



**Khaseke & 3 others v Khaseke & 2 others; Khaseke & 2 others (Interested Party)
(Environment & Land Case 58 of 2015) [2022] KEELC 127 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 58 OF 2015**

**AA OMOLLO, J
JUNE 8, 2022**

BETWEEN

**VINCENT KHASEKE 1ST PLAINTIFF
JOSEPH BARASA 2ND PLAINTIFF
FRANCIS MACKIDY KHASEKE 3RD PLAINTIFF
MARTIN KHASEKE 4TH PLAINTIFF**

AND

**ALFRED KHASEKE 1ST DEFENDANT
LINUS ANGEDI 2ND DEFENDANT
EDWIN ODINGA KHASEKE 3RD DEFENDANT**

AND

**ANN AUMA KHASEKE INTERESTED PARTY
MOSES OKELLO KHASEKE INTERESTED PARTY
CHARLES ODUNDO KHASEKE INTERESTED PARTY**

JUDGMENT

1. The Plaintiffs commenced their suit vide a plaint filed on the 23rd of August, 2007 in Busia PMCC No. 302 of 2007 and which case was on the 15th of October, 2015 adopted as the lead file after the case was consolidated with Busia SRMC Case No. 495 of 1996 following the transfer of both suits to this Court. The Plaintiffs therein impleaded the Defendants in this suit and prays for judgement against them for:-



- a. An order of permanent injunction against the Defendants, jointly and or severally, his agents and or servants restraining them from any whatever use of L.R NO. BUKHAYO/MATAYOS/2453;
 - b. An order of eviction against the Defendant, his agents, and or servants from L.R NO. BUKHAYO/MATAYOS/2453;
 - c. Costs of this suit; and
 - d. Any other relief this Court deems fit to grant.
2. The 2nd Plaintiff averred that he is the registred owner of L.R NO. BUKHAYO/MATAYOS/2453 and seeks orders of injunction and eviction against the Defendants who have put structures on the Plaintiffs' land without regard to the Plaintiffs' rights and interests.
 3. The 2nd Defendant filed a defence on the 4th of September, 2007 denying all the assertions in the Plaint and stated that L.R NO. BUKHAYO/MATAYOS/2453 is a subdivision of L.R NO. BUKHAYO/MATAYOS/63 which was family land and had been registered in the name of Didymus Khaseke Odundo. That he entered the suit land in 7th October 1994 and established a homestead thereon and that he has been in legal occupation of the land ever since to the exclusion of anybody else and the Plaintiff's suit is therefore time barred. That the Plaintiff hold the title of the suit land in trust for the Defendant. He listed the particulars of trust on the 2nd Plaintiff's part as:
 - a. That L.R No. L.R NO. BUKHAYO/MATAYOS/2453 is a sub-division of L.R NO. BUKHAYO/MATAYOS/63 and is family land;
 - b. That the Plaintiff's father prior to his death sub-divided land L.R NO. BUKHAYO/MATAYOS/63 amongst his three wives;
 - c. That the Defendant's mother was allocated the portion comprised of L.R NO. BUKHAYO/MATAYOS/2453;
 - d. That the Defendant took possession of the portion comprised in L.R NO. BUKHAYO/MATAYOS/2453 and build thereon on or about the 17th of October, 1994;
 - e. That thee Defendant has been using the said parcel of land ever sicne and is therefore in possession thereof;
 - f. That the Plaintiff has never been in possession of the suit land; and
 - g. That the Plaintiff is from the first house and has his own portion elsewhere where he has established his home.
 4. The Plaint filed by the Defendants in SRM Case No. 495 of 1996 was adopted as their counterclaim in this suit. The Defendants averred that they have been in occupation of different portions of L.R NO. BUKHAYO/MATAYOS/63 but in May, 1996 the 1st Plaintiff at the instigation of the various other persons including his fellow plaintiffs cause the land to be registered as L.R NO. BUKHAYO/MATAYOS/2453 therefore disinheriting the Defendants. They listed the particulars of fraud on the Plaintiffs' part as:
 - a. Causing land parcel title number L.R NO. BUKHAYO/MATAYOS/63 to be surveyed and subdivided secretly and without doubt the knowledge of the Plaintiffs;
 - b. Causing the 1st Defendant to execute all the that the relevant documents of transfer of the suit parcel to the Defendants without his knowledge;



- c. Taking advantage of the 1st Defendant old age and ignorance of the transaction going on involving the suit land;
 - d. Falling to disclose to the district land registrar that the Plaintiffs were equally entitled to their father's land;
 - e. Subdividing the whole, the of the suit land amongst the sons of the first wife of the 1st Defendant disinheriting other sons of the 1st Defendant.
5. The Defendants in their counterclaim prayed for judgement against the Plaintiffs jointly and severally for:
 - a. Cancellation of the register of the seven new title deeds aforesaid;
 - b. A declaration that the Plaintiffs get their respective shares of the suit land;
 - c. A declaration that the Plaintiffs have been unfairly disinherited;
 - d. A declaration that the defendants hold the suit land in trust for the Plaintiffs; and
 - e. Costs of the suit.
 6. The Plaintiffs filed a defence to the Defendants suit on the 2nd of July, 1996 which was converted as the defence to the Counterclaim. They denied the counterclaim stating that the prayers sought are a figment of the Defendants' imagination and are very far-fetched. They urged the Court to dismiss the suit with costs.
 7. The Interested Parties filed their joint statement on the 6th of November, 2020. They averred that they jointly and severally occupy L.R No. BUKHAYO/MATAYOS/2451 which parcel borders LR No. BUKHAYO/MATAYOS/2455 and 2452 and any decision made over the two parcels adversely affects their occupation. They stated that sometime in 1994, their family patriarch Didymus Khaseke divided his parcels of land among his 8 wives and that the demarcation still stands on the ground. They urged the Court to dismiss the plaintiffs suit with costs.

THE PLAINTIFFS' CASE

8. The hearing commenced on the 15th of December, 2016 when Vincent Khaseke testified as PW1. He stated that the Linus Angendi is his step brother who came to his land no. Bukhayo/Matayos/2453 and constructed thereon. PW1 said he got the land from his father and he has a title to prove his ownership. PW1 continued in evidence that his father's land was L.R NO. BUKHAYO/MATAYOS/63 which he subdivided before his demise in May, 1996. He produced the mutation form signed in 1996 which indicated that the land was subdivided into seven parcels running from numbers 2451 to 2457. PW1 said his parcel was 2453 which measured 0.63Ha. That his late father got the Land Control Board consent to subdivide and later to change or correct the names on the register. That the correct procedure was followed prior to him obtaining the title deed to the suit land on 15th May, 1996 and produced the green card as evidence.
9. On whether he obtained the suit land fraudulently, PW1 stated that he did not as all the process were duly followed. He stated further that he does not hold the land in trust for the Defendants as alleged. That the Defendant entered the land by force. PW1 stated further that the Defendant's mother Agnes Khaseke died in 1993 and his father could not put the land in the names of a deceased's person. He admitted that the Defendants filed a suit against him and his late father, Case No. 495 of 1996 seeking



cancellation of the title deeds but the case was never finalized. PW1 concluded by stating that he did not take the Defendants' land and urged the Court to grant him what he sought in the Plaintiff.

10. On cross-examination, PW1 stated that this case is essentially against Linus Angedi. He elaborated that his late father Didymus Khaseke had eight wives, his mother Melenia Khaseke was his first wife and Joseph Baraza, Francis Mackidy and Martin Khaseke are his brothers. That Alfred Khaseke, Linus Angedi and Edwin Oginga Khaseke are his step brothers being the children of his father's third wife. That the suit land originated from parcel 63 which land was handed down to by his father by their grandfather. PW1 stated further that his father lived on the suit parcel with six of his wives including Melenia, Agnes Khaseke, Colleta Khaseke, Alice Khaseke, Anna Khaseke and Ombita Khaseke all of whom had houses on the land. That all the wives lived on the land with their children and they were even buried there.
11. PW1 admitted that even before 1994, Alfred, Linus and Edwin had built their houses on the suit land. That they built where his late father had built. With regards to the meeting on the 17th of October, 1994, PW1 stated that he did not recall the same but he knew the people, Michael Baraza, Leah Khaseke and John Nambuka mentioned in the minutes because they are his cousins. That he was not aware that the land was subdivided among three wives and that some sons who had built on the land were told to shift and build on the portions allocated to their mothers. He further conceded that Alfred lives on parcel no. 2454 with his two wives, and Anna, his step mom lives on parcel no. 2451. That he only cultivates the land and asserted that Linus trespassed onto his land in 2007. He reported the matter to the police where he was advised to file a suit in court.
12. PW1 was certain that his father was not insane and neither was he sick. He denied there was no forgery, inspite of the serial number for the consent for the land board form number 352689 is the same serial number as the consent for parcel number 2453. He continued further that parcel number 63 produced 7 portions of land from 2451 to 2457 and that parcel 2456 belongs to Joseph Baraza. That the green card indicated that some of the parcels were restricted due to the duplication of numbers. That the titles are not fake and his father was healthy when he caused the sub-divisions. That the subdivisions could not have been wrongly done and that neither is it true to say that the Defendants have been on the land for over 12 years.
13. On re-examination, PW1 confirmed that there was a case No. 495 of 1996 between him and the Defendants. He stated that the Defendants occupation of the land has never been peaceful because of cases and as such right under adverse possession does not arise. He explained that the consents referred to by the Defendants' counsel are for 1997 and 2002 while their consents came earlier. He stated that only the duplicated numbers should be affected. He confirmed that his father was not insane when he made the subdivision in 1996. That his father was the absolute owner of land parcel no. 63 and he was literate because he was doctor by profession as such the subdivision cannot be said to be fraudulent. That the meeting held on the 17/10/1994 does not show the presence of the wives that were said to have been given the land.
14. Joseph Barasa Khaseke testified PW2 by adopting his statement dated 5th January, 2016 and stated that he has sued the 1st Defendant because he entered into his parcel of land no. 2455 measuring 0.74Ha, which land he obtained from his late father Didymus Ondundo Khaseke. That his father gave him the land on the 2nd of April, 1994 and the land is in his name. That the 1st Defendant has entered the land and built his houses there, one permanent and the other semi-permanent. He urged the court to remove the 1st Defendant from the said land.
15. On cross-examination, PW2 stated his complaint is against the 1st Defendant. He agreed that his father had nine wives four of whom were staying on the original land parcel number 63. That the Defendants'



mother, Agnes Khaseke was the 3rd wife and she lived on the land and she was even buried there. That when Agnes died they were all of age and Alfred was married and even had his house on the land. PW2 stated further that it was not true that in 1994 his father subdivided the land into portions for the four wives. That the land was subdivided in accordance with the children of his late father and not the wives. He stated that he moved to his present portion of land in 1994. He refuted claims that they took advantage of their father's old age to cheat their siblings of the land and that when the Surveyor came on 9/5/1996 the Defendants were present as well.

16. PW2 continued in cross-examination that because parcel 63 was agricultural land, the Land Control Board consent was obtained in 1994 when the board sat on the 13/10/1994. PW2 confirmed that he also went to the land control board before his land was transferred to him and he obtained consent on the 6/2/1996 and its entry is 105/96 in the register. That he was not aware that the entry was not in the land board's records. He reiterated that his father subdivided the land into seven portions and the Defendants were given land parcel 2454 which was to be shared amongst them. That when he got his title in 1996, the 1st Defendant was not living on the land although he built on the land in 1994 few months after PW2 had been shown the land. He concluded by stating that he has been living on the land before the 1st Defendant.
17. On re-examination, PW2 stated that his father was not senile when he gave him the land in fact on the Plaintiff filed by the Defendants in SRM CC 495/1996 their father is introduced as a person with sound mind. That his father died in 1997 and had filled all the forms and transferred the portions to them. That there was no administrator of his estate and if at all there were any mistakes made, he was not the one to be blamed for them. He stated that the land parcels are not indicated in the Defendants' list of documents at the places where the defence counsel indicated. He urged this court to give him the orders he was praying for and dismiss the Defendant's counterclaim.
18. Francis Mackidy Khaseke testifying as PW3 stated that his land was parcel number 2456 which was registered in his name on the 15/6/1996 and was a subdivision of land parcel number 63 which was owned by his father. That his father died in 1996 and the Defendants had sued him in case no. 495/1996. That parcel number 63 was subdivided into seven portions and his portion was the seventh one parcel number 2456. That parcel numbers 2454 and 2451 remained in his father's name and they are 0.6Ha and 2.4H respectively. That the two parcels were in their father's name and they were meant for the Defendants and others who had not gotten land when their father shared the same. He produced the green card for the parcels number 2451, 2456 and 2454 as MFI-12, MFI-11 and MFI-10.
19. PW3 continued in evidence that his father did not perpetrate the fraud as the Defendants were not co-registered owners with him and neither have they filed succession proceedings for the parcels that were in their father's name. He stated that the 1st Defendant was on his land as well as that of PW2 and he prayed for eviction, injunction and costs. He also urged this court to dismiss the Defendants' counterclaim.
20. Upon cross-examination, PW3 reiterated that the Defendants were his step brothers. He confirmed that his father had nine wives and that before he got his portion of land, his father's four wives, Melenia, Agnes, Colleta and Alice were living on parcel number 63 with some of their children who were grown and married. Each of these wives had been given a portion to cultivate. That his father shifted the portions they were cultivating before subdivision to their respective areas. PW3 stated further that the 1st Defendant has been staying on the land illegally having constructed a semi-permanent house on PW2's parcel number 2455 and a permanent house on his land parcel number 2456.
21. With regards to the meeting held in 1994, PW3 stated that he did not recall attending any meeting at their home. He only recalled the land control board meeting to transfer his portion of land from his



father to him. That the consent is dated 6/2/1996 although the minutes do not show the consent or entry number. That the consent letter for subdivision is dated 13/10/1994 and the register number is 673/1994 although the records do not show such an entry although the defendants list of documents show a different thing. PW3 stated that he was not aware that some of their consents had the same serial numbers or that their numbers were already duplicate numbers restricted by the Land Registrar. He confirmed that it was only the children of the first wife who got title deeds and about eight brothers from the other houses did not get titles. He stated that the eight brothers are sharing parcel numbers 2454 and 2451. He concluded that they did not take advantage of their father's advanced age nor their other brothers.

22. On re-examination, PW3 reiterated that their father was of sound mind when he gave them their portions of land and that the duplication alleged in their numbers is in different land maps and does not relate to the same parcel of land. He stated that the other brothers have parcels number 2454 and 2451 which are about 6 acres. That the Defendant was on his land without permission. He concluded by stating that in the event mistakes were made, he was not the one to be blamed for them.
23. The Busia County Surveyor, Mr Kamadi testified as PW4. He stated that he was producing his predecessor report, Julius Mulusa as PEx 13. That the former land surveyor visited the suit parcels sometime in 2018 and as per the report, there were several houses thereon. He stated that the report and the annexed sketch captured the encroachment. Upon cross-examination by the Defendants, PW4 stated that at the time of the site visit, he was stationed in Nairobi and he had never been on the site and that the report did not indicate the extent of encroachments.
24. Upon cross-examination by the Interested parties, PW4 stated that there was no indication of the parties present during the site visit or who built the encroaching house. He stated further that there was also no evidence that the summons were served but he had copies that indicated which individuals were served. He concluded by stating that although he had not seen the court order issued to the surveyor, he believed that the surveyor executed the same. This marked the close of the Plaintiffs' case.

THE DEFENCE' CASE

25. The defence hearing commenced on the 16th of June, 2021 with Alfred Khaseke testifying as DW1. He adopted his witness statement made in June 2016 as his evidence in chief and produced the list of documents as Dex 1-19 respectively. DW1 stated that his father owned land number Bukhayo/ Matayos/63 and on the 17/10/1994, he summoned his family in the presence of elders to subdivide the land to his children. He confirmed that he was present in that meeting and the said land was distributed amongst his father's three wives as follows: 1st house - 80 strides, 2nd house - 65 strides width, and the 3rd house - 55 strides.
26. DW1 stated that he got married in 1994 and built his house on the land where he lives to date which was within the portion that their mother had been given. That his brothers, the 2nd and 3rd Defendants also have their homes within their mother's share. That although the boundaries were placed, in May, 1996, the Plaintiffs destroyed the boundaries and subdivided the suit land. That the Defendants were not involved in the subdivision process and after learning of the same they filed suit no. 493 of 1996 and prayed that if any titles were issued, the same are held in trust since the Defendants were already in possession.
27. DW1 stated further that in suit number 302 of 2007 there was no prayer for eviction from parcel numbers 2454 and 2455, they only sued to stop him from building while the 2nd to 5th Plaintiffs have no claim against him in that suit. That the consent to subdivide was obtained on 14/10/1994 and from the minutes of the Land Control Board reference 673 of 1994 were in favour of Tadeyo and



John Omunyimi. He stated that none of the minutes of the Land Control Board meetings indicated a transfer to the Plaintiffs. He also pointed out that all the consents bore the same serial number and that the D.O confirmed that there were no minutes for the subdivision and transfer. DW1 stated further that the Surveyor visited the land and prepared a report dated 29/10/2018 and as per the report, he was the one in occupation of LR 2453. He concluded by stating that according to him, he was in occupation of LR 2455 and 2456.

28. Upon cross-examination by the Interested Parties, DW1 stated that the land was shared in October, 1994 and one of his step mothers was allocated parcel no. 2451 and her parcel was also part of land parcel no. 63 and her children are living on her share. Upon cross-examination by the Plaintiff, DW1 answered that the subdivision was not carried out by their father and that the process of sharing took place after their father had died. He reiterated that he was one of the Plaintiffs in the 1996 case where they had also sued their father to have him elaborate the truth. He reiterated that the land belonged to their father through inheritance and he had a right to share it among his dependants as per his will. With regards to the minutes of the meeting, DW1 stated that there were no signatures of the attendees and that the Plaintiffs were also part of the meeting but they did not sign anywhere. DW1 continued to state further that his father gave land to his wives, their mothers and not his sons and that the four portions allocated had no numbers neither was the acreage indicated in the minutes. He confirmed that the sharing of the parcels was done in the absence of a surveyor. He stated that he wanted the consents issued nullified as they were never given to the proprietor of the land. That he did not have a report confirming that their father's signature on the applications for consent were not his. He also stated that they had not challenged the surveyor's report. On re-examination, DW1 reiterated that in 1994 the sharing was done among four houses. He added further that his father used to write and sign and as such the fingerprints cannot be his.
29. Linus Angedi Khaseke giving evidence as DW2 adopted his witness statement dated 6/6/2016 together with the 1st Defendant's evidence. He stated that land parcel Bukhayo/Matayos/63 belonged to their father who had nine wives with his mother being the 3rd wife. That before his father's demise, he shared his land among his four wives, the 1st, 3rd, 9th and 8th wife. That their houses were still on the main home when the land was shared. That he built his home in 1994 on the share that had been given to his mother. That there are three semi-permanent houses on the said portion. That their father had planted boundaries which were destroyed by the Plaintiffs in 1996 when they interfered with their father's distribution and got the numbers. That according to the subdivision, he now lives on parcels number 2453 and 2454 and that the Plaintiffs are holding those titles in trust for him and his children. He urged this Court to dismiss the Plaintiff's suit and allow their counterclaim.
30. Upon cross-examination by the Plaintiffs, DW2 stated that they did not have a case between his mother and their father. That they sued their father because they only wanted to know whether he had authorised the destruction of the boundaries. He confirmed that the Plaintiffs had title deeds and that L.R 2453 and 2454 are registered in the name of Vincent and Didymus although the one registered in his father's name is less than one acre. He asserted that he lives on the portion numbered as LR 2453 and 2454 from in 1994. That his father died in 1997 after the land had been shared in 1994. He concluded by stating that he did not know when the Plaintiffs got titles.
31. Upon cross-examination by the Interested Parties, DW2 stated that during the sharing, Anna Auma was also given a share of land parcel no. 63 and that her portion is separated by the road. On re-examination, DW2 reiterated that case no. 495/96 was for their father to tell them why the 1994 land was being shared out again. He admitted to not being aware of the sharing in 1996. That the boundary in 1996 was planted inside his brother's house.



32. Edwin Khaseke Odundo adopted his witness statement dated 6/6/2016 as his evidence in chief. He stated that he moved out of parcel number 63 in 2005 but his portion still exists. That he is aware that his father shared the land in 1994 and the Plaintiffs also subdivided it in 1996. That in the new sharing, Christopher, the 2nd Plaintiff, is the one who is claiming his portion although the 2nd Plaintiff has not sued him. He concluded by praying for the dismissal of the Plaintiff's suit and allowing their counter-claim.
33. Upon cross-examination by the Plaintiffs, DW3 stated that he was not present in 1994 when his father shared the land and neither was he present during the forceful sharing in 1996. That his eldest brother informed him that their father had shared the land among his wives. He stated further that his share is registered in Christopher's name even though he did not know the title number. That although the land belonged to his father, their father's mistake was to give others numbers and not everyone. He stated that his father gave the land to the wives and it is evident that the Plaintiffs got the titles secretly.
34. Joseph Odhiambo Namboka testifying as DW4 stated that Didymus Khaseke was his uncle and on the 17/10/1994, he was at home when Michael Barasa, their clan chairman, informed him that Didymus Barasa was sharing his land among his wives. That 23 people were present during the meeting. That the land was shared to Herenia, Agnes and Alice. Herenia was given 80 feet, Agnes 65 feet and Alice 55 feet and that they planted boundaries of sisal on the same day. That the Defendants have built their homes in their mother's share. He stated that he was the secretary to the meeting and among those present were the 2nd and 3rd Plaintiffs. He stated that the boundary they planted is not there as it was removed by Vincent when they shared the land.
35. Upon cross-examination by the Plaintiff, DW4 stated that the land belonged to Didymus and he was sharing among his wives. He explained that the decision to share the land originated from Didymus as he was the one who convened the meeting in 1994. That he did not know anything about the 1996 and he is not sure whether Mzee Didymus was present when the new boundaries were planted or whether he changed his mind to share the land again. He concluded by stating that he did not know whether the Plaintiffs had titles to their portions. On re-examination, DW4 stated that he learnt of the second boundary planting from the 1st Defendant a few days after it happened and he cannot tell whether the Plaintiff's father was part of the second sharing. This marked the close of the Defendants' case.

INTERESTED PARTIES' CASE

36. The Interested Parties' case kicked off with Anna Auma Khaseke testifying as DW5. She stated that she was the seventh wife and she had been given a portion of the land on the lower part of the road. That before the actual date of the demarcation, her husband called all of them in a closed-door meeting in which he disclosed his intention to demarcate the land among his wives. That he allocated her the parcel acquired from the late Mzee Juma Odundo and the rest of the co-wives, Alice, Herenia and Agnes were allocated 55, 80 and 65 strides respectively.
37. Upon cross-examination by the Plaintiffs, DW5 stated that her husband had many parcels of land and that she was present when the suit land was shared amongst the wives. That at the time of sharing the land, he had built her a house on the portion she was later given, below the road where she is living to date. She added that she does not have a number for her parcel as it is in Didymus's name. She concluded by stating that she has nothing to do with the dispute between the Plaintiffs and the Defendants.
38. Upon cross-examination by the Defendants, DW5 stated that she lived on the land purchased from Juma Odundo and she is the only surviving wife. She confirmed that her husband called a meeting and shared the land. That the homeland was given to Herenia 80ft, Agnes 65 ft and Alice 55ft. Joseph was to relocate to his mother's share while the Defendants had houses in the big home in their mother's



share where they still live to date. She stated that her husband was not part of the planting of the new boundaries and he never called them again about sharing in 1996. She concluded by stating that everyone was present in the sharing of 1994 and no one complained.

39. Charles Odundo Khaaseka was DW6 opening his evidence by stating that he is the first born of DW5 and the late Didymus Khaseke and he has five other siblings: three sisters and two brothers. That none of them were allocated land by their father and that the land they live on was allocated to their mother on 17/10/1994 before the community elders. That their parcel is separated from the ancestral land by the Matayos-Nasewa road. The ancestral land was allocated to his stepmothers Alice 55 strides, Herenia 80 strides and Agnes 65 strides. That he is not aware of any other demarcation by the elders. Upon cross-examination by the Plaintiffs, DW6 stated that they all lived on parcel number 63.
40. Moses Okello Khaseke, DW7 stated that he was the son to the late Didymus Khaseke Odundo and Alice Khaseke. That his father allocated his mother and his other stepmothers, Herania and Agnes parcel number Bukhayo/Matayos/63 as 55, 80 and 65 strides respectively on 17th October, 1994. That the only surviving step mother, DW5 was allocated the land separated by Matayos-Nasewa road from the ancestral land while the rest of his step mothers were allocated land in Namikoye and Samia. That he is not aware of any other demarcation thereafter.
41. Upon cross-examination by the Defendants, DW7 stated that his mother was given a share in parcel number 63 which was where he lived. He stated that the land was shared among three wives and the boundaries were planted. That the Defendants have built on their mother's share while Martin the 4th Plaintiff has built on DW7's share of the land. DW7 explained that the battle of 1996 occurred on a Sunday when they were all in church. That their father could not have participated because he was sick. That he did not know that numbers were created after the 1996 incident and neither was he a part of the 1996 sharing.
42. Upon cross-examination by the Plaintiffs, DW7 stated that he was born in 1979 and in 1994 he was present at the meeting and he even witnessed the same. He stated that Vincent was not present because he was at work. That although he was present when the Plaintiffs destroyed the boundaries, he could not remember the date. That he is not aware that their father shared land among his sons and neither that the Plaintiffs have titles. This marked the close of the Interested Parties' case.

SUBMISSIONS

43. Parties were ordered to exchange written submissions within 21 days. The Plaintiffs filed their submissions on the 7th of December, 2021. They submitted that they are the registered proprietors of suit parcels of land having acquired them after their father Didymus Khseke Odundo subdivided land parcel Bukhayo/Matayos/63 into parcels number Bukhayo/Matayos/2451 to 2457 and transferred them to the Plaintiffs. That the deceased exercised his wishes while he was alive and subdivided his land accordingly and that from the evidence he was wise to do so as the beneficiaries had not carried out succession yet. While relying on section 75 of the Old Constitution and section 28 of the Land Registration Act provide for the protection of a proprietor's rights to their property.
44. The Plaintiffs submitted that the onus of proving fraud lay on the Defendants as provided by sections 107 to 109 of the Evidence Act. While relying on the case of Justine Magare Bosire v Isaac Omoga (2018) eKLR, stated that the Defendants had failed to prove their counterclaim, as there has been no proof for the allegations of fraud against the Plaintiffs. That the late Didymus was the absolute owner of land parcel number 63, he applied for the consent to subdivide the land and the same was granted and the subdivided parcels were registered in his name before he gave consent to transfer some of the parcels



- to the Plaintiffs. That there was no collusion pertaining to any illegality on the Plaintiff's part that has been proved by the Defendants.
45. They submitted further that, sections 24 and 25 of the [Land Registration Act](#) confer absolute rights to a registered owner of land and as such the Plaintiffs enjoy statutory protection of Land parcels numbers Bukhayo/Matayos/2452, 2454, 2455, 2456 and 2457 and that the County Surveyor confirmed that there was encroachment on the said land. That the Defendants did not call any expert to challenge the county surveyor's report and as such this Court should take judicial notice of the professional opinion of County Surveyor.
 46. While relying on the cases of [Doune Farms Ltd vs. Richard Soi 4 others](#) (2017) eKLR and [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others](#) (2014) eKLR, the Plaintiffs submitted that the Interested Parties are neither Complainants nor Respondents and as such their involvement in the case does not alter the status quo of the case. That they were merely brought in by the defence to fill gaps left open and to enlist those whom they thought were potential witnesses given their testimony that they had no interest in the suit properties. The Plaintiffs urged this Court to dismiss the Defendants' counterclaim and to allow their suits with costs.
 47. The Defendants filed their submissions on the 2nd of December, 2021. They submitted that although the registration of a person as an owner of land was intended to give a registered person indefeasible title to the land, that registration was not and was never meant to defeat the subsisting rights of others over the same land or to be used as an instrument of oppression by disinherit or defrauding other people or family members who have bonafide interests over the same parcel of land. That it is for this reason that the law recognizes that the registration of a person is not irrefutable but subject to overriding interests and further that such registration can be impeached and cancelled if it was fraudulently or unprocedurally done.
 48. The Defendants submitted on the history of the suit and that of the suit land. They stated that the suit land was owned by their father Didymus Khaseke who in 1994 subdivided the upper part of the original land into three parts in the presence of his clansmen and most of his sons who are parties to this case. The houses that benefitted were: house of Melania Khaseke (the mother to the Plaintiffs), the house of Agnes (the Defendants' mother) and the house of Alice Khaseke (the mother to the 2nd Interested Party) and that, live boundaries were planted to demarcate the said portions. That it was upon the sub-division that the Defendants moved and occupied the portion of land that had been allocated to their mother's house. They submitted further that in 1996, the Plaintiffs unilaterally and together with their families destroyed and uprooted the live boundaries that had been planted on the upper part of the land and subdivided the land into seven portions: LR no. 2452 to 2457. This necessitated SRM Civil Suit 495 of 1996 seeking the cancellation of titles that had been created in utter disregard of the earlier division of land by their father and a declaration that the Plaintiffs were holding the titles in trust for the Defendants.
 49. The Defendants submitted further that although the 1st, 2nd and 3rd Plaintiffs testified in support of their alleged claims against the Defendants, it was only the 1st Plaintiff who filed a suit against the 2nd Defendant in PMC Civil Suit No. 302 of 2007. That the claims by the 2nd and 3rd Plaintiffs against the 1st and 3rd Defendants have no legal basis whatsoever as the Notice of Motion dated 13/01/2014 cannot be said to have originated a suit against the Defendants. As such no substantive reliefs can be issued by this Court against the Defendants. While relying on the case of [Rahab Kosgei v Nuru Jepleting](#) (2020) eKLR, the Defendants submitted that all the evidence including witness statements and documents produced by the 2nd and 3rd Plaintiffs have no basis in law in the absence of a plaint.



50. They submitted further that the sub-division of the original parcel of land and the ensuing titles in favour of the Plaintiffs were all fraudulently and/or unprocedurally done without the participation of their father who was then very old and sick which evidence was confirmed by the defence and the interested parties. That the letters of consent for subdivision and transfer allegedly obtained by their father to undertake the transfer related to totally different transactions and parties who were neither the Plaintiffs nor their father, which evidence was confirmed by the Assistant County Commissioner in his letter dated 14/3/17 and produced as Dex 19. That the Defendants have proved the particulars of fraud as per paragraph 5 of their counterclaim, to the required standards.
51. On the premise of *Macharia Mwangi Maina & Others v Davidson Mwangi Khagiri* (2014) eKLR, the Defendants submitted that by the time the Plaintiffs were subdividing the origin parcel in 1996, the Defendants were already in occupation of their respective portions with the full knowledge of the Plaintiffs thus creating a constructive trust in the Defendant's favour as against the Plaintiffs. That the possession and occupation of the suit parcels by the Defendants created an overriding interest thereon protected under section 30 (g) of the repealed *Registered Land Act*. That likewise, a customary trust exists as the original parcel is family land and that the subdivision and issuance of titles does not diminish the Defendants' rights and interests over the land as recognized under section 28(b) of the *Registered Land Act*, now under sections 25(1)(b) & 2 and section 28(b) of the Land Registration Action. They supported this argument with findings made in the case of Isaack *M'Inanga Kiebia vs. Isaya Theuri M'Lintari & Another* (2018) eKLR on customary trust.
52. The Defendants concluded by submitting that they had on a balance of probability proved that the suits titles were fraudulently obtained by the Plaintiffs and that the same should be cancelled or in the alternative, a declaration be made that they hold the same in trust for the defendants and that the 1st Plaintiff's suit be dismissed with costs.

DETERMINATION

53. I have considered the parties' pleadings filed; evidence adduced; submissions rendered; and the applicable law. The issues which in my opinion arise for determination of the dispute are as follows:
- a. Whether the Plaintiffs acquired the Land Reference No. BUKHAYO/MATAYOS/63 fraudulently;
 - b. Whether the Plaintiffs' are holding the titles to the Suit Land in trust for the Defendants;
 - c. Whether the Plaintiffs titles to the suit property should be cancelled and in turn the subdivisions as well;
 - d. Whether the 2nd Defendant has encroached onto the 1st Plaintiff parcel of land; and
 - e. Who bears the costs of this suit?
54. Before delving into the substantive issues, it is imperative for this Court to note that the Plaintiff's suit against the Defendant is premised on the Plaintiff's PMCC No. 302 of 2007 wherein he sued the 2nd Defendant for encroachment and subsequent eviction from his suit parcel number 2453. The Plaintiffs did not amend the Plaintiff's to include the 2nd to 5th Plaintiffs' claims and as stated by DW3's in his evidence and also in their submissions, that the 2nd to 5th plaintiffs do not have any substantive claims against them. However, these Plaintiffs were sued by the Defendants in their counterclaim hence their involvement in the present suit. Consequently, the issue of whether or not the 2nd Defendant encroached onto the 1st Plaintiff's parcel of land shall be ably handled once this Court has established that the titles were legally acquired or otherwise.



55. The Defendants’ impleaded fraud on the part of the Plaintiffs and enumerated the particulars of fraud under paragraph 5(a) to (e) of the amended plaint in SRMCC No. 495 of 1996. The *Black’s Law Dictionary*, 10th edition defines fraud as,

‘As knowing misrepresentation or know concealment of a material fact made to induce another to act to his/her detriment.’

56. As the Court of Appeal in the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, held that fraud is a question of fact to be proved by evidence. Fraud is an allegation that has to be proved as held in the case of *Paul Muira & Another v Jane Kendi Ikinyua & 2 others* (2014) eKLR where the court cited with approval the Court of Appeal decision in *Musonga v Nyati* (1984) KLR 425 and in *Koinange and 13 Others* (1986) eKLR 23 where it was observed:

“Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud.”

57. The principles of proving fraud have been stated in HCCC No. 135 of 1998 *Insurance Company of East Africa v The Attorney General & 3 Others* as borrowed from page 427 in Bullen & Leake & Jacobs, *Precedent of pleadings* 13th Edition quoting with approval the cases of *Wallingford v Mutual Society* (1880) 5 App. Cas. 685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd’s Rep. 305, 308, *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221 and *Davy V Garrett* (1878) 7 ch.D. 473 at 489 it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

58. The Defendants testified that on the 17th of October, 1994, their father Didymus Khaseke Oundo convened a meeting with the attendance of his clansmen, his wives and children and proceeded to share his land parcel No. BUKHAYO/MATAYOS/63 among his three wives Melania, Alice and Agnes. That Melania was given 80 strides, Agnes 65 strides and Alice 55 strides and sisal was planted to mark the boundaries. That immediately after the allocation of land, the sons of the wives relocated into their mothers’ parcels and constructed thereon. According to the Plaintiffs, their father brought a surveyor in 1996 who undertook the subdivision of parcel 63. The Defendants aver that this second sharing distorted the earlier demarcation made in 1994. Consequently, the Plaintiffs obtained titles to the property whose acquisition the Defendants allege was fraudulent. DW1 in his evidence stated that the consent to subdivide the land was obtained on the 14/10/1994 but the said consent according to records he obtained from the Nambale Land Control Board records (Dex 19) belonged to someone other than the proprietor of parcel number 63. DW1 also pointed out that the dates the respective consents to transfer were allegedly obtained do not correspond with the records at the Nambale Land Control Board.



59. The Plaintiffs' witnesses during cross-examination stated that they could not explain why the consents were not in the Land Control Board's records or why they had the same number for all the consents. PW2 in his cross-examination stated that:

"...My father went to the Land Control Board. He did so in 1994. I do not agree with the minutes showing that it is a different land that was transacted on, on 13/10/1994.... Yes, I know that in order that my land could come to me, I had to go to the Land Control Board. We went to the Land Control Board. We were given consent on 6/2/1996. Its entry in the register is 105/96. I do not know why that entry is not in the Land Control Board's records...."

PW3 in his cross-examination stated that:

"...Yes, I know that records of Land Control Board show what happens. The office keeps records. This is the consent to transfer my portion to me. It is dated 6/2/1996 and the entry number is shown as 107/1996. I see these minutes in your record. They do not show the consent or entry number. I do not know why they do not show. This is the consent letter for subdivision. It is dated 13/10/1994. The register number is 673/1994. This record shows there is no such entry. In fact, in your list of documents, the records show a different thing..."

60. The issue of consent to subdivide and transfer is central to the legality or not of the process of acquiring land. The Defendants punched holes into the Plaintiffs consents and the Plaintiffs did not provide any documents or witnesses to substantiate the fact that valid letters of consent to subdivide the original numbers and subsequent letters of consent to transfer were obtained. Section 6 of the [Land Control Act](#), CAP 302 thereof provides as follows :-

Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

61. The evidence before the Court confirms that the consents acquired by the Plaintiffs in the subdivision and subsequent transfer were not supported by the issuing authority. This invalidates the process of subdivision and transfer that the Plaintiffs allegedly undertook in 1994 and 1996. The [Land Control Act](#) makes it mandatory for the consent to be acquired before any subdivision or transfer is carried out. This was the holding in the case of [David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others](#) [2014] eKLR, where the Court observed as follows:

"In Leonard Njonjo Kariuki vs. Njoroge Kariuki Alias Benson Njonjo, Ca. No. 26 Of 1979, this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became



void in the absence of consent from the land control board. And in *KARURI v GITURA* [1981] KLR 247, the Court concluded that the provisions of the *Land Control Act* are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.”

62. The letter from the Assistant County Commissioner Nambale Sub County dated 14th March of 2017 and produced as DEx 19 confirms that no Land Board meetings were held for the transaction involving the Plaintiff. It states that:

“This is to refer to your letter No. BO-CC-07-135 dated 25/01/2017

1. Sub-division for Bukhayo/Matayos/63 into title numbers Bukhayo/Matayos/2451-2457;
2. Minutes for transfer of the titles numbers Bukhayo/Matayos/2451 to 2457 dated 6/2/1996;
3. Minutes for consent for correction of names dated 14/2/1989.

I am hereby informing you that one and two above is not in our records but number three-minutes for consent for correction of name dated 14/2/1989 is in our record and its LCR No. is 211 of 7th February, 1989....”

63. The second issue is whether the Plaintiffs are holding the titles to the suit land in trust for the Defendants as pleaded by the 2nd Defendant in his defence to the 1st Plaintiff’s claim and was submitted on as well. The Plaintiffs in their evidence stated that after the subdivision of the land they left two parcels of the land for the Defendants and other sons of their deceased father. PW2 and PW3 stated that the when the land got subdivided, the Defendants were already occupying the suit portion and some had married with kids who also lived on the said land. PW1 however allege that the 1st Defendant forcefully got on to the land in the year 2007 but I find this piece of evidence was not corroborated,

64. On cross-examination, all the Plaintiffs witnesses confirmed that the suit land belonged to their father and it was ancestral land. This was confirmed by the defence as well as the interested parties. The Plaintiffs confirmed that it was only the sons of the first house who had titles and not the rest of the family. DW4 stated that he was the secretary of the meeting held on 17/10/1994, asserting that 23 people were present during the meeting including but not limited to some of the Plaintiffs, the Defendants, the Interested parties and other clansmen. That it was at this meeting that the late Didymus Barasa allocated portions of the land number 63 to his four wives. According to the Defendants, they are in occupation of the portions of land allocated to their mothers.

65. This court would have ignored the sharing of the land made in 1994 as alleged by the Defendants if the Plaintiffs led evidence to support their assertion that their father had shared the land to his sons. I find this evidence lacking as the subdivision that the plaintiffs are relying on only benefitted them as the sons of the first house. They do not mention how their father gave land to the sons of the remainder three houses which included the Defendants and some of the interested parties. Nothing would have easier for the late Didymus to assign each of the sons their portions if that was his intention. Similarly, the plaintiffs did not lay a basis why they were being given portions already occupied by their stepbrothers. For instance, DW2 said he built his home on the suit portion in 1994. This was two years before the 1st Plaintiff acquired title in his name and now 11 years to the filing of their suit in the year 2007.

66. They defendants did not raise a defence of adverse possession which was being denied by the Plaintiffs in their evidence. Rather, the Defendants are stating that the plaintiffs are holding the titles on their



behalf because they (defendants) are the ones in occupation. The occupation by the defendants are not denied as it is the basis the plaintiffs came to court seeking eviction orders. The Supreme Court in Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR held as follows with regards to customary trusts:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- a. The land in question was before registration, family, clan or group land;
- b. The claimant belongs to such family, clan, or group;
- c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;
- d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
- e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

67. The present suit meets all the criteria for the granting of a customary trust. The Plaintiffs, Defendants and the Interested parties all belong to the same family, the suit land was ancestral land and all the parties would be entitled to be registered as owners of portions of the land. The applicable law when this claim was brought to Court was section 30 of the Registered Land Act (repealed) that provided for trusts as overriding interests which did not have to be noted in the register. Currently, section 28 (b) of the Land Registration Act lists trusts including customary trusts as overriding interests to that may subsist and affect registration of land without them being noted in the register.

68. With regards to the third issue, on whether the Plaintiffs' titles should be cancelled, the Land Registration Act empowers this Court to order the rectification of the register under Section 26 which stipulates that;

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



69. The Defendants have levelled sufficient evidence against the Plaintiffs to warrant the revocation of the Plaintiffs titles. The said title having been obtained fraudulently and or illegally, cannot be protected by the law.
70. With regards, to the fourth issue on whether the 2nd Defendant encroached on the 1st Plaintiff's suit land. PW1 testified that even before 1995 all the wives and their children were living on the land. He stated that:
- “...Yes, by 1994, Alfred Khaseke, Linus Angedi and Edwin Oginga Khaseke were all adults who had even married. Yes, even before 1994, they had their homes on that land. They had built where my father had built...”
71. PW4 was the Busia County Surveyor who produced a report by his predecessor who stated that he visited the land. From the report there was encroachment on parcels number 2453 with two houses illegally constructed, parcels number 2455 with one house illegally constructed and parcel number 2456 with one house illegally constructed. Under Section 19 of the *Land Registration Act*, 2012, the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:-
1. If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
 2. The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
72. The survey exercise was carried out on titles that were improperly acquired and the same is therefore void. In the alternative that the title stands, this court finds that the Plaintiffs acquired their titles with the knowledge of the Defendants being on the land thus their registration amounts to trustee on behalf of the said defendants in occupation. In essence, the Defendants are in possession as of right acquired by way of customary trusts, therefore, the orders of permanent injunction and or eviction orders sought cannot be granted.
73. In view of the above analysis and observations, I am satisfied that the Plaintiffs have not proved their case against the Defendants on a balance of probabilities and such it fails. The Defendants' counterclaim against the Plaintiffs succeeds as they have substantially proved the allegations of fraud and customary trust against the Plaintiffs.
74. Consequently, I enter judgment for the defendants as follows:-
- a. The Plaintiffs' title in respect of Bukhayo/matayos/2452, 2453, 2455, 2456 and 2457 be and is hereby cancelled and the title reverts to the name of Didymus Khaseke Odundo;
 - b. Consequently, the subdivision of the suit land number Bukhayo/matayos/63 carried out in 1996 be and is hereby declared void and illegal;
 - c. Boundaries be reverted to the original boundaries as prescribed in the 17/10/1994 meeting; and
 - d. There shall be no orders as to costs as this is a case between family members.



DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE, 2022.

A. OMOLLO

JUDGE

