute appears to be the fact that he holds the title to the suit land. However, as I have already stated above, such a title is, under **Section 26(1)** of the **Land Registration Act** only *“prima facie evidence”* that he is the *“absolute and indefeasible owner”* of the suit land. Further, his title cannot be saved under the Constitutional protection of right to property

because **Article 40(6)** thereof provides that: -

40(6) “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

It is not enough, therefore, for the plaintiff to simply wave his title to the suit land as a basis for the grant of the remedies which he seeks from this Court by his amended plaint. As is now clear from the pleadings and evidence supporting the Counter – Claim by the 1st defendant, the plaintiff’s title is impeachable. He cannot therefore rely on it to evict the defendants or have the remains of the late **MANYONGE WASWA** exhumed from the suit land. As was held in **MUNYU MAINA .V. HIRAM GATHIHA MAINA C.A CIVIL APPEAL No 239 of 2009 [2013 eKLR]**: -

“..... When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal formal and free from any encumbrances including any and all interests which need not be registered on the register.” Emphasis mine.

The burden of proving fraud in the manner in which the plaintiff acquired the title to the suit land was of course on the 1st defendant. She has already surmounted that burden as is clear from the preceding paragraph of this Judgment. But I hear the Court of Appeal to be stating in the **MUNYU MAINA** case (supra) that under **Section 112** of the **Evidence Act**, the fact of proving how he obtained the title to the suit land was a matter within the personal knowledge of the plaintiff. It was therefore also his duty to show that he obtained it in a manner that was above board. However, in the circumstances of this case, the 1st defendant has not only pleaded fraud but has led cogent evidence and proved that indeed the plaintiff’s title to the suit land is tainted with fraud and impropriety. She is therefore entitled to the remedies sought in her Counter – Claim.

28. Ultimately therefore and having considered all the evidence in this case, this Court makes the following orders in disposal of the suit: -

1. The plaintiff’s suit is dismissed with costs to the 1st, 3rd, 4th and 5th defendants.

2. The 1st defendant’s Counter – Claim is allowed in the following terms: -

(a) A declaration is issued that the sub – division of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/9 & 4010 and the subsequent transfer of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/ 4106 to the plaintiff was not only irregular and unlawful but was also fraudulent.

(b) An order is issued cancelling entries No 2, 3, 4, 5 and 6 from the register of the land parcel NO EAST BUKUSU/SOUTH KANDUYI /4106 and the same to revert to DANIEL WASWA WAMAYEYE.

(c) The plaintiff shall meet the 1st defendant’s costs of the Counter – Claim.

BOAZ N. OLAO.

J U D G E

14TH FEBRUARY 2022.

Judgment dated, signed and delivered this 14th day of February 2022 at **BUNGOMA** 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

14TH FEBRUARY 2022.