



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 50 OF 2011

BRENDA NELIMA KIMUNGUI.....1ST PLAINTIFF

SARAH MATEYI KIMUNGUI(Suing as Legal representative of ISAAC KIMUNGUI)...2ND PLAINTIFF

MARY LUMBASI.....3RD PLAINTIFF

ROSEMARY MAKOKHA.....4TH PLAINTIFF

VERSUS

STEPHEN LUMBASI KUYI.....1ST DEFENDANT

SAMSON TOYWA.....2ND DEFENDANT

J U D G M E N T

Talk of really intriguing scenarios, this dispute is an illustration of one. Other than for **SAMSON TOYWA** (the 2nd defendant who is the current registered proprietor of the land parcel **NO KIMILILI/KIMILILI/2159** (the suit property), the rest of the protagonists herein are a family.

BRENDA NELIMA KIMUNGUYI and **SARAH MATEYI KIPTENGELE** (the 1st and 2nd plaintiffs respectively) filed this suit both on their own behalf and as the legal representative of the Estate of the late **ISAAC KIMUNGUYI KUYI** (hereinafter **KUYI**) who was the father to the 1st plaintiff and husband to 2nd plaintiff and the original plaintiff in this case before being substituted. The later **KUYI** was the brother to **STEPHEN LUMBAS KUYI** (1st defendant herein) and together with their other sibling **EMMANUEL MAKOKHA KUYI** were the sons to the late **ALFRED KUYI NAMAKA** (hereinafter **NAMAKA**) and **BERITA NASAMBU KUYI**. **MARY LUMBASI** (the 3rd plaintiff) is the wife to the 1st defendant while **ROSEMARY LUMBASI KUYI** (the 4th plaintiff) is the wife to **EMMANUEL MAKOKHA KUYI** and therefore the sister in law to the 1st defendant. The 3rd and 4th plaintiff are therefore sisters – in – law to **KUYI** and the 1st defendant.

By an amended plaint filed herein on 31st August 2018 following a consent dated 29th April 2019, the plaintiffs sought Judgment against the defendants jointly and severally in the following terms: -

- a. That the 1st defendant's registration as the owner of the land parcel LR NO KIMILILI/KIMILILI/2159 was unlawful, fraudulent, unprocedural and malafides and that consequently the transfer of the same to the 2nd defendant is invalid.
- b. A declaration that L.R NO KIMILILI/KIMILILI/2159 is property that formed part of the Estate of the deceased and subsequently that of the Estate of his widow and therefore the plaintiffs were and are entitled to a share thereof. The defendants are holding the same in trust for them.
- c. An order for rectification of register cancelling the entries that reflect the defendants at the material times as the registered owners of L.R NO KIMILILI/KIMILILI/2159.
- d. The plaintiffs further claim for a declaration that at all material times there was created and existed a constructive trust in favour of ISAAC KIMUNGUYI KUYI (in respect of whose Estate the 1st and 2nd defendants are legal administrators) this must be a typing error meant to be the 1st and 2nd plaintiffs), and the other plaintiffs over the subject property.

e. A permanent injunction against the 2nd defendant restraining him from demolishing or doing any construction works on the premises situate upon LR NO KIMILILI/KIMILILI/2159, forcing out the tenants that are in the premises, or in any manner impairing the plaintiffs, their tenants from peacefully using the premises and the land, alienating, selling and/or in any manner transacting with the land.

f. Costs.

The basis of the plaintiff's case is that the late **KUYI** and the 1st defendant were brothers both being the sons of the late **NAMAKA** who, prior to his demise, had acquired motor vehicles and parcels of land totaling 52 acres comprised in various titles some of which had not yet been transferred to him. That the 1st defendant was the administrator of the Estate of the late **NAMAKA** who had pointed out and allocated each of his sons land to inherit. That **NAMAKA** had developed a bakery on the suit property where he was carrying on business and after his demise, his daughter (1st plaintiff), wife (2nd plaintiff) and son **EMMANUEL MAKOKHA** (husband to the 4th plaintiff) continued staying on the premises developed on the suit property which had been purchased from one **PASCAL NABWANA** who however had not yet transferred it to **NAMAKA**. That the said suit property was intended for **NAMAKA**'s widow and her three sons being **KUYI**, the 1st defendant and **EMMANUEL MAKOKHA KUYI** the husband to the 4th plaintiff. Prior to her demise, **NAMAKA**'s widow **BERITA NASAMBU KUYI** handed over the documents to the suit property to the 1st defendant to procure the registration of the same into her names. That from 1989, **KUYI** had been having tenants in his share of the suit property where the plaintiffs have also been carrying on business. However, on 18th May 2011, the plaintiffs were surprised to discover that the 2nd defendant had issued notices to all the tenants in the suit property to be paying rent to him. It was then that the plaintiffs discovered that on or about 17th March 1995, the 1st defendant had without their knowledge registered the suit property in his names and thereafter, on or about 13th May 2011, he had transferred it to the 2nd defendant.

It is the plaintiff's case that the registration of the suit property in the names of the 1st defendant and subsequently the 2nd defendant was fraudulent, unlawful and unprocedural. Particulars thereof have been pleaded in paragraph 25 of the amended plaint as follows: -

- 1. Fraudulently obtaining a Land Control Board Consent.**
- 2. Causing the suit property to be registered in his names contrary to the desire of the widow of the deceased (NAMAKA) and the entire family.**
- 3. Presenting to the Land Registrar forged transfer documents.**
- 4. Causing the property to be registered in his names without a valid Land Control Board Consent.**
- 5. Registering in his names property which for all purposes and intents was belonging to the Estate of the deceased's widow without first obtaining Letters of Administration.**
- 6. Deliberately and in bad faith wanting to disinherit others.**

The plaintiffs further pleaded that at all material times there existed a constructive trust in their favour in respect of the specific portion of the subject property as alluded herein above. The particulars of that trust were pleaded in paragraph 25A as follows: -

- a. The suit property belonged to the deceased prior to his demise.**
- b. The suit property therefore was entitled to by all beneficiaries of the Estate at any time it was to through (sic) registration become part of the Estate of the deceased.**
- c. The suit property got registered or ought to have been registered in the names of the 1st defendant not as absolute owner but as legal representative of the Estate of the deceased.**
- d. The intention of the widow is express on the trust.**

The plaintiffs therefore pleaded that the transfer of the suit property to the 2nd defendant by the 1st defendant was invalid. That the 2nd defendant has now embarked on demolishing parts of the premises on the suit property hence this suit.

Together with the amended plaint, the plaintiffs filed the statements of the following witnesses: -

- 1. JOAKIM NAMASAKA MUCHONJI (PW 1)**
- 2. MARY LUMBASI the 3rd plaintiff (PW 2)**
- 3. SARAH MATEYI KIPTENGELE the 2nd plaintiff (PW 3)**

They also filed their list of documents dated 20th June 2018 and 30th April 2019.

In his statement dated 24th August 2018 **JOAKIM NAMASAKA MUCHONJI (PW 1)** stated that he knew both **NAMAKA** and **JOSEPH PASCAL NABWANA** very well. He recalled that in 1972, **JOSEPH PASCAL NABWANA** sold to **NAMAKA** and **ZAPHANIA WASIKE** a piece of land at **KIMILILI "B" MARKET** measuring 100 ft by 100 ft which was subsequently registered as land parcel **NO KIMILILI/KIMILILI/2159** the suit property herein. He added that the suit property was never sold to the 1st defendant. That he was a witness to the transaction and in 1993, he accompanied **BERITA NASAMBU KUYI** the wife of **NAMAKA** to the Land Control Board where **BENARD EMMANUEL NABWANA** the son of **JOSEPH PASCAL NABWANA** (then deceased) was to execute the transfer. That the family of **NAMAKA** has been staying on the suit property.

In her statement dated 30th April 2019. **MARY LUMBASI (PW 2)** and who is the 3rd plaintiff states that she is the wife to the 1st defendant having been married in 1974. That his father – in - law **NAMAKA** had three sons and owned various properties within **BUNGOMA COUNTY** including the suit property situated in **KIMILILI** and which had been purchased by his father in law **NAMAKA** from the late **PASCAL NABWANA**. That she and the 1st defendant had put up their matrimonial home on a property in **CHEBUKWABI** which the 1st defendant had been given by his father but she moved from there in 1991 due to insecurity and joined her mother – in – law on the suit property where both **KUYI** and **EMMANUEL MAKOKHA**, husband to the 4th plaintiff, were also living. However, by the time **NAMAKA** passed away, the suit property had not yet been transferred to him by the vendor **PASCAL NABWANA** although his family was willing to execute the transfer once a legal representative had been appointed. The vendor's son **EMMANUEL BENARD NABWANA** was later appointed as the legal representative of his father's Estate and was even ready to testify in this case having recorded a statement but he passed away before he could do so. That the suit property was intended to benefit all the sons of **NAMAKA** and before she died, **NAMAKA**'s widow had given each of the three sons a share of the suit property where some did business while others rented. Her husband **EMMANUEL MAKOKHA** put up an Agrovet shop while the 1st defendant put up a posho mill. **KUYI** rented his portion. In 2004, the 1st defendant retired and moved out with his other wife to the land at **CHEBUKWABI** where he engaged in farming but also started selling portions of the land. The 2nd plaintiff remained on the suit property doing business and was surprised in May 2011 when people went to renovate the premises on the suit property and it was then that she learnt that it had been sold to the 2nd defendant who is in fact their relative. She told him that the suit property belongs to her family and that each of **NAMAKA**'s sons has a share therein. It was then that they discovered that the 1st defendant had fraudulently transferred the suit property to his names and subsequently to the 2nd defendant. That during the **"LUFU"** ceremony, the suit property was listed as part of **NAMAKA**'s property and the 1st defendant did not express any contrary view. She stated that the 1st defendant never purchased the suit property.

SARAH MATEYI KIPTENGELE (PW 3), and who is the 2nd plaintiff herein, recorded a witness statement on 20th June 2018 in which she confirmed that her late husband **KUYI** and the 1st defendant were brothers both being the sons of the late **NAMAKA** who had three sons. That at his demise, the late **NAMAKA** left behind motor vehicles and parcels of land among them the suit property on which he had put up a bakery. The property was also being occupied by her husband and **EMMANUEL MAKOKHA** the husband to the 4th plaintiff as well as their mother in law. That all the heirs of **NAMAKA** were entitled to benefit from a share of the suit property which had been purchased from one **PASCAL NABWANA** who however had not yet transferred it to **NAMAKA** by the time the latter died. The legal representative of **PASCAL NABWANA** intended to transfer the suit property to the widow of **NAMAKA** who by the time of her demise had already allocated each of her three sons i.e. **KUYI**, the 1st defendant and **EMMANUEL MAKOKHA** the husband to the 4th plaintiff a share. She had however given the transfer documents to the 1st defendant to obtain the title in her names by the time of demise. By that time her husband **KUYI** had tenants in his share of the suit property while the 3rd plaintiff was carrying on business in the share of her husband the 1st defendant herein. The 4th plaintiff had tenants in the share of her husband **EMMANUEL MAKOKHA**.

The plaintiffs later discovered that the 1st defendant had registered the suit property in his names and subsequently transferred the same to the 2nd defendant fraudulently and in breach of trust.

The defendants filed separate defences as well as their statements and those of their witnesses. They also filed their respective list of documents.

STEPHEN LUMBASI KUYI (the 1st defendant) filed an amended defence dated 10th July 2019 and denied that his father **NAMAKA** left behind plots in various markets or that he had developed the suit property where he was carrying on bakery business at the time of his demise and where the plaintiffs were living. The 1st defendant also denied that **NAMAKA** had purchased the suit property from **PASCAL NABWANA** which had not been transferred to him at the time of his demise or that the said property was meant for his widow. He also denied that **NAMAKA**'s widow had, before her demise, shared out the suit property between **KUYI**, the 1st defendant and **EMMANUEL MAKOKHA KUYI** the husband to the 4th plaintiff. He similarly denied that **NAMAKA**'s widow had, before her demise, handed over the documents to the suit property to him (1st defendant) together with stamp duty for purposes of obtaining the title deed or that **KUYI** had since 1989 been having tenants in the said property. He also denied that his wife the 3rd plaintiff has been operating a business in his (1st defendant's) portion of the suit property or that **EMMANUEL MAKOKHA**, who is the 4th plaintiff's husband and lives outside the country, had given her his share of the suit property as a gift. The 1st defendant pleaded that the suit property belonged to him having acquired it from the initial owner at an agreed consideration after which he sold it to the 2nd defendant in 2011. He added that the suit property did not form part of the Estate of **NAMAKA** and neither did he hold it in trust. He therefore denied the allegations of fraud and illegality in the manner in which he obtained it. He pleaded that the plaintiffs have never had any proprietary interest in the suit property which was the subject of **BUNGOMA HIGH COURT SUCCESSION CAUSE No 69 of 1990** whose particulars thereof are within the full knowledge of the plaintiffs. Therefore, this case is a non – starter and a Preliminary Objection would be taken questioning the jurisdiction of this Court to determine this dispute and urged that the suit be dismissed with costs.

The 1st defendant filed two witness statements dated 6th July 2011 and 6th November 2019. He also filed three lists of documents dated 6th July 2011, 10th July 2019 and 6th November 2019. He also filed witness statements of the following witnesses: -

1. AMONA WASIKE – DW 2

2. CHRISTOPHER MASIBO WASIKE – DW 3 and

3. PAULINE NAMBUYE LUMBAI

The 1st defendant's statement dated 6th July 2011 and filed herein on 11th July 2011 is very brief in which he simply denies the plaintiffs' claim and urges the Court to dismiss it with costs.

His statement dated 6th November 2019 and filed on 7th November 2019 is more elaborate and in it, he confirms that he is the eldest son of **NAMAKA** and **BERTA NASAMBU KUYI**. That he was a major contributor of all the properties acquired by his late father having been a teacher and also engaged in bakery business. That whereas the suit property was acquired by **NAMAKA** and **ZEPHANIA WASIKE** for their first born children being the 1st defendant and **CHRISTOPHER MASIBO WASIKE** and later sub – divided it. That other than the suit property, he and his late father also jointly purchased the following properties: -

1. Land parcel NO KIMILILI/KIBINGEI/309.

2. Land parcel NO KIMILILI/KIBINGEI/269.

3. Land parcel NO KIMILILI/KIBINGEI/269.

That the plaintiffs did not contribute to the purchase of the suit property and in 1990, with the consent of all the family, he applied for a grant in respect of his father's Estate and distributed it in line with the family's wishes.

That the 1st and 2nd plaintiffs have never stayed on the suit property and have their own land parcels being **KIMILILI/KIBINGEI/302** and **305** respectively where they have put up commercial businesses. That **KUYI** sold his land parcel **NO KIMILILI/KIBINGEI/1625** to **JOSEPH WANJALA SATIA** while their younger brother **EMMANUEL MAKOKHA** sold his land parcel **NO KIMILILI/KIBINGEI/1595** to **MERUNI WALIMO**. That he is the one who developed the suit property by constructing the premises thereon and when **EMMANUEL MAKOKHA** was shot by a stray bullet in South Africa and needed money for treatment, he sold the suit property to the 2nd defendant. That the suit property belongs to him as confirmed by the minutes of the "**LUFU**" ceremony held on 6th September 1983 and at no time did his late mother hand over the transfer documents relating to the suit property to him and therefore the plaintiffs' claim is misguided and should be dismissed with costs.

AMONA WASIKE (DW 2) recorded a brief two sentence statement dated 6th November 2019 in which he stated that he was the secretary and took minutes during the "**LUFU**" ceremony on 6th September 1983 following the demise of **NAMAKA**. He adopted that statement during the trial and added that "**LUFU**" for a man is done after 4 days and for a lady after 3 days following the burial. During the plenary hearing however, he told the Court when cross – examined that "**LUFU**" for a man is done 3 days after burial and for a lady, it is after 2 days. He was however emphatic that no "**LUFU**" could have been done for **NAMAKA** on 5th September 1983 and insisted that it was held on 6th September 1983 and he was the secretary. Minutes of the "**LUFU**" ceremony held on 6th September 1983 were annexed to his statement and produced as part of the 1st defendant's documents.

CHRISTOPHER MASIBO WASIKE (DW 3) also recorded a brief six (6) paragraph statement dated 6th November 2019 in which he stated that **NAMAKA** was his cousin and a great friend of his father **ZEPHANIA WASIKO MASIBO**. That the two friends purchased a plot measuring 100 ft by 100 ft from one **JOSEPH PASCAL NABWANA** for their first born sons being the **STEPHEN LUMBASI KUYI** (1st defendant) and himself. That the 1st defendant who was a teacher contributed towards the purchase price. That the said plot was later shared equally between him and the 1st defendant whose portion was registered as parcel **NO KIMILILI/KIMILILI/2159**.

PAULINE NAMBUYE LUMBASI (DW 4) is the wife to the 1st defendant and a co – wife to the 3rd plaintiff. In her statement also dated 6th November 2019, she states that when she married the 1st defendant in 1974, they lived at **CHEBUKWABI** market on plot NO 16 which belonged to her father – in - law but was developed jointly by him and the 1st defendant. That the two were doing bakery business on the said plot. Upon the demise of **NAMAKA**, the said plot was shared between the 1st defendant, **KUYI** and **EMMANUEL MAKOKHA**. She added that it was the 1st defendant who developed the suit property by putting up rental houses and shops in 1986. She denied that the suit property was developed by **NAMAKA** or that the plaintiffs were occupying it.

SAMSON TOYWA the 2nd defendant filed his amended statement of defence on 17th September 2019 in which he denied the plaintiffs' averments and pleaded that the suit property was not part of the Estate of **NAMAKA**. He added that the suit property was registered in the names of the 1st defendant having been transferred from **BERNARD M. NABWANA** in 1995 and none of the beneficiaries to the Estate of **NAMAKA** raised any objection. That **NAMAKA** was never registered as the proprietor of the suit property and therefore the plaintiffs are not entitled to the same. He denied having obtained the suit property fraudulently illegally or unprocedurally adding that his registration as the proprietor thereof was done above board. He added further that the concept of constructive trust does not therefore apply and there is no privity of contract nor Estate between himself and the plaintiffs. Further, that the plaintiffs' claim is statute barred by dint of **Section 7 of the Limitation of Actions Act** and this suit is also bad in law as it seeks to challenge the distribution of a deceased person's Estate and Preliminary Objection would be raised. The 2nd defendant prayed for the dismissal of the plaintiffs' suit with costs.

In his witness statement dated 11th October 2014, he reinstated that he is the proprietor of the suit property having purchased the same from the 1st defendant vide an agreement dated 11th April 2011 at a consideration of Kshs. 1,200,000/=. That before executing the sale agreement, he conducted a search and executed all the necessary documents as required by law including obtaining the consent of the Land Control Board. That this suit is therefore instituted in bad faith merely as an afterthought to frustrate him from developing the suit property.

Although he also filed witness statements of **GLADYS TOYWA** and **GEORGE BUSURU**, they did not testify. He however filed his list of documents dated 11th October 2014.

During the plenary hearing which commenced on 20th January 2020, the parties and their witnesses adopted as their evidence their statements which I have already referred to above. They also produced as their documentary evidence their list of documents. Submissions were thereafter filed by **MR OCHARO** instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the plaintiffs, **MR BWONCHIRI** instructed by the firm of **OMUNDI BWONCHIRI ADVOCATES** for the 1st defendant and by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the 2nd defendant.

I have considered the evidence by the parties including the documents produced and the submissions by Counsel.

Before I delve into the evidence, I must first address two legal issues which, though pleaded, were not raised as Preliminary Objection or even during the plenary hearing. However, both are issues of law which this Court is entitled to raise even suo motto. This is because they go to the jurisdiction of this Court to determine this dispute and must therefore be determined at the earliest opportunity – **OWNERS OF THE MOTOR VESSEL “LILLIAS S” .V. CALTEX OIL (KENYA) LTD 1989 KLR 1**.

Both defendants questioned the jurisdiction of this Court to determine this dispute on the basis that it involves the administration of the Estate of a deceased person and is therefore the preserve of the **HIGH COURT**. That in fact the suit property was the subject of succession proceedings in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 69 of 1990** particulars whereof are within the knowledge of the plaintiffs. The simple answer to the above is that I have perused the confirmed grant issued in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 69 of 1990** (the form **P & A 54** bears the name **HIGH COURT NAIROBI** but that is clearly an error) and the suit property is not listed among the properties therein. Therefore, the issue regarding the ownership of the suit property was never determined in that succession cause. Secondly, the plaintiffs herein have pleaded the concept of a constructive trust with respect to the suit property. Since the suit property was not a subject in the succession cause, the issue of trust was not determined in that cause and in any event, there is nothing to show that the plaintiffs were parties in that cause and raised any protests with regard to the suit property.

The 2nd defendant further pleaded in paragraph 9 that the plaintiffs' claim is statute barred by dint of **Section 7** of the **Limitation of Actions Act**. That provision reads: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

However, **Section 26** of the same Act provides, in so far as is relevant, that: -

“Where in the case of an action for which a period of limitation is prescribed, either –

- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- b. the right of action is concealed by the fraud of any such person as aforesaid; or**
- c. the action is for relief from the consequences of a mistake.**

the period of limitation does not begin until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.”

In paragraphs 22, 23 and 26 of their amended pleadings, the plaintiffs have pleaded as follows: -

22: “The plaintiffs do aver that on or about the 18th of May 2011, they were startled when it dawned upon them that the 2nd defendant had issued notices to all the tenants in the premises situate upon the title hereinabove mentioned, requiring them to pay rent to him as owner of the property.”

23: “it dawned on the plaintiffs that on or about the 17th March 1995, without their knowledge, the 1st defendant had caused the subject property to be registered in his names.

26: “The plaintiffs aver that on or about the 13th day of May 2011, the 1st defendant transferred the title KIMILILI/KIMILILI/2159 to the 2nd defendant.”

The particulars of fraud, illegality and want of procedure are pleaded in paragraph 25 of the said pleadings. It is therefore clear from the above pleadings that although the 1st defendant was registered as the proprietor of the suit property on or about 17th March 1995, it was not until on or about 18th May 2011 that the plaintiffs made that discovery. This suit was first filed on 31st May 2011, the same year that the plaintiffs made the discovery, before being amended on 20th June 2018. Clearly, the plaintiffs' claim is not caught up the provisions of **Section 7** of the **Limitation of Actions Act**.

Secondly, on the issue of limitation, the plaintiffs have pleaded a constructive trust. It is their claim that the suit property belonged to

NAMAKA prior to his demise and was registered in the names of the 1st defendant not as absolute owner but as a legal representative of the Estate of **NAMAKA**. That will of course be determined by the evidence herein. However, as was held in **STEPHENS & SIX OTHERS .V. STEPHENS & ANOTHER 1987 eKLR**, no plea of limitation is available to a fiduciary in an action to recover trust property which the trustee has converted to his own use. The plea of limitation is therefore not available to the defendants. The plaintiffs' claim is not statute barred.

I shall now consider the merits or otherwise of the plaintiffs' case. I consider the following to be the pertinent issues for my consideration: -

- 1. Did NAMAKA purchase the suit property or does it belong to the 1st defendant?**
- 2. Was the registration of the 1st defendant as the proprietor of the suit property fraudulent, unlawful and irregular?**
- 3. Did the 1st defendant pass a valid title in the suit property to the 2nd defendant?**
- 4. Is the 2nd defendant a bona fide purchaser for value without notice or his title is equally tainted?**
- 5. Was the 1st defendant a mere trustee holding the title to the suit property in trust or is it his sole property?**
- 6. Are the plaintiffs entitled to the orders sought in their plaint?**
- 7. Who bears the costs?**

At the commencement of this Judgment, I pointed out that other than the 2nd defendant, the rest of the parties are a family. It is the plaintiffs' case that the suit property was among the various properties which **NAMAKA**, the husband to the 2nd plaintiff and father to **KUYI**, the 1st defendant and **EMMANUEL MAKOKHA** (husband to 4th plaintiff) acquired during his life time and that the same was meant for the benefit of his family. That **NAMAKA**'s widow **BERITA NASAMBU KUYI** handed over the documents to the suit property to the 1st defendant to enable him acquire the title thereto in his names but he fraudulently registered it in his names. The 1st defendant has strenuously denied those averments and in paragraph 16 of his amended defence, he has pleaded that infact the suit property belongs to him having acquired the same from the initial owner at a consideration. He adds further in paragraph 18 that the plaintiffs have no proprietary interest in the suit property.

Among the documents produced by the plaintiffs is an agreement dated 25th March 1972 between **ZEPHANIA WASIKE MASIBO** and **NAMAKA** as purchasers, and **J. P. NABWANA** as vendor over a plot at **KIMILILI MARKET** measuring 100 feet by 100 feet. The agreement is signed by both the purchasers and the vendor. Among the witnesses to that agreement is **JOAKIM NAMASAKA (PW 1)** who testified in support of the plaintiffs' case and adopted as his evidence, his statement dated 24th August 2018. In that statement, he confirms that he witnessed **JOSEPH PASCAL NABWANA** selling a plot at **KIMILILI MARKET** to both **NAMAKA** and **ZEPHANIA WASIKE**. That the agreement was executed in 1972 and the plot measured 100 feet by 100 feet and later in 1993, he accompanied **NAMAKA**'s widow **BERITA NASAMBU JUJI** to the Land Control Board where **JOSEPH PASCAL**'s son **BENARD EMMANUEL NABWANA** was to transfer the plot, which he adds later became parcel **NO KIMILILI/KIMILILI/2159**, to **BERITA NASAMBU KUYI**. During the plenary hearing, he could not remember the land parcel number but there can be no doubt that the plot measuring 100 feet by 100 feet which was the subject of the agreement dated 25th March 1972 can only be the suit property as stated by the witness in his statement since there is nothing to suggest that **NAMAKA** bought any other property at **KIMILILI** market from **JOSEPH PASCAL NABWANA** in 1972. In his statement dated 6th November 2019, the 1st defendant stated that he contributed towards the purchase price since he was then a teacher. He does not however say what his contribution was. When he was cross – examined by **MS RATEMO** Counsel for the plaintiffs, he said: -

“I was a teacher. It is true that my father acquired properties. There was property belonging to my father and my property. It is true that it was my late father who bought the plot in dispute. It is me who gave him the money. I have no evidence that I gave him the money.”

When he was re – examined by his Counsel **MR BW'ONCHIRI** he said: -

“In 1972 I gave my father 400/= and his partner ZEPHANIA also paid 100/=. I was a teacher in 1972.”

Clearly, the 1st defendant was not being candid with the Court. He was testifying from both sides of his mouth saying one thing from one side and another thing from the other side. That is clear evidence of a dishonest witness with no respect for the truth. It is no wonder therefore that in her ruling delivered on 21st May 2013 in which she granted the plaintiffs' orders injunctioning the defendants from interfering with the tenants on the suit property or demolishing the premises thereon, **OMOLLO J** said the following about the 1st defendant: -

“He also denied at paragraph 6 that the deceased left behind certain vehicles and land parcels which had not been registered in his name. His affidavit is merely full of denials. He does not explain how he acquired the suit property. He has only made a flimsy attempt at paragraph 10 that the transfer took place after consideration exchanged hands. He does not state how much was the consideration, when he paid for it and copies of documents transferring the plot to him have not been annexed to his affidavit. Had he done so, the Court would have deciphered whether it was transfer on transmission or transfer for consideration. Such doubt created, it can only be safe to preserve the status quo as it to determine real issues during the hearing.”

Having now heard the evidence herein, I have no doubt that the suit property was purchased by **NAMAKA** in 1972 and that neither the 1st defendant, nor any of his other children for that matter, made any contribution towards the purchase thereof. Indeed, this was also confirmed by the 1st defendant's own witness **AMONA WASIKE (DW 2)** who, upon being cross – examined by **MR OCHARO** Counsel for the plaintiffs said: -

“The land in dispute was bought by the deceased ALFRED KUYI NAMAKA. I don't know if he had transferred the land in dispute prior to his death.”

The same witness also stated as follows with regard to **NAMAKA** when cross – examined by **MR OCHARO**: -

“I knew the deceased. He was first a teacher then he became an Inspector of the Maize Marketing Board. He was also a member of the Land Control Board. He had bought several plots and parcels of land.”

NAMAKA was therefore a person who could afford to purchase the suit property and the 1st defendant's suggestion that he was the one who purchased it, or made contribution, must fall flat on it's face.

The plaintiffs have pleaded that the 1st defendant registered the suit property in his names through fraud, illegality and want of procedure. Among the allegations of fraud, illegality and want of procedure levelled against him in paragraph 25 of the amended plaint is that he registered the suit property in his names contrary to the desire of the widow of **NAMAKA**, registering in his names property which for all purposes and interest belonged to the Estate of a deceased without obtaining Letters of Administration and deliberately wanting to disinherit others. This Court has already made a finding that the suit property was purchased by **NAMAKA**. Therefore, following his demise, the suit property became part of his Estate. The record shows that among the documents produced by the 1st and 2nd defendants is the Grant of Letters of Administration issued to the 1st defendant on 16th January 1991 in respect to the Estate of **NAMAKA** by the **SENIOR RESIDENT MAGISTRATE'S COURT BUNGOMA in SUCCESSION CAUSE No 69 of 1990**. That Grant was subsequently confirmed on 27th November 1991. However, the suit property is not among the properties listed in the Grant and that omission could only have been deliberately done by the 1st defendant in an attempt to treat the suit property as belonging to him and not to **NAMAKA**. By registering the suit property in his names on 17th March 1995 and the subsequent transfer to the 2nd defendant on 13th May 2011, the 1st defendant was intermeddling with the Estate of **NAMAKA** which is a criminal offence under **Section 45 of the Law of Succession Act**. The duty of an Administrator is to collect and preserve the Estate of a deceased person for the benefit of his heirs. What the 1st defendant did was to exclude the suit property from the inventory of the deceased's Estate for the sole purpose of treating it as his own. That was not only fraudulent but also amounted to a criminal offence. Contrary to the submissions of both the 1st and 2nd defendants Counsels, the plaintiffs have not only pleaded but also strictly proved the allegations of fraud as was held in the case of **VIJAY MORJARIA .V. NANSING MADHUSING DARBAR & ANOTHER 2000 eKLR**. See also **RATILAL PATEL .V. LALJI MAKANJI 1975 E.A 314** which has been cited by Counsel for the 2nd defendant.

It is also instructive to note that in her evidence, the 2nd plaintiff told the Court that **BERITA NASAMBU KUYI** the widow of **NAMAKA** had given the documents relating to the suit property to the 1st defendant so that he could process and acquire the title deed to the suit property in her names. That is contained in paragraph 15 of her statement. **BERITA NASAMBU KUYI**, as per the Certificate of Death, died on 16th February 1994 and the suit property was registered in the 1st defendant's names a year later on 17th March 1995. That could not have been a coincidence. Rather, it is evidence demonstrating that the 1st defendant waited until the demise of his mother, in whose names the suit property should have been registered to hold for the family, before executing the fraudulent and illegal transfer of the suit property in his names.

Having obtained the registration of the suit property fraudulently and illegally, the 1st defendant had no legal interest therein which he could pass to the 2nd defendant. The 1st defendant had essentially stolen the suit property from the Estate of **NAMAKA**. And as was held in **JANE GATHECHA .V. PRISCILLA GITUNGU & ANOTHER 2008 eKLR** which has been cited by Counsel for the plaintiffs: -

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

Therefore, even though the 1st defendant pleaded that the suit property belonged to him and the 2nd defendant pleaded that he obtained a valid title from the 1st defendant, the truth of the matter is that their titles are not protected by **Article 40 of the Constitution** because under **sub – Article (6)**, it is provided that: -

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

Contrary to the submissions by Counsel for the 2nd defendant that the 2nd defendant's title is protected by the provisions of **Section 28** of the repealed **Registered Land Act**, it is now clear that both his title and that of his predecessor the 1st defendant can be impeached.

Further evidence that the registration of the suit property in the names of the 1st defendant and the subsequent transfer thereof to the 2nd defendant was shrouded in fraud and illegalities is discernible in the fact that he kept the plaintiffs herein in the dark. It is common ground that even as the 1st defendant was transferring the suit property to the 2nd defendant vide the sale agreement dated 11th April 2011, the plaintiffs were in occupation of the same carrying on businesses and renting part of the premises to tenants. And one month after the sale agreement, the 2nd defendant issued a notice dated 18th May 2011 informing the tenants that he had acquired the ownership of the suit property and directing the tenants to henceforth pay the rent into his account. That startled the plaintiffs who promptly moved to the Court

on 31st May 2011 and obtained injunctive reliefs restraining the 2nd defendant from interfering with their tenants or carrying out any construction works on the suit property. If indeed the suit property belonged to the 1st defendant and knowing very well that the plaintiffs who were his relatives were utilizing it, it would have been expected, as a sign of good faith, that he would have informed them directly that he intended to dispose of it. After all, if it was his sole property, he would have nothing to fear. But rather than do that, he surreptitiously transferred it to the 2nd defendant and hid behind the notice dated 18th May 2011 to actualize the fraud. Unfortunately for him, the Courts of equity are not blind and his veil of fraud has been lifted.

Is the 2nd defendant an innocent and bona fide purchaser for value without notice? From what I have already stated above, he cannot claim to be one. His Counsel has submitted, citing the case of **JOYCE WANJIKU MADEN & ANOTHER .V. DANIEL KAIRI KIARAHO & OTHERS 2014 eKLR**, that the 2nd defendant was not a party nor have knowledge of any fraud and so his title cannot be impeached. But was the 2nd defendant really an innocent and bona fide purchaser? In the recent case of **ELIZABETH GITHINJI & 20 OTHERS .V. KENYA URBAN ROADS AUTHORITY & OTHERS 2019 eKLR**, the Court of Appeal described the rights of such a person as follows: -

“The Courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing.”
Emphasis added.

In **KATENDE .V. HARIDAL & COMPANY LTD 2008 2 E.A 173**, a Ugandan decision which has been affirmed by our Courts, it was stated thus with regard as to what constitutes an innocent or bona fide purchaser: -

“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:-

- a. he holds a Certificate of title;**
- b. he purchased the property in good faith;**
- c. he had no knowledge of the fraud;**
- d. he purchased for valuable consideration;**
- e. the vendors had apparent valid title;**
- f. he purchased without notice of any fraud;**
- g. he was not a party to any fraud.**

A bona fide purchaser of legal Estate without notice has absolute unqualified and answerable defence against claims of any prior equitable owner.”

In paragraph 8 of his amended defence, the 2nd defendant pleaded that he is a bona fide purchaser from the 1st defendant who had a valid title to the suit property and that he is therefore entitled to exclusive possession and development thereof. And in paragraph 4 of his witness statement dated 11th October 2014, he states as follows: -

4 “That before executing the agreement, I did carry out search and land was clean and registered in the names of the 1st defendant.”

The onus was really on the 2nd defendant to show that indeed he is an innocent and bona fide purchaser for value. This is because, the onus of conducting due diligence fell on him and other than carrying out the search, it was important that he inspects the suit property to confirm that it was not only free from any encumbrances but most importantly, that it was available for occupation and possession.

There is no doubt that the 1st defendant had a title to the suit property for which the 2nd defendant paid valuable consideration at least if the sale agreement dated 11th April 2011 is anything to go by. However, the 2nd defendant can hardly be described as having acted in good faith without any knowledge of fraud. Certainly not from the evidence herein which clearly shows that the 2nd defendant knew all along that the plaintiffs who are relatives of the 1st defendant were utilizing the suit property and also carrying on businesses therein. This is what he said when he was cross – examined by **MR OCHARO**: -

“Before I purchased the land, I visited it. It is true that the 3rd plaintiff MARY LUMBASI was staying there. PAULINE NAMBUYE was also doing business there. So too was SARAH KIMUNGUI the 2nd plaintiff. I did not see ISAAC KIMUNGUI doing business on the land.”

When I cross – examined **SARAH KIMUNGUI** the 2nd plaintiff about who was utilizing the premises on the suit property, she said: -

“The plot in dispute is utilized currently by myself and the other plaintiffs since it was distributed. When I went there in 1989, I found them using it.”

Given those undisputed facts, the least that the 2nd defendant should have done would have been to engage the plaintiffs and inform them of his desire to purchase the suit property. After all, the suit property was not vacant and since the 2nd defendant knew the relationship between the plaintiffs and the 1st defendant, due diligence required of him to find out if they had any interest in the suit property before purchasing it. The presence of the plaintiffs and tenants on the suit property ought to have flashed the red light and made him more cautious. Surely, common sense would demand that a person who visits a prospective spouse to arrange their wedding only to find a third party lying comfortably on the bed ought to run away very fast without looking back and put the wedding plans on hold until the status of the third party is satisfactorily explained. That is of course unless that person is prepared to enter into a polyandrous or polygamous relationship whichever the case may be. The 2nd defendant did not seem to care that the suit property was developed and occupied by tenants including the relatives of the vendor who were known to him. Instead, he promptly issued notices and even commenced the demolition of part of the buildings thereon. He does not fall under the definition of a bona fide purchaser. If anything, his conduct strikes me as that of a person who was being used by the 1st defendant as a veil to conceal his fraudulent activities. A fraudulent act is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** to include: -

“Conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.”

There can be no doubt that the transactions by the 1st and 2nd defendants involving the suit property were fraudulent, illegal and un – procedural and do not portray the 2nd defendant as a bona fide purchaser.

Was the 1st defendant only a trustee holding the title to the suit property in trust or was it his private property?

I have already found above that the suit property was in fact purchased by **NAMAKA** for the benefit of his family and not by the 1st defendant. It is clear from the decision of the **SUPREME COURT** in the case of **ISACK M’INANGA KEBIA .V. ISAYA THEURI M’LINTARI & ANOTHER 2018 eKLR** that where land is held for the family, then a customary trust would be presumed and the person holding the title will qualify as a trustee. Other elements to be considered include that the registered proprietor is a member of the family and the relationship of those claiming the land is not so remote or tenuous as to make their claim idle or adventurous. It is common ground that the plaintiffs are still in occupation and possession of the suit property from the time it was purchased and developed by **NAMAKA**. The 1st defendant suggested that the plaintiffs have other properties elsewhere. That may be so. However, the fact that the plaintiffs may also own other land elsewhere does not extinguish any intents that they may have in the suit property.

Much time was spent by the parties canvassing the issue on when the **“LUFU”** ceremony, which by the parties’ custom, is held following the demise of a person where his property is identified and persons who have any claim are allowed to identify it, was held and whether the suit property featured. There was contrasting evidence as to whether the **“LUFU”** ceremony was held on 5th September 1983 or 6th September 1983. The 1st defendant testified that the **“LUFU”** ceremony was held on 6th September 1983. He was supported in that regard by **AMONA WASIKE (DW 2)**. He produced among his list of documents the minutes of the **“LUFU”** meeting dated 6th September 1983.

On the other hand, the 2nd plaintiff testified that the **“LUFU”** was actually held on 5th September 1983 and she also produced the minutes of that meeting. Counsel for the 1st defendant made the following submissions with regard to the **“LUFU”** meeting: -

“That the 1st defendant wished to state further that land parcel number KIMILILI/KIMILILI/2159 was his property and the same has never been in the names of their parents as can be confirmed from the LUFU minutes of 6.9.1983 which it was confirmed that it was purchased for the deceased’s first born son (i.e. the 1st defendant).”

Customary law is no doubt part of the law in this country. **Section 3(2)** of the **Judicature Act** makes that clear. Further, under **Article 11** of the **Constitution**, culture is recognized as the foundation of the Nation. But customary law is only applicable in so far as it is not repugnant to justice and morality or is inconsistent with any written law. I did not hear any of the parties alleged that under their customary law, a party cannot lay a claim to any property of a deceased person unless that is captured in the **“LUFU”** minutes. Neither did I hear them allege that any property that is not captured in the **“LUFU”** minutes as not belonging to a deceased person is enough evidence to defeat any claim by his Estate to such property. While the **“LUFU”** proceedings are important for the orderly identification of the assets and liabilities of a deceased’s Estate, such customary practices cannot be elevated to the extent of defeating clear statutory provisions both in civil and criminal law. Similarly, cultural practices cannot be invoked to perpetuate what would clearly be an injustice hence the qualification in the **Judicature Act**. My take in this case is that the contrasting testimonies surrounding the issue of **“LUFU”** did not aid any of the parties herein. Indeed, none of them held themselves out as experts in the matter.

Counsel for the 1st defendant also questioned the capacity of the plaintiffs to file this suit. It is his submission that the plaintiffs have pleaded under paragraph 4 of the amended plaint that they are **“sons of the late ALFRED KUYI NAMAKA”** and therefore ought to have taken out Letters of Administration in respect to his Estate to enable them file this suit. It is however clear from paragraph 2 of the amended plaint that the 1st and 2nd plaintiffs have described themselves as having filed this suit as **“legal representatives of the Estate of ISAAC KIMINGUI KUYI suing herein both on their own behalf and that of the Estate of ISAAC KIMINGUI KUYI.”** The 3rd and 4th plaintiffs on the other hand have not described themselves as suing on behalf of any Estate. Clearly, the plaintiffs also filed this suit as persons who occupy and have an interest in the suit land. Their locus standi cannot be doubted.

I am persuaded from the evidence that the 1st defendant was a mere trustee holding the title to the suit property in trust for the family. The transfer of the same to the 2nd defendant was always subject to that trust. The plaintiffs are therefore entitled to the remedies sought in the plaint.

With regards to costs, they follow the event. However, the plaintiffs and the 1st defendant are a family and this Court would not wish to set them up against each other any longer. The 2nd defendant however was not an innocent by-stander in the processes that necessitated these proceedings. He will meet the plaintiffs' costs.

Ultimately therefore, there shall be Judgment for the plaintiffs against the defendants in the following terms: -

- 1. A declaration that the registration of the 1st defendant as the owner of the land parcel NO KIMILILI/KIMILILI2159 was unlawful, fraudulent, unprocedural and malafides and that consequently, the transfer of the same to the 2nd defendant was invalid.**
- 2. A declaration that the land parcel NO KIMILILI/KIMILILI/2159 formed part of the property of the Estate of the late ALFRED KUYI NAMAKA and subsequently that of the Estate of his widow and therefore the plaintiffs are entitled to a share thereof and the defendants hold the same in trust for them.**
- 3. An order for the rectification of the register to the land parcel NO KIMILILI/KIMILILI/2159 cancelling the registration of the 2nd defendant as the registered owner and substituting therewith an entry that the same is registered in the names of the 1st defendant in trust for the plaintiffs and himself.**
- 4. A declaration that the 1st defendant holds the land parcel NO KIMILILI/KIMILILI/2159 in trust for the plaintiffs and himself.**
- 5. A permanent injunction against the 2nd defendant restraining him, his agents, servants or any other person whatsoever acting under him from demolishing or doing any construction works on the premises situated upon the land parcel NO KIMILILI/KIMILILI/2159, forcing out the tenants that are in the premises or in any manner impairing the plaintiffs and their tenants from peacefully using the premises on the said land through alienation, selling and/or in any manner transacting with the said land.**
- 6. The 2nd defendant shall meet the plaintiffs' costs.**

Boaz N. Olao.

J U D G E

23rd February 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 23rd day of February 2021 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

23rd February 2021.