



Mabachi & 2 others v Land Registrar, Busia & 2 others (Environment & Land Case 28 of 2015) [2024] KEELC 5903 (KLR) (17 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 28 OF 2015**

**BN OLAO, J
SEPTEMBER 17, 2024**

BETWEEN

**LUCAS OUMA MABACHI 1ST PLAINTIFF
HENRY GABRIEL MABACHI 2ND PLAINTIFF
MASIGA OKUMU JAMES LEMMY 3RD PLAINTIFF**

AND

**THE LAND REGISTRAR, BUSIA 1ST DEFENDANT
THE ATTORNEY GENERAL 2ND DEFENDANT
BENJAMIN OKELLO SEMBE 3RD DEFENDANT**

JUDGMENT

1. This judgment was due on 14th March 2024 but I was bereaved having lost my step-mother on the same day. I thereafter proceeded on my pre-scheduled annual leave until July 2024 followed by the vacation until 15th September 2024. That explains the delay in delivering this judgment. The same is highly regretted.
2. By a plaint dated 16th March 2015, Lucas Ouma Mabachi, Henry Gabriel Mabachi and Masiga Okumu James Lemmy (the 1st, 2nd and 3rd Plaintiffs respectively), impleaded the Land Registrar Busia, The Attorney General and Benjamin Okello Sembe (the 1st, 2nd and 3rd Defendants respectively) and sought against them jointly and severally, judgment in the following terms with respect to the land parcel No Samia/buchululo-Bukhulungu/225 (the suit land):
 1. Cancellation of the illegal entries in the register and reinstatement of the rightful entries and a declaration as per paragraph 15 of the plaint.



2. Cancellation of the 3rd Defendant as title holder and reinstatement of the Deceased or 1st Plaintiff as registered title holder as per paragraph 16 of the plaint.
 3. Eviction and injunction as per paragraph 17 of the Plaint.
 4. Costs.
 5. Any other or further relief this Honourable Court deems fit and just to grant.
3. The Plaintiffs have pleaded that at all material times the 1st Plaintiff is the legal administrator to the Estate of Gabriel Mabachi Okello (hereinafter the deceased) and who was the registered proprietor of the suit land. That in 2008, the 1st Plaintiff realised that the 3rd Defendant had fraudulently registered himself as the proprietor of the entire suit land during the lifetime of the deceased and without the knowledge of the deceased and his family. The particulars of fraud have been pleaded in paragraphs 6(a) to (d) as follows:
- a. Taking advantage of the deceased's illiteracy to register himself as proprietor of the suit land.
 - b. Registering himself as proprietor of the suit land without regard to the deceased and his family's welfare.
 - c. Forging the deceased's signature.
 - d. Transferring the suit land to himself without proper legal process.
4. Upon discovering the fraud, the 1st Plaintiff sued the 3rd Defendant at the Funyula Land Disputes Tribunal which ruled in his favour and the title to the suit land reverted to the deceased's name on 10th July 2009. The 1st Plaintiff then filed for succession vide Busia High Court P&A Case No 183 of 2009 and had the suit land transferred to himself and later, he sub-divided it and registered the land parcels No Samia/Luchululo-bukhulungu 1919, 1920 and 1921 in his names.
5. On 23rd July 2009, the 3rd Defendant placed a restriction on the suit land pending the hearing and determination of Busia High Court Misc. Application No 4 of 2009. The restriction was removed upon determination of that case. The 1st Defendant without any authority and in misinterpretation of the ruling in Busia High Court Misc Application (JR) No 4 of 2009 interfered with the register of the suit land and cancelled the Plaintiffs' titles without any justification or notice and without giving them an opportunity to be heard. That the Defendants' actions were contrary to the law and also to the orders in Busia High Court Misc Application (JR) No 4 of 2009, Busia High Court P&A No 183 of 2009, contrary to the beneficial interests of the Plaintiffs, contrary to the Land Registration Act and contrary to the Constitution of Kenya.
6. The Plaintiffs therefore claim against the Defendants is for the cancellation of the 3rd Defendant's title to the suit land and all illegal entries to the land parcels No Samia/Luchululo-Bukhulungu – 1919, 1920 and 1921 and the reinstatement of the titles into the 1st Plaintiff's name as the Administrator to the Estate of the deceased. Further that the 3rd Defendant be evicted from the suit land or the new titles being Samia/Luchululo-Bukhulungu 1919, 1920 and 1921 and a permanent injunction be issued restraining the 3rd Defendant from using the said land in any way.
7. The Plaintiffs also admitted that there have been previous suits between the 1st and 2nd Plaintiffs and the 3rd Defendant namely:-
1. Funyula Land Disputes Tribunal Case.
 2. Busia PMD Land Case No 92 of 2008.



3. Busia High Court Civil Application (JR) No 4 of 2009.
4. Busia SPM Civil Case No 318 of 2008.
5. Busia SPM Civil Case No 90 of 2014.

Together with their plaint, the Plaintiffs filed their respective statements as well as their list of documents in support of their case.

8. In his statement dated 16th March 2015, the 1st Plaintiff confirmed that he is the son to the deceased and that the 2nd Plaintiff is his sibling. That the deceased was the registered proprietor of the suit land where he, the 2nd Plaintiff and their mother still live. That he had sold to the 3rd Defendant the land parcel No Samia/Luchululo-Bukhulungu/1921 but the 3rd Defendant fraudulently had the entire suit land transferred in his names prompting the 1st Plaintiff to sue him at the Funyula Land Disputes Tribunal which revoked the 3rd Defendant's title to the suit land and reverted it to the deceased on 10th July 2009. On 23rd July 2009, the 3rd Defendant placed a restriction on the suit land pending the hearing and determination of Busia High Court Misc Application (JR) No 4 of 2009 which had been filed to challenge the award of the Funyula Land Disputes Tribunal long after the Land Registrar had already enforced the said Tribunal's award as adopted by the Court and the suit land had been transferred into the names of the deceased. Meanwhile, the 1st Plaintiff had transferred the suit land into his name and sub-divided it to create land parcels No Samia/Luchululo-Bukhulungu/1920 and 1921 which he had transferred to the 3rd Defendant. Later, he discovered that the titles to the said sub-divisions had been cancelled by the Defendants and the title to the suit land had reverted to the 3rd Defendant without any notice to the Plaintiffs nor an opportunity to be heard.
9. In a further statement dated 10th July 2020 and filed on 17th July 2020, the 1st Plaintiff states that he had filed Busia High Court P&A Case No 183 of 2009 and obtained a confirmed Grant in respect of the Estate of the deceased. That the suit land was subsequently sub-divided to create the land parcels NO Samia/Luchululo-Bukhulungu/1919, 1920 and 1921. That on 21st January 2019, the 3rd Defendant challenged the said Grant and sought its revocation. That application was however dismissed by the High Court on 18th December 2019.
10. Henry Gabriel Mabachi (PW2) and who is the 2nd Plaintiff herein filed his statement dated 2nd August 2016. He confirmed that the 1st Plaintiff is his brother while the 3rd Plaintiff is a purchaser of a portion of the suit land from the 1st Plaintiff. He added that the 3rd Defendant is his cousin and that he (2nd Plaintiff) is the registered proprietor of the land parcel NO Samia/Luchululo-Bukhulungu/1920 which is a resultant sub-division of the suit land. However, the 3rd Defendant cancelled that title without any legal reasons or notice to the Plaintiffs. He also adopted the statement of the 1st Plaintiff herein as his evidence.
11. Masiga Okumu James Lemmy (PW3) and who is the 3rd Plaintiff also filed his statement dated 16th March 2015 in which he states that while looking for land, he was informed that the 1st Plaintiff was selling his land. They agreed at a purchase price of Kshs.100,000 for a portion measuring 0.40 Hectares and after executing all the necessary documents including obtaining the consent of the Land Control Board, he obtained the title deed to his land. That he was not a party to the Busia High Court Misc Application (JR) No 4 of 2009 and is an innocent purchaser for value whose title was cancelled by the Defendants without notice to him.
12. The Plaintiffs filed three lists of documents the first dated 16th March 2015, the second dated 31st June 2021 and the third dated 15th December 2021.



13. In the list of documents dated 16th March 2015, the Plaintiff listed the following documents:
 1. Copy of title deed for the land parcel No Samia/Luchululo-Bukhulungu/225.
 2. Copy of register for the land parcel No Samia/Luchululo-Bukhulungu/225.
 3. Copies of register for the land parcels no Samia/Luchululo-Bukhulungu/1919, 1920 and 1921.
 4. Copies of title deeds for the land parcels No Samia/Luchululo-bukhulungu 1920 and 1921.
 5. Grant of Letters of Administration issued in Busia High Court P&A Cause No 183 of 2009.
 6. File in Busia High Court P&A Cause No 183 of 2009.
 7. Copy of confirmed Grant issued in Busia High Court P&A No 183 of 2009.
 8. Demand Letters.
 9. Notice to A-G.
 10. Application for consent, Letters of consent and Transfer Forms for parcels No Samia/luchululo-bukhulungu/1920 and 1921.
 11. Certificate of death for Gabriel Mabachi Okello.
 12. Judgment in Busia High Court Misc Application (JR) No 4 of 2009.
 13. Letter dated 12th August 2013 addressed to Land Registrar.
 14. Letter dated 14th October 2013 addressed to Land Registrar.
 15. Notice of Motion, Verifying Affidavit and Statement filed in Busia High Court Misc Application (JR) No 4 of 2009.
 16. Proceedings and Ruling in Busia PMCC No 318 of 2008.
 17. Court file in Busia High Court Misc Application (JR) No 4 of 2009.
 18. Plaint and defence in Busia PMCC No 318 of 2008.
 19. Court File in Busia PMCC No 318 of 2008.
 20. Plaint and Defence in Busia CMCC No 90 of 2014.
14. The Plaintiffs also filed two further lists of documents dated 3rd June 2021, 15th July 2020 and 15th December 2021.
15. In the list dated 15th July 2021, the following documents were listed:
 1. 3rd Defendant's Certificate of Urgency and summons for Revocation of Grant dated 21st January 2019 and filed in Busia High Court P & A Cause No 183 of 2009.
 2. Replying Affidavit dated 5th March 2019.
 3. Ruling delivered on 18th December 2019 in Busia High Court P&A Cause No 183 of 2009.
 In the list dated 15th December 2021, the following documents were filed:
 1. Ruling by the Court of Appeal in Kisumu C.A. Civil Application [No 29 of 2021](#).



2. Mutation Form for parcel No Samia/luchululo-bukhulungu/225.
3. Letter from Chief dated 28th August 2008.
4. Order issued on 26th January 2009 in Busia PMCC Land Dispute No 92 of 2008.
5. Green card for parcel No Samia/luchululo-bukhulungu/225.

Finally, in the list of documents dated 3rd June 2021, the following documents were listed although most of them had been listed in the first list:

1. Copy of title deed for the land parcel No Samia/luchululo-bukhulungu/225.
 2. Copies of register for the land parcel No Samia/luchululo-bukhulungu/225.
 3. Copies of register for the land parcel No Samia/luchululo-bukhulungu/225.
 4. Copy of title deed for the land parcel No Samia/luchululo-bukhulungu/1920 and 1921.
 5. Copy of Grant of Letters of Administration issued in Busia High Court P&A Cause No 183 of 2009.
 6. Court File in Busia High Court P&A Cause No 183 of 2009.
 7. Certificate of Confirmed Grant issued in Busia High Court P&A Cause No 183 of 2009.
 8. Copy of Ruling in Busia High Court P&A Cause No 183 of 2009.
 9. Notice to sue A-G.
 10. Application for Consent, Letter of Consent and Transfer Form for the land parcels No Samia/luchululo-bukhulungu/1920 and 1921.
 11. Death Certificate for Gabriel Mabachi Okello.
 12. Judgment delivered in Busia High Court Misc Application (JR) No 4 of 2009 on 8th August 2013.
 13. Notice of Motion filed in Busia High Court Misc Application (JR) No 4 of 2009.
 14. File in Busia High Court Misc Application (JR) No 4 of 2009.
 15. Proceedings and Ruling in Busia PMCC No 318 of 2008.
 16. Plaintiff and Defence in Busia PMCC No 318 of 2008.
 17. File in Busia PMCC No 318 of 2008.
 18. Plaintiff and Defence in Busia CMCC No 90 of 2014.
 19. Judgment in Busia CMCC No 90 of 2014.
16. The 1st and 2nd Defendants filed a joint statement of defence dated 17th July 2015. They pleaded therein that they are strangers to the averments contained in paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint and put the Plaintiffs to strict proof thereof. They denied having interfered with the entries to the register of the suit land.



17. They filed the following documents vide their list dated 1st March 2018:
 1. Transfer of Land Form in respect of the land parcel No Samia/luchululo-bukhulungu/225.
 2. Letter of Consent dated 6th May 1982 for transfer of land parcel No Samia/luchululo-bukhulungu/225.
 3. Application for consent to transfer land parcel no Samia/luchululo-bukhulungu/225.

The 3rd Defendant filed a defence dated 3rd August 2015 in which he pleaded that he was legally voluntarily registered as the proprietor of the suit land in 1982. He denied all the allegations of fraud levelled against him in paragraph 6 of the plaint and added that he is a stranger to the averments in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19 of the plaint.
18. The 1st and 2nd Defendants did not file any witness statements.
19. The 3rd Defendant filed his statement dated 4th October 2023 and which was admitted though filed late.
20. He stated therein that the deceased was his uncle and the registered proprietor of the suit land which he voluntarily transferred to him as a gift on 12th June 1982 well before his demise. That he proceeded to occupy the suit land with the full knowledge of the deceased and his family. That following the demise of the deceased, the 1st Plaintiff filed a complaint against him at the Funyula Land Disputes Tribunal with respect to the suit land and obtained a favourable order. That decision was however quashed by the High Court and the suit land remained in the 3rd Defendant's name. The 1st Plaintiff then moved to the Succession Court and listed the suit land as among the assets of the deceased yet it should not have formed part of the Estate of the deceased. After obtaining the confirmed Grant, the Plaintiffs have now moved to this Court after transferring the suit land in their names and now want to evict him therefrom. He accuses the Plaintiffs of being malicious persons who did not disclose to the Court the full list of the beneficiaries to the deceased's Estate.
21. The 3rd Defendant produced the following documents in support of his case:
 1. Proceedings in Busia PMCC No 92 of 2008.
 2. Copy of Land Certificate for the land parcel No Samia/luchululo-bukhulungu/225 dated 20th August 1982.
 3. Transfer of Land Form for the land parcel No Samia/luchululo-bukhulungu/225.
 4. Letter of consent to transfer the land parcel No Samia/luchululo-bukhulungu/225.
 5. Application for consent to transfer the land parcel No Samia Luchululo-Bukhulungu/225.
22. The hearing commenced on 5th October 2023 when the Plaintiffs testified and produced as their documentary evidence the documents listed above. They adopted their respective statements as their oral testimony.
23. The 1st and 2nd Defendants did not call any witnesses in respect to their defence.
24. The 3rd Defendant testified and he too adopted as his testimony the contents of his statement and produced the documents filed herein in support of his case.
25. Submissions were thereafter filed both by Mr Onsongo Instructed by the firm of Obwoye Onsongo & Company Advocates for the Plaintiffs and by Mr Jumba instructed by the firm of Balongo & CompAny Advocates for the 3rd Defendant.



26. I have considered the evidence by the Plaintiffs and the 3rd Defendant as well as the submissions by counsel. The 1st and 2nd Defendants, as I have already stated above, did not call any witnesses during the trial nor file submissions.
27. The Plaintiffs case is that the 1st and 2nd Plaintiffs are the children of the deceased who was at all times material to this suit the registered proprietor of the suit land. The 1st Plaintiff is the legal representative to the Estate of the deceased while the 3rd Plaintiff is a purchaser of the land parcel No Samia/luchululo-bukhulungu/1921 which he purchased from the 1st Plaintiff. That in 2008, the 1st Plaintiff realised that the 3rd Defendant had fraudulently registered himself as the proprietor of the suit land. Particulars of that fraud have been pleaded in paragraph 6 (a) to 6 (d) above.
28. The 3rd Defendant's defence is that infact the suit land was gifted to him by the deceased who was his uncle in 1982. He denied all the allegations of fraud levelled against him.
29. I consider the following issues to be key towards the determination of this dispute. These are:
1. Whether the 3rd Defendant was legally registered as the proprietor of the suit land in 1982 and;
 2. Whether infact he obtained the title to the suit land fraudulently and if his title thereto should be cancelled and he be evicted therefrom.

I shall consider the issues simultaneously.

30. From the documents filed by the parties herein, it is common ground that whereas the 1st Plaintiff holds the title deed to the suit land issued to him on 14th November 2013, the 3rd Defendant holds the Land Certificate to the same land issued on 20th August 1982. The Green Card to the suit land shows that it was first registered in the name of the deceased on 9th April 1977 but on 20th August 1982, it was registered in the name of the 3rd Defendant as a gift although it is also indicated that he paid a consideration of Kshs.4,000. However, that ownership was revoked on 10th July 2009 following orders issued in BUSIA PMCC Land Case No 92 of 2008 which adopted as it's judgment the award of the Funyula Land Disputes Tribunal which had found in favour of the 1st Plaintiff and the title to the suit land reverted to the deceased.
31. Meanwhile, the 3rd Defendant moved to the High *Court vide Judicial Review Application NO 4 of 2009* and on 8th August 2013 obtained orders quashing the award of the Funyula Land Disputes Tribunal as adopted by the subordinate Court and advised the 1st Plaintiff to file his claim in the Environment and Land Court. The 3rd Defendants, perhaps emboldened by those orders in the Judicial Review Application promptly moved to the Chief Magistrate's Court Busia in ELC Case No 90 of 2014 where he filed a suit against the 1st and 2nd Plaintiffs as well as one Felesta Mabachi seeking their eviction from the suit land as well as damages and costs. That suit was however dismissed by Hon. W. K. Chepseba Chief Magistrate vide a judgment delivered in March 2021.
32. As all the above was going on, the 1st Plaintiff had filed in the Busia High Court Succession proceedings being P&A Cause No 183 of 2009 pursuant to which the suit land was wholly transmitted to him with one Felista Ojiambo having a life interest therein as per the confirmed Grant issued by Onyancha J on 13th May 2010. An application filed by the 3rd Defendant (as objector) seeking to revoke, that Grant was dismissed by Kiarie J vide a ruling delivered on 18th December 2019 and an appeal against that ruling was dismissed by the Court of Appeal Kisumu vide a ruling delivered on 18th June 2021 in Court Of Appeal Kisumu Civil Application *NO 29 of 2021*. On 20th February 2014, the title to the suit land was closed and parcels No Samia/luchululo-Bukhulungu/1919, 1920 and 1921 were created. Those processes having taken place pursuant to orders issued by a Court of concurrent jurisdiction, it cannot



be disputed that the suit land no longer exists and that the Plaintiffs hold valid titles to the resultant subdivisions of the suit land being land parcels No Samia/luchululo-bukhulungu/1919, 1920 and 1921.

33. With regard to the Land Certificate to the suit land issued to the 3rd Defendant on 20th August 1982, his case is that he obtained it legally as a gift from the deceased. The Plaintiffs' case is that in fact he obtained it fraudulently. As was held in the case of R.G. Patel -v- Lalji Makanji 1957 E.A. 314:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

See also Central Kenya Ltd-v- Trust Bank Ltd C. A. Civil Appeal No215 of 1996 [1996 eKLR] where it was held that allegations of fraud are serious allegations and the onus of proof is much higher than in the ordinary civil cases. How then did the 3rd Defendant obtain the registration of the suit land in his name? This is contained in the first paragraph of his statement dated 4th October 2023 where he states thus:

“That the late Gabriel Mabachi Okellowas my uncle and was the originally registered proprietor of the suit land herein designated as Samia/luchululo-bukhulungu/225 which he freely and expressly transferred to me as a gift and I had the same registered in my name on 12th June 1982 well before the death of my said uncle.” Emphasis mine.

34. A gift is defined in the Oxford English Dictionary as:

“a thing given willingly to someone without payment; a present.”

In the Black's Law Dictionary 10th Edition, the same word is defined as:

“The voluntary transfer of property to another without compensation.”

What comes out of the above definitions is that a gift is free. It is not paid for. It comes without any charge. While the 3rd Defendant claims that the deceased transferred the suit land to him freely and expressly as a gift, the Green Card to the suit land under the Section “Consideration and remarks” reads:

“Gift transfer Kshs.4,000”

It cannot be possible that the deceased transferred the suit land to the 3rd Defendant as a “gift” and at the same time, received Kshs.4,000 from him as consideration.

35. Among the allegations of fraud levelled against the 3rd Defendant with respect to the registration of the suit land in his name is that he took advantage of the deceased's illiteracy and registered the suit land in his name without regard to the deceased and his family's welfare (paragraphs 6(a) and (b) of the plaint). When he was cross-examined by Mr Onsongo counsel for the Plaintiffs, the 3rd Defendant admitted that the deceased was illiterate. He said:

“It is true that the said Gabriel Mabachi Okellowas illiterate. I was a teacher.”

He also admitted during cross-examination that he knew the 1st and 2nd Plaintiffs as children of the deceased. It is highly unlikely that the deceased would have gifted the suit land to the 3rd Defendant leaving his family destitute yet there is no evidence of any bad blood between the deceased and his family or that he had made any other provision for them. The Plaintiffs' claim that the 3rd Defendant forged



the deceased signature (the documents were actually thumb printed against the deceased's name) are clearly not without merit. In my view, fraud as against the 3rd Defendant, most probably in collusion with the 1st and 2nd Defendants, has been proved to the required standard. It is not surprising therefore that in a ruling delivered herein on 26th July 2018, Kaniaru J dismissed the 3rd Defendant's application seeking to injunct the Plaintiffs from the suit land and used very strong language in describing the 3rd Defendant who was the Applicant. This is how the Judge described the 3rd Defendant:

“I think it is also useful to add that the Respondents responded to the application rather well. The response contains a factual premise and a legal exposition that easily displaces the Applicant's arguments. For instance, it was easily shown that the Applicant had made a similar application in PMCC No318/2008 BUSIA which was dismissed. He has now come up again with this application. and with lies.” Emphasis mine.

That was not flattering of the 3rd Defendant by any means and it goes a long way to confirm that indeed the 3rd Defendant is a fraudulent person and engaged in the vices described in paragraph 6(a) to (d) of the plaint with regard to the registration of the suit land in his name.

36. As stated earlier, the 3rd Defendant also holds a Land Certificate to the suit land issued on 20th August 1982 long before the Plaintiff obtained his title deed to the suit land dated 14th November 2013. As is also clear from Section 26 (1) of the *Land Registration Act* however, that title deed is only “prima facie evidence” that the 3rd Defendant is the absolute and indefeasible owner of the suit land. The same can be challenged if there is evidence to show that it was obtained through fraud, or misrepresentation to which the person is proved to be a party or where it is shown that the same was obtained illegally, unprocedurally or through a corrupt scheme. It is not sufficient to simply Wave The Title As Evidence of Ownership. In The Case of *Munyu Maina -V- Hiram Gathiba Maina C.a. Civil Appeal No 239 of 2009* [2013 eKLR] the Court stated thus:

“We state that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted in the register.”

And in the case of *Hebert L. Martin & Others -v- Margaret J Kamar & Others* 2016 eKLR the Court held:

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and properly trace its root without a break in the chain. The parties to such investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no



advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed property to the current title holder.”

The above case was basically reiterating what the Court of Appeal had reiterated in the case of *Munyu Maina-v- Hiram Gathiha Maina*(supra).

37. The 3rd Defendant has dangled the Land Certificate to the suit land issued to him on 20th August 1982 as evidence of his claim to ownership thereof. He says it was gifted to him by the deceased but for the reasons already stated above, this Court is not persuaded that his testimony is truthful. In addition to what I have already stated above, if indeed the deceased had gifted him the suit land in 1982 as he claims, the 3rd Defendant has not told this Court why he kept that gift a secret to the Plaintiffs who only discovered the fraud in 2008 some 26 years later and some 16 years after the demise of the deceased. It also does not add up that the deceased, having “gifted” the 3rd Defendant the suit land, continued to live there with his family including his children the 1st and 2nd Plaintiffs herein.
38. In his statement dated 4th October 2023 and which he adopted as his oral testimony, the 3rd Defendant appears to be still challenging the decision of the Busia High Court in P&A Cause No 183 of 2009. This is what he has stated in paragraph 7 of that statement:

7: “That the Plaintiffs did not disclose the full extent of the beneficiaries of the Estate of the late Gabriel Mabachi Okello and instead detailed himself as the only beneficiary and proceeded to have the grant confirmed without involving all the beneficiaries, transferred the land into his name exclusively and is now determined to dispose the resultant parcels off to the detriment of all the beneficiaries.”

The fact is that the Grant in that Succession Cause was up-held by the Court of Appeal in Kisumu Civil Appeal No29 of 2021 and cannot therefore be an issue for determination in this Court. This Court is also alive to the fact that in Busia High Court Misc Application(JR) No4 of 2009 where the 3rd Defendant was the Applicant seeking to quash the award of the Funyula Land Disputes Tribunal while the 1st Plaintiff was the Interested Party, Kimaru J (as he then was) proceeded to quash the said award for want of jurisdiction. The Judge proceeded to advise the 1st Plaintiff to file a suit in this Court. But what is telling are the following remarks made by the Judge at page 3 with respect to how the 3rd Defendant obtained the title deed to the suit land:

“This Court has perused the instrument of transfer that was used to transfer the suit parcel of land to the Applicant. The previous owner, the deceased father of the Interested Party was illiterate. He signed the transfer by appending his thumb print. There was no consideration paid by the Applicant. It was claimed that the land was transferred to him as a gift. What was interesting was that despite this transaction, the deceased and the members of his family have continued residing in the land. The Interested Party has a case when he alleges that the transfer was obtained under circumstances that clearly points to either undue influence or fraud.” Emphasis mine.

Kimaru J (as he then was) was of course handling a Judicial Review Application which was basically dealing with the issue whether or not the award of the Funyula Land Disputes Tribunal could be up-held. He certainly was not determining the dispute over the ownership of the suit land. However, he could smell “either undue influence or fraud” in the manner in which the 3rd Defendant acquired the ownership of the suit land. Having now heard the parties over the legality of their competing titles to the suit land, I have no doubt that indeed the 3rd Defendant obtained his title fraudulently as pleaded by the Plaintiffs. His land certificate dated 20th August 1982 is clearly for cancellation as sought by the Plaintiffs. It is also instructive to note that the 3rd Defendant did not make any counter-claim with respect to the titles held by the Plaintiffs.



39. With regard to the Plaintiffs' claim for the eviction of the 3rd Defendant from the suit land, it must now be clear from the above that he is essentially a trespasser with no right to be on the suit land. He should be evicted therefrom and subsequently enjoined permanently from interfering with the Plaintiffs occupation and possession of the resultant sub-divisions of the suit land being land parcels No Samia/Luchululo-Bukhulungu – 1919, 1920 and 1921.
40. On the issue of costs, the 1st and 2nd Plaintiffs as well as the 3rd Defendant and who are the main protagonists in this suit are members of the same family. The order that commends itself to me to make in the circumstances of this case is to direct that each of them meets their own costs of the suit.
41. I have also considered whether the Plaintiff's suit may be statute barred under Section 7 of the *Limitation of Actions Act* which provides that a claim to land cannot be brought after 12 years. I find, however, that although the 3rd Defendant obtained his Land Certificate to the suit land on 20th August 1982, the Plaintiff claim is founded on fraud and he discovered the fraud in 2008 and filed this suit on 17th March 2015. His suit is protected by Section 26 of the *Limitation of Actions Act*.
42. Ultimately after considering the evidence herein, this Court makes the following disposal orders:
1. The Land Certificate issued to the 3rd Defendant in respect to the land parcel No Samia/luchululo-bukhulungu/225 on 20th august 1982 is hereby cancelled.
 2. A declaration is hereby issued that the deceased is proprietor of the land parcel NoSamia/luchululo-bukhulungu/225 and the 1st, 2nd and 3rd Plaintiffs are rightful owners of the resultant sub-divisions of that land being parcels No Samia/luchululo-bukhulungu/1919, 1920 and 1921.
 3. The 3rd Defendant and all those claiming under him shall within 60 days from the date of this judgment vacate from the land parcels No Samia/luchululo-bukhulungu/1919, 1920 and 1921.
 4. In default of (3) above, the Plaintiffs shall be at liberty to evict the 3rd Defendant, and all those claiming under him, from the land parcels No Samia/luchululo-bukhulungu/1919, 1920 and 1921.
 5. Thereafter, the 3rd Defendant and all those claiming under him shall be permanently enjoined from interfering with the 1st, 2nd and 3rd Plaintiffs occupation and possession of the land parcels No Samia/luchululo-Bukhulungu 1919, 1920 and 1921.
 6. The 1st, 2nd and 3rd Plaintiffs as well as the 3rd Defendant shall each bear their own costs of this suit.

BOAZ N. OLAO

JUDGE

17TH SEPTEMBER 2024

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF SEPTEMBER 2024
BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

Right of Appeal.

BOAZ N. OLAO

JUDGE



17TH SEPTEMBER 2024

