



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 186 OF 2014

SYLVESTER ATEYA WAMUKOYA.....1ST PLAINTIFF

ISMAEL OMINA OTITIRO.....2ND PLAINTIFF

VERSUS

VICTORINA APONDI KWANG'OTO1ST DEFENDANT

PAUSTINA AYONGO.....2ND DEFENDANT

LAWRENCE MBOYA MURUKA.....3RD DEFENDANT

ARNOLD OGOLA NAMUTECHÉ(deceased).....4TH DEFENDANT

GEOFFREY OUMA ODUOR.....5TH DEFENDANT

SHADRACK MUREMO ODUOR.....6TH DEFENDANT

KASSIM KWANG'OTO OKUMU.....7TH DEFENDANT

IBRAHIM ODUOR OKUMU.....8TH DEFENDANT

PATRICK WANZALA MULWOTO.....9TH DEFENDANT

REPUBLIC.....10TH DEFENDANT

J U D G E M E N T

1. The Plaintiffs brought this suit vide a plaint dated 18th September 2014 and subsequently amended and filed 19th November, 2015 impleading the Defendants in the suit and prays for judgement against the Defendants for:

- a) This Honourable Court be pleased and grant orders authorizing the 1st and 2nd Defendants herein to transfer seven (7) acres being part portion of L.R No. Marachi/Elukongo/1770 to the 1st Plaintiff therein;
- b) This Honourable be pleased and grant orders authorizing the 1st up to 9th Defendants herein to pay the Plaintiffs damages on agricultural accounts at the Court interest rates;
- c) This Honourable Court be pleased and grant orders authorizing the 9th Defendant herein to refund the surveying fees he received between the 29th day of October, 2010 and 27th day of July, 2014 but failed to perform the exercise;
- d) This Honourable Court be pleased to grant orders directing the 10th Defendant herein to revoke the Succession Cause No. 68 of 2009 in the High Court of Kenya at Busia, then amend the Busia Lands Registry registration of L.R No. MARACHI/ELUKONGO 1770 in the names of VICTORIA APONDI KWANGOTO AND PAUSTINA ANYANGO (1st and 2nd Defendants herein) who survived the late OKHUYA NAMUTECHÉ vide Succession Cause No. 62 of 2004 in the High Court of Kenya at Busia;

e) Any other remedy this Honourable Court finds just and expedient to grant; and

f) Costs hereof.

2. The Plaintiffs pleaded that the 1st Plaintiff purchased 5 acres of L.R No. MARACHI/ELUKONGO 1770 (**the Suit Property**) on the 4th day of December, 2012 from the 1st and 2nd Defendants as per the attached sale agreement. That on the 2nd day of May 2014, 1st and 2nd Defendants again sold to the 1st Plaintiff 1.5 acres from the said Suit Property.

3. The Plaintiffs pleaded further that they then engaged the services of the 9th Defendant and paid him KES 51,000/= between 29th October, 2010 and 27th August, 2013 for the purposes of ascertaining the seven (7) acres which the Plaintiffs had purchased from the 1st and 2nd Defendants with consent from the 2nd, 7th and 8th Defendants. However, the 9th Defendant never executed his mandate.

4. The 1st, 7th and 8th Defendants filed a joint statement of Defence on the 7th of January, 2016 admitting the Plaintiffs claim and alleging fraud on the part of the 3rd, 4th, 5th and 6th Defendants. They urged the court to make the following orders;

a) *This Honourable Court be pleased and nullify the subdivision of LR No. MARACHI/ELUKONGO 3406 & 3407 back to L.R No. MARACHI/ELUKONGO 1770 in the names of the 1st and 2nd Defendants herein then evict the 3rd up to 6th Defendants therefrom;*

b) *This Honourable Court be pleased and grant orders authorising the 3rd up to 6th and then 9th and 10th Defendants herein to pay the 1st Plaintiff herein as well as the 1st, 2nd, 7th and 8th Defendants damages on account of agricultural accounts at court interest rates;*

c) *This Honourable be pleased and grant orders that the 1st and 2nd Defendant shall subdivide and transfer a minimum of seven (7) acres to the 1st Plaintiff herein which was severally bought from L.R No. MARACHI/ELUKONGO 1770 by the 1st and 2nd Plaintiffs herein and witnessed by the 7th and 8th Defendants among other family witnesses.*

d) *This Honourable Court be pleased and grant orders that the 10th Defendant herein to revoke the Succession Cause No. 68 of 2009 in the High Court of Kenya at Busia, then amend the Busia Land Registry registration of L.R No. MARACHI/ELUKONGO 1770 in the names of Victoria Apondi Kwangoto and Paustina Anyango (1st and 2nd Defendants) who survived the late OKHUYA NAMUTECHÉ vide Succession Cause No. 62 of 2004 in the High Court of Kenya.*

5. The 2nd Defendant filed her statement of defence on the 22nd of June, 2016 vide the firm of Shitsama & Company Advocates denying the contents of the Plaintiffs and the fact that she ever sold the L.R No. MARACHI/ELUKONGO 1770 to the Plaintiffs. She states that the Suit Property is jointly registered in her names together with the 1st Defendant and there is no way a valid sale or legal sale can be done without the express authority and consent of both registered owners. She prayed that the Suit against the 2nd Defendant be dismissed.

6. The 3rd and 4th Defendants filed a joint statement of Defence on the 12th of April, 2016 denying all the allegations in the Plaintiffs and urging this Court to dismiss the suit with costs.

7. The 5th, 6th and 9th Defendants neither entered an appearance nor filed defence to the claim.

8. There is filed and on record a consent letter signed between the Plaintiffs and the 1st, 2nd, 7th and 8th Defendants on the 24th of April, 2017. The consent stated thus:

a) *Sylvester Ateya Wamukoya, Ismail Omina Otitiro, the Plaintiffs herein and the 1st Defendant, Victoria Apondi Kwang'oto, 2nd Defendant Paustina Anyango, 7th Defendant Kassim Kwang'oto Okumu and Ibrahim Oduori Okumu, the 8th Defendant respectively have agreed that this matter be withdrawn against them by the Plaintiffs herein;*

b) *The matter will only proceed between the Defendants who have not appended their signatures below.*

9. The 10th Defendant filed its defence on the 14th of February, 2018 denying all the allegations of fraud and stating that there is no reasonable cause of action disclosed in the suit as against the 10th defendant. It pleaded that the case against it should be dismissed.

10. During the hearing, the Plaintiffs called one witness, **ISMAEL OMINO OTITIRO** who testified as **PW1**. He stated that jointly with the 1st Plaintiff, they bought L.R No. MARACHO/ELUKONGO/1770 from the 1st and 2nd Defendants. That the 1st and 2nd Defendants informed the Plaintiffs that they had inherited the land from their father and that two people, Lawrence and Arnold, had invaded the Land but they had sued them.

11. **PW1** stated that they entered into a sale agreement with the 1st and 2nd Defendants before their area Assistant Chief and they subsequently applied for a Land Control Board Consent with they obtained. That during the second Land Board Control meeting, the Plaintiffs discovered that the 3rd and 4th Defendants had placed a restriction on the land and they filed the present case to have the restriction removed. That the 4th Defendant died leaving a claim against the 3rd Defendant. **PW1** urged the Court to issue judgement and that the restriction be removed and for orders to allow the Plaintiffs to use the land.

12. Upon cross examination by the 3rd Defendant, **PW1** stated that Case No. 130 of 2015 was filed after the present case and that there was no order that the Plaintiffs should await the outcome of their case No. 130 of 2015 for them to get their Land.

13. The Defendants called two witnesses. The 5th Defendant, **KASSIM KWANG'OTO OKUMU**, gave evidence as **DW1**. He stated that he has the letter of authority to represent the 1st, 2nd, and 6th Defendants. He stated that he knew the Plaintiffs and that the 1st and 2nd Defendants sold a portion of LR No. BUTULA/1770 to the Plaintiffs. The plaintiffs even brought a surveyor called Patrick who took measurements in the presence of the Assistant Chief and Village elder. That when they came they found the 3rd Defendant had ploughed the land. He stated that the land sold belonged to the 1st and 2nd Defendants who were given the land by their father.

14. **DW1** explained that the Defendants' father had two wives who were each given land. That Leonida who gave birth to Muruka who is the father of the 3rd Defendant was assigned L.R No. 1321 where the 3rd Defendant lives to date. He further stated that the younger wife Clausina gave birth to two sons, Oloko and Zakaria, and a daughter. That Oloko and Zakaria died leaving Paustina and Victoria living on the suit land.

15. **DW1** continued in evidence that Arnold's (the 4th Defendant) land is parcel No. 1327. He is the father to Rose Juma and Bonventure Ochieng. According to **DW1**, there was no dispute while Clausina was alive. That the dispute began on the 3rd of September, 2011 after the Defendants (1st and 2nd) sold the land and the 3rd Defendant entered the sold portion of 1770 and the remainder of the portion belongs to the 1st and 2nd Defendants.

16. In cross-examination by the 3rd Defendant, **DW1** denied that the 3rd Defendant had been on the land since 1998 and that no written will existed that stated the 3rd Defendant be given a portion of the suit land. He confirmed that Leonida and Clausina each lived on separate titles and that the 3rd Defendant lived on LR 1321. On cross-examined by the 10th Defendant, **DW1** stated that the LR No. 1770 initially belonged to Mzee Okhuya who was the husband of Clausina. That Victoria is the daughter of Mzee Okhuya while Paustina is the daughter in law. That it is the 1st and 2nd Defendants who are entitled to inherit the land. He confirmed that the size of the land is forty-six (46) acres. That the 3rd Defendant is the grandson of Okhuya and also a step brother to the 1st Defendant. **DW1** confirmed that he was a witness during the sale by the 1st and 2nd Defendants to the Plaintiffs, and that the surveyor who was called was a private surveyor.

17. The 3rd Defendant, **LAWRENCE MBUYA MURUKA**, testified as **DW2**. He stated that he denied the claim by the Plaintiffs because they bought the portion of land that had been allocated to him. **DW2** stated that the suit land was family land and that Mzee Okhuya had given his father nine (9) acres of the suit land which he has been using since 1997. He stated further that Okhuya had an uncle called Papai Okuya who was given eleven (11) acres out of LR 1321. It is **DW2**'s evidence that the Plaintiffs bought the land without the Land Control Board Consent and while Case No. 130 of 2015 was ongoing and was still pending. He confirms that he filed the case to stop the Plaintiffs from using the land. He denied entering the suit land to grab the same.

18. During cross-examination by the 1st, 2nd and 5th Defendants, **DW2** stated that he was not living on the suit land but was cultivating a portion of the land given to him by his father. That the land was his grandfather's land and he had given the same to his father although he had no documentary evidence to prove the same. He confirmed that there had been no dispute until the sale happened. On cross-exam by the 10th Defendant, **DW2** stated that Mzee Okhuya gave his father 9 acres out of the 42 acres of 1770. That he wants to be added nine acres from LR 1770 to his seven acres comprised in parcel number 1321.

19. On cross examination by the 1st Plaintiff, **DW2** stated that his father died a long time ago when he was young and he knew that the land had been given to his father as told to him by his older sister. He stated that he did not have any documents to prove that the land was given to his father. On further cross-exam by the 2nd Plaintiff the witness said that in the submissions filed on 24th January, 2018 he had stated that the 1st and 2nd Defendants were registered as owners of the Suit Land.

20. **BONVENTURE OCHIENG' OGOLA** testified as **DW3**. He stated that he was testifying on behalf of Arnold Ogola, the 4th Defendant, who was deceased at the time of hearing. **DW3** stated that Ogola and Okhuya were brothers and that Okhuya gave his brother Ogola 24½ acres out of L.R No 1770. That the 4th Defendant lived on the said land and built on it and even took out letters of administration to have each of the persons entitled to the land get their portions. That the 1st and 2nd Defendants objected to the distribution proposed. **DW3**' said that his mother Rose Juma lives on the suit land while he (**DW3**) lives on parcel No. 1327. That there was a boundary planted to mark Ogola's portion and the portion given to the 3rd Defendant. He further stated that the grant given to the 1st and 2nd Defendant did not list the suit land as the succession in respect of the Suit Land was done by Ogola and the 3rd Defendant.

21. In cross-examination, **DW3** stated that Okhuya gave Ogola (4th Defendant) 24½ acres out of L.R 1770. That he lives on 1327 which is 10 acres and that the 1st and 2nd Defendants are among the surviving children of Okhuya. He confirmed that the 1st and 2nd Defendants are living on the suit land LR No. 1770. That the 4th Defendant did succession because he had a share on the Suit Land. That the 1st and 2nd Defendants were not given shares but they were going to be given. He confirmed that while sharing the land there was no agreement. He stated that Ogola did not know about the case before the tribunal. **DW3** said that he took out letters of administration and that he did not have a problem with the purchasers only that they should be given the shares of the 1st and 2nd Defendants.

22. After the close of the hearing, the Plaintiffs and the 10th Defendant opted to rely on the evidence on record. The 3rd Defendant filed his submissions on the 30th day of December, 2020 stating that the suit land belonged to his great grandfather. That the 1st and 2nd Defendant's father/father in law, Okhuya Namteche, was holding it as family land therefore it will be unfair to have the 1st and 2nd Defendants have the entire 42 acres of the suit land without considering the children of Okhuya's siblings. The 3rd Defendant further submits that the Plaintiffs relied upon the decision by the Tribunal which according to him the Tribunal never existed in 2011 when the matter was heard before it and that the Tribunal only existed after the commencement of this Court. He urged the Court to dismiss the Plaintiffs' case with costs.

23. The 4th Defendant filed his submissions on the 30th of December, 2020 stating that the 4th Defendant was a brother of Okhuya Namuteche, who died in 1982 leaving the suit property as registered in his name. He states that Okhuya was holding the titles for suit land and two other properties and had the same registered in his name as he was the eldest son. He submits further that there was a family meeting where the deceased, Okhuya Namuteche subdivided the suit land in 1969 giving his brother, Ogolla Namuteche 24½ acres. That the Plaintiffs have failed to prove their case and that the same should be dismissed with costs.

24. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

a.

(i) **Whether or not the 1st and 2nd Defendant are the beneficiaries of the proprietor of the Suit Land.**

(ii) **Whether the 1st & 2nd Defendants had capacity to sell part thereof to the plaintiffs;**

b. **Whether or not the restriction placed on the Suit Property by the 3rd and 4th Defendants should be lifted;**

c. **Whether the entries on the green card of the Suit Land after the 27th of April, 2010 should be cancelled;**

d. **Who bears the costs of this suit?**

25. As stated herein above, the Plaintiffs entered into a consent with the 1st, 2nd, 7th and 8th Defendants on the 16th day of May, 2017 which consent essentially admitted the plaintiffs claim of seven (7) acres of land to be carved from parcel No. Marachi/Elukongo/1770. The consent was adopted by the court thus the case against the 1st, 2nd, 7th and 8th Defendants was withdrawn leaving the case against the 3rd, 4th, 5th, 6th, 9th and 10th Defendants.

26. With regards to the **first issue**, PW1 in his testimony said that the 1st and 2nd Defendants were the beneficiaries of the proprietor of the Suit land, Okhuya Namuteche (deceased). That they had obtained letters of grant in Succession Cause No. 62 of 2004 for the administration of the estate of the deceased (none was presented to court but parties to the dispute seemed to be aware of this cause). DW1, DW2 and DW3 all confirmed that the 1st and 2nd Defendants were daughter and daughter in law to the deceased. All the parties are in agreement that the 1st and 2nd Defendant deserved to inherit the estate of the deceased, except not the entire estate.

27. The Law of Succession is very elaborate on the order of priority in petitioning for grant of letters of administration by virtue of section 66 of the Law of Succession Act and rule 7 (7) of the Probate and Administration Rules. The 1st and 2nd Defendants are the surviving daughter and daughter-in-law of the deceased hence mandated to take out the letters of grant. In **Nairobi Succession Cause No. 2015, in the matter of the estate of Joshua Orwa Ojode (deceased)** Musyoka J opined that;

“Going by the above provision, where a deceased person is survived by spouse or child/children, the other relatives are not entitled to a share of the intestate estate of such a person. The spouse and children are entitled to the estate to the exclusion of all other relatives. The excluded relatives include the parents of the deceased.”

28. The 3rd and 4th Defendants are nephew and brother to the 3rd deceased respectively and went ahead to obtain letter of grant in a separate Succession Cause No. 68 of 2009 four years after the 1st and 2nd Defendants had obtained their grant of letters of administration. The copy of grant from that cause was also not produced in evidence. It is important to note that the first grant was not revoked by Court at the instance of the 3rd and 4th Defendants. The 3rd and 4th Defendants did not object to the issuing of the grant to the 1st and 2nd Defendants but instead proceeded to take out a fresh grant to the exclusion of the 1st and 2nd Defendants. This was the holding in the ***Estate of George Muriithi Gitahi (deceased) (2019) eKLR.***

29. Besides the 1st & 2nd defendants having letters of administration of the late Okhuya Namuteche, there was produced/filed copies of proceedings in land case No. 017/07/2011 from Butula Land Disputes Tribunal. The claim was made by the 1st & 2nd Defendants herein as against the 3rd & 4th Defendants. The Tribunal made an award on 17th October 2011 in which the suit title Marachi/Elukongo/1770 was awarded to the claimants. The Tribunal award was adopted as an order of the Court on Busia CM land case No. 145 of 2011. The 3rd & 4th defendants attempted to have that suit transferred to this court.

30. The trial judge, Kibunja J rendered himself on the application to transfer (Misc. Application No. 197 of 2012) on 14th May 2013 thus;

“I find the case commenced through the award received from the Butula Land Dispute Tribunal. The Applicants obtained stay to file appeal but there is no appeal filed herein. There is also no application for Judicial Review orders filed in this matter. Even if the applicants obtains the orders to transfer the lower court file there is nothing in that file to be canvassed before this court. The applicant ought to move this court by either an appeal or Judicial Review application. As such the application is struck out with no orders to costs.”

31. From the evidence presented, it is clear that the 1st & 2nd Defendants were the administrators of the estate of Okhuya Namuteche the registered owner of the suit land thus they had capacity to deal with it. Secondly, having been awarded the entire land by the Butula Land Disputes Tribunal and no appeal and or review preferred against that decree, it made the 1st & 2nd Defendants as the sole beneficiaries to the

suit land. Thus in the year 2012 they had capacity to sell as they did a portion of the suit land to the plaintiffs.

32. It is impossible for this Court to determine the intentions of the deceased without any written proof to confirm the allegations of the 3rd and 4th Defendants. This was the holding in the cases of *Benjamin Maiyo vs. Barnaba Kichwen (2013) eKLR* and *Daudi Ledama Morintat vs. Mary Christine Karie & 2 others (2017) eKLR*.

33. The 2nd issue is whether the restriction placed on the Suit Property by the 3rd and 4th Defendants should be lifted. During the presentation of their cases, DW2 and DW3 gave the reason why the Court should keep the restriction in force because they are entitled to a portion of the suit land i.e. that the deceased had gifted them 9 acres and 24½ acres of the Suit Land respectively. The entire land measures approx. 42 or 46 acres (18.81ha) out which the 3rd defendant claims that the portion comprising his sharer is what was sold to the plaintiffs. DW1 giving evidence on his own behalf and on behalf of the 2nd defendant stated that the 3rd defendant's father was given a different parcel no 1321 by the deceased Okhuya Namuteche. According to DW1, the 3rd & 4th defendants are not entitled to a share of the suit land.

34. The 3rd and 4th defendants did not deny owning the stated suit parcels. Further, the 3rd defendant did not lead evidence to show that his share in the suit title if any can only be curbed from the boundaries identified for the plaintiffs. The 1st & 2nd defendants already obtained consent to subdivide the land on 12th June 2011. The process could not be completed because of the restriction placed by the 3rd & 4th defendants. **Section 76 (2)** of the Land Registration Act provides that a restriction may be expressed to endure;

- a. For a particular period;
- b. until the occurrence of a particular event; or
- c. until a further order is made.

35. The 3rd and 4th Defendants cannot therefore bar the Plaintiffs and the 1st and 2nd Defendants from completing their indefinitely. It is not the intention of the law that restrictions remain indefinitely. This was the reasoning in the cases of *Joyce Waithira Mwangi vs. Thika Land Registrar (2018) eKLR* and *Esther Wangari Maina vs. Julius Kiruma Kariuki (2019) eKLR. Section 78(2)* of Land Registration Act provides that the Court may order the Registrar to remove a restriction, vary it or give any other order as the Court may deem fit.

36. With regards to the 3rd issue, on whether entries on the green card of the Suit Land after the 27th of April, 2010 should be cancelled. As aforementioned the 1st and 2nd Defendants' grant was registered on the green card of the suit land on the 27th of April, 2010. The 3rd and 4th Defendants then placed a restriction on the title and even went ahead to obtain letters of grant and subdivide the Suit Land into two parcels 3406 and 3407. The 3rd and 4th Defendants are the nephew and brother of the deceased, who was the proprietor of the Suit Land and therefore rank below the 1st and 2nd Defendants in the priority of applying for the administration of the estate of Okhuya Namuteche, the deceased. If they had an objection to the grant issued to the 1st and 2nd Defendants, they should have applied to the Court to have the same revoked instead of applying for a fresh grant on the estate of the deceased. It is evident on the face of the record that the title of the Suit Land was registered in the name of Okhuya Namuteche who was survived by **Victorina Apondo Kwang'oto and Paustina Anyango**, the 1st and 2nd Defendants respectively and who already obtained the grant to have the estate of the deceased administered.

37. Section 26 (1) of the Land Registration Act provides that;

“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 the 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 the 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.”

38. The Plaintiffs, 1st, 2nd, 7th and 8th Defendants all alleged that the 3rd and 4th Defendants fraudulently had the Suit Property registered in their names to the exclusion of the 1st and 2nd Defendants who are the beneficial owners of the said parcel in the order of priority provided under section 66 of the Law of Succession Act. It does not need an expert to see that the 3rd and 4th Defendants misrepresented facts to both the Family Court in Succession Case No. 68 of 2009 and subsequently to the Land Registrar causing the Registrar to have the Suit Land subdivided on account of a grant obtained by the 3rd and 4th Defendants.

39. The principles of proving fraud have been stated in *HCCC No. 135 of 1998 Insurance Company of East Africa vs 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”.

40. From the proceedings before the Butula Land Disputes Tribunals to the pleadings before this Court it is evident that the 3rd and 4th Defendants intentions are to disinherit the 1st and 2nd Defendants on the basis of non-existent evidence that the deceased, Okhuya Namteche, left them portions of the Suit Land despite the fact that they are not the immediate beneficiaries of the deceased.

41. The Land Registration Act empowers this Court to order the rectification of the register under Section 80 which provides that;

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

42. In view of the observations and analysis made herein above and in consideration of the consent entered into between the Plaintiffs on one part and the 1st, 2nd, 7th and 8th Defendants on the other part, I am persuaded to find that the Plaintiffs have proved their case against the 3rd, 4th, 5th, 6th in so far as it relates to the prayer for removal of the restriction and rectification of the register. The 9th defendant did not defend the suit thus claim against him for refund of Kshs.51,000 also succeeds.

43. In conclusion, I am of the considered opinion and I so hold that:

(a) That an order be and is hereby made directed at the Land Registrar, Busia to have the restriction placed on the Suit title Marachi/Elukongo/1770 by the 3rd and 4th Defendant lifted immediately forthwith

i) To allow the plaintiffs get title for their 7 acres portion purchased.

ii) The restriction to remain registered on remainder portion of after creating/subdividing the suit title to curve the 7 acres pending final determination of Busia ELC case no 130 of 2015.

(b) That an order be and is hereby issued directing the Land Registrar Busia to amend the register of Marachi/Elukongo/1770 cancelling all the entries made after the 27th of April, 2010;

(c) The 3rd & 4th defendants shall surrender the Titles issued for L.R No. Marachi/Elukongo/3406 and 3407 for cancellation within 21 days of this judgement. In default, the same shall stand revoked;

(d) The 1st and 2nd Defendant shall forthwith subdivide & transfer of seven (7) acres portion curved out of L.R No. Marachi/Elukongo/1770 in favour of the Plaintiffs;

(e) That an order of permanent injunction be and is hereby issued against the 3rd to 6th Defendants restraining them from interfering with the plaintiffs use & occupation of the 7-acre portion comprised in L.R No. Marachi/Elukongo/1770;

(f) Prayer (b) of the amended Plaint seeking general damages has not been proved and therefore none is awarded.

(g) Prayer (c) of the amended Plaint is allowed directed at the 9th Defendant to refund the survey fees of Kshs.51,000/- paid to him by the Plaintiffs within 30 days from the date of service of the decree upon him. In default, Plaintiffs at liberty to execute.

(h) The 3rd, 4th, 5th & 6th Defendants to pay jointly and severally costs of this suit awarded to the Plaintiffs.

Dated, signed and delivered at BUSIA this 17th day of March, 2021.

A. OMOLLO

JUDGE