



Okwako (substituted by Charles Ajuma Obango) v Makokha (Environment & Land Case 99 of 2017) [2024] KEELC 6347 (KLR) (1 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 99 OF 2017**

**BN OLAO, J
OCTOBER 1, 2024**

BETWEEN

BARASA OBANGO OKWAKO (SUBSTITUTED BY CHARLES AJUMA OBANGO) PLAINTIFF

AND

ALEX WANDERA MAKOKHA DEFENDANT

JUDGMENT

1. The subject of this dispute is land parcel NO Bukhayo/Matayos/1340 (the suit land). The Green Card thereto shows that it was first registered in the name of Apulunary Makokha Okwako (now deceased and hereinafter referred to as Apulunary) on 4th December 1985. Following the demise of Apulunary on 28th April 2016, his nephew Barasa Obango Okwako (also now deceased and herein referred to a Barasa) took out a limited Grant of letters of Administration on behalf of his Estate and filed a plaint on 11th May 2017 against Alex Wandera Makokha (the defendant herein). He pleaded that the defendant had fraudulently transferred the suit land to himself and sought, among other orders, the cancellation of all the illegal entries made on the register to the suit land.
2. Barasa passed away on 27th March 2021 in the course of these proceedings and was substituted by Charles Ajuma Obango (the Plaintiff herein). Following that substitution, the plaint was further amended on 16th February 2023. That further amended plaint sets out the basis of the plaintiff's claim in which he has approached this court as the legal representative of the Estate of Barasa who had himself filed the initial suit as the legal representative of the Estate of Apulunary.
3. By the said further amended plaint, the plaintiff seeks judgment against the defendant in the following terms:



- a. Cancellation of the illegal entries in the register to the land parcel NO Bukhayo/Matayos/1340 and reinstatement of the title to revert into the name of Apulunary and cancellation of the defendant's name therefrom.
 - b. A declaration that the plaintiff is the registered owner of the land parcel NO Bukhayo/Matayos/1340 and holds it in trust for the family of Barasa.
 - b) (A) An order of eviction and injunction against the defendant, his agents, servants, employees, workers or any person acting through him from further dealing in any way with the land parcel NO Bukhayo/Matayos/1340 to the detriment of the rightful beneficiaries and owners of the same.
 - c. Costs of this suit.
 - d. Interest.
 - e. Any other further relief that this Honourable Court deems fit and just to grant.
4. The basis of the plaintiff's claim is that Apulunary was the registered proprietor of the suit land and was also childless. He had therefore adopted Barasa and brought him up as his son. Barasa married and established his home on the suit land. Upon their demise, both Apulunary, Barasa and his wife were buried on the suit land leaving their sons and families thereon.
 5. That sometime in 1979, the defendant approached Apulunary seeking permission to be allowed to make bricks on the suit land proceeds of which would be shared between the two of them. Later, the defendant again approached Apulunary and offered to purchase part of the suit land where he was storing his bricks and that portion measuring 1 acre was demarcated and the defendant gave Apulunary a bicycle. When Apulunary asked the defendant if the bicycle was the consideration for the 1 acre, the defendant answered him that they would continue sharing the proceeds from the sale of bricks.
 6. In 2009, Apulunary, Barasa and the plaintiff went to attend the burial of Apulunary's cousin and the defendant requested him to leave the keys to his house with him so that he could take care of Apulunary's poultry and homestead. However, upon returning to his house, Apulunary found his house in a mess and he complained to the plaintiff that his title deed, identity card, land agreements among other things which he had left in a metal box were missing. Then in 2016, the plaintiff and his family discovered that the defendant had fraudulently transferred the entire suit land in his name during the life time of Apulunary without his knowledge or that of his family and despite the fact that the family of Apulunary and the plaintiff still reside thereon. Upon discovery of the fraud, the matter was reported to the Assistant Chief and Chief of Matayos who called the defendant several times to resolve the dispute. However, the defendant did not turn up. It was only when the matter was reported to the District Officer (D.O) for intervention that the defendant turned up and alleged that he had been given the suit land by Apulunary as a sign of friendship. The plaintiff contends that by the illegal and fraudulent acts of the defendant, Apulunary's Estate has been defrauded of the whole suit land thus turning the plaintiff and his family into squatters on land which they have been living on in their life time.
 7. The particulars of the fraud on the part of the defendant are pleaded in paragraph 13(i) to (ix) as follows:
 - i. Taking advantage of the blindness of Apulunary to register himself.
 - ii. Deceiving Apulunary to sign and to take his photo to make him believe that he was helping him to process his new identity card.



- iii. Registering himself as proprietor of the entire suit land without regard to the family of Apulunary.
- iv. Transferring the entire suit land to himself without proper legal process.
- v. Stealing Apulunary's identity card and title deed and transferring the title without a valid agreement.
- vi. Misrepresenting facts to Apulunary and the Lands Office Busia to have the entire suit land illegally transferred to him and to procure an illegal title.
- vii. Being fraudulent per se.
- viii. Forging the transfer documents to facilitate the illegal transfer.
- ix. Forging the sale agreement, application for consent and consent.

The plaintiff, notwithstanding the prayers sought against the defendant herein as stated above, goes on to add in paragraph 15 of the further amended pleadings that this court should order the County Surveyor Busia to survey and confirm the boundary as placed during the life time of Apulunary and separate the defendant's 1 acre which he bought and thereafter be permanently stopped from encroaching or interfering with the boundaries and causing the whole suit land to be transferred to himself.

8. When Barasa filed the original pleadings on 11th May 2017, he also filed a list of documents dated 10th May 2017 to which was annexed the following documents:
 1. Copy of Apulunary's death certificate dated 21st June 2016.
 2. Copy of the register for the land parcel NO Bukhayo/Matayos/1340.
 3. Certificate of Official Search for the land parcel NO Bukhayo/Matayos/1340.
 4. Copy of Petition of Letters of Administration Ad Litem filed by Barasa in respect to the Estate of Apulunary in Succession Cause NO 8 of 2017.
 5. Copy of Confirmed Limited Grant of Letters of Administration Ad Litem issued in Succession Cause NO 8 of 2017 in respect to the Estate of Apulunary.
 6. Copy of transfer of the suit land dated 28th May 2009.
 7. Copy of a letter dated 25th August 2016 addressed to the Registrar of Persons from the Chief Lwanya location.
 8. Copies of letters dated 14th August 2016, 15th August 2016 and 11th August 2016 addressed to Barasa and the defendant by the Chief Lwanya location.
 9. Copy of minutes of Land Dispute Arbitration meeting held on 2nd September 2016.
 10. Copy of a letter dated 13th September 2016 from the Chief Lwanya and addressed to the Registrar Busia Court.
 11. Copy of letter dated 5th October 2016 from the Assistant Chief Lwanya addressed to Barasa and the defendant.
9. Following the plaintiff's Notice of Motion dated 30th April 2020 and which was allowed by Omollo J vide a ruling delivered on 8th October 2020, the plaintiff was allowed to file the following further documents:



1. Letter dated 11th March 2020 addressed to the firm of Obwoge Onsongo & Company Advocates by the Land Registrar Busia in respect of the suit land.
2. Copy of a letter from the Assistant Chief Igero Sub-location dated 30th November 2016 and addressed to “whom it may concern.”

And following the filing of the further amended plaint on 10th February 2023, the plaintiff filed the following further documents:

1. Letter from the Chief Lwanya Location addressed to the Judge and dated 5th October 2021.
2. Copy of Certificate of death for Barasa.
3. Copy of Limited Grant of Letters of Administration issued to the plaintiff in respect to the Estate of Barasa.

When Barasa first filed the original plaint herein on 11th May 2017, he also filed his statement and those of his witnesses PATRICK OCHIENG OKECH, GEORGE PAMBA ONIALA and PHANICE NOROCHO KHUSALA also dated 10th May 2017. Following the further amendment of the plaint, the plaintiff Charles Ajuma Obango also filed his statement dated 10th February 2023.

10. In his statement Barasa (PW1) stated that Apulunary was his uncle (he also referred to him as grandfather according to family ties). He added that the defendant had requested Apulunary for a place on which to put up a structure in which he could store his bricks and later requested to purchase the portion of and where he had put up the structure. Apulunary agreed and in the presence of Barasa and one DANIEL OGWEKO as witnesses, he demarcated a portion of the suit land measuring 75 steps which DANIEL OGWEKO who had previously worked at the Land Board confirmed was equivalent to 1 acre and sisal plants were used to demarcate the boundary. When Apulunary asked the defendant, who is also referred to as OJUKHU, for the money for the 1 acre, the defendant left to go and see his father and later came back with a bicycle instead of the money. When the plaintiff enquired if the consideration for the 1 acre was a bicycle, DANIEL informed him that Apulunary and the defendant had made an earlier understanding with each other.
11. The plaintiff and Apulunary later travelled to attend a funeral but before they left, the defendant asked Apulunary to give him the keys to his house so that he (defendant) could take care of the homestead in their absence and also take care of the poultry. However, when they returned to the house, they found it in a mess and when Apulunary checked the metal box in his room, he found that his identity card and the title deed were missing. When he asked the defendant if he was the one who had taken the identity card and title deed or if he had given the house keys to anyone else, the defendant denied.
12. The plaintiff went and reported the incident to the village elder and the Assistant Chief. A week later, Apulunary told him that a tall man had gone to his house and asked him to put his thumb print to some forms to help him process a new identity card. When the plaintiff followed up on the issue, the Assistant Chief confirmed to him that he was the one who had gone to see Apulunary.
13. Following the demise of Apulunary, the plaintiff questioned the defendant about the title deed to the suit land but the defendant insisted that he had not taken it. He however added that Apulunary had sold him a portion of the suit land. When Apulunary’S family conducted a search, they discovered that the defendant had registered the suit land in his name. The family reported the matter to the Assistant chief who said the issue was beyond him. They then reported to the Chief who summoned the defendant three times but he did not appear. When the matter was referred to the District Officer,



- the defendant attended and on being asked about the suit land, he replied that Apulunary gave it to him because he liked him. However, the defendant could not avail any agreement with Apulunary and said that the matter should be finished in Court.
14. In his statement Patrick Ochieng Okech (PW2) stated that he purchased land from Apulunary in 1984 and was therefore his neighbour his land being parcel NO Bukhayo/Matayos/1341. In 2009, Apulunary went to attend his nephew's funeral and left the keys to his house with the defendant. Upon his return from the funeral three days later, Apulunary discovered that his Identity Card and other documents were missing and reported to the Assistant Chief for directions.
 15. George Pamba Oniala (PW3) recorded his statement of even date stating that Apulunary, the plaintiff and the defendant are all his relatives and that they all live on the suit land which belong to Apulunary. That Apulunary sold the defendant 1 acre out of the suit land. In 2016, they were all summoned to the Chief's office following claims that the defendant had taken Apulunary'S land. However, the defendant did not attend and the plaintiff's family decided to place a restriction on the suit land.
 16. The matter was later referred to the District Officer (D.O) Matayos who summoned the family of Apulunary, the defendant and other members of the community to discuss the issue. The defendant was present and when he was asked how he had acquired the suit land, he said that Apulunary had given it to him. Those present informed him that they were aware that he had only purchased 1 acre of land from Apulunary and the family decided to seek Court intervention.
 17. Phanice Norocho Khusala (PW4) is a sister to Apulunary and in her statement, she states that the defendant asked Apulunary to allow him to make bricks on the suit land and they would share the proceeds. After a while, the defendant asked Apulunary to give him a portion of the suit land where he could erect a structure for keeping the bricks. Subsequently Apulunary sold a portion of the suit land measuring 1 acre to the defendant who gave him a bicycle in return and continued making bricks thereon but without sharing the proceeds. Apulunary complained and asked the defendant why he had only given him a bicycle for the 1 acre.
 18. Several days later Apulunary left to attend the funeral of his nephew but gave the keys to his house to the defendant so that he could take care of the house and the poultry. However, when Apulunary returned from the funeral, he found his house in a mess with some of his documents including his identity card missing. A report was made to the Assistant Chief and later it was discovered that the defendant had registered the suit land in his name leaving out the beneficiaries who still reside thereon.
 19. Following his substitution as the plaintiff herein and further amendment of the plaint, Charles Ajuma Obango (PW5) recorded his statement dated 10th February 2023 in which he confirmed that the suit land belonged to Apulunary his uncle. He stated that the defendant stole Apulunary'S identity card and forged documents to transfer the suit land to himself and taking advantage of the said Apulunary'S blindness yet he had only purchased 1 acre out of the suit land. That Apulunary, Barasa and his wife Roseline were all buried on the suit land but their children and their families still live thereon.
 20. During the plenary hearing, the plaintiff called as his witness Violet Lamu (PW6) the Land Registrar Busia. She produced the register for the suit land and transfer documents as part of the plaintiff's evidence.
 21. The defendant filed a statement of defence dated 7th July 2017 which he later amended on 28th April 2018. He questioned the capacity of Barasa (then the plaintiff) to file the suit. He denied the allegations of fraud stating that he purchased the suit land from Apulunary at a consideration of Kshs.280,000 and took vacant possession thereof on 29th August 1997 to-date. He put the plaintiff to strict proof of the allegations of fraud adding that no triable issues are raised as the sale agreement was witnessed



before the firm of Balongo & Company Advocates. He pleaded further that the plaint discloses no cause of action and the plaintiff is not entitled to the orders sought. He urged the court to dismiss this suit with costs.

22. The defendant filed a list of documents dated 7th July 2017 to which he annexed the following documents:

1. Copy of a land sale agreement dated 6th February 2009 between himself and Apulunary in respect to the land parcel NO Bukhayo/Matayos/1340.
2. Another copy of a land sale agreement dated 29th August 1997 between himself sand Apulunary for the sale of 1 acre out of the land parcel NO Bukhayo/Matayos/77.
3. Demand letter from the firm of Obwoye Onsongo & Company Advocates dated 29th October 2016 addressed to the defendant.
4. Copy of a letter from the Chief Lwanya location dated 14th August 2016 and addressed to the defendant and Barasa.
5. Copy of the title deed to the land parcel NO Bukhayo/Matayos/1340 issued on 5th June 2009 in the name of the defendant.
6. Transfer of land form and application for transfer.
7. Certificate of Official Search for the land parcel NO Bukhayo/Matayos/1340.
8. Reply to the demand letter.
9. Copy of the Green Card to the land parcel NO Bukhayo/Matayos/1340.

The defendant filed his statement and also that of this witness Mark Swaka Oganda (DW2). Both are un-dated.

23. In the statement, the defendant states that he purchased the suit land from Apulunary who transferred it into his name without any objection from any person. That he is in possession of the title deed and following the demise of Apulunary, the plaintiff has continuously encroached and trespassed onto the suit land with a malicious intent to obtain it by way of adverse possession. This has inconvenienced the defendant and jeopardized his efforts to developing it. The plaintiff should therefore be evicted therefore.

24. His witness Mark Swaka Obanda (DW2) also vide his un-dated statement has supported his case. He says he was a witness to the sale agreement between Apulunary and the defendant on 6th February 2009 and said the consideration of Kshs.280,000 being paid. The defendant obtained title deed to the suit land after adhering to all the provisions of the law and is therefore the owner thereof.

25. The plaintiff filed a reply to the defence in which he joined issues with the defendant. He denied that the defendant lawfully purchased the suit land at a consideration of Kshs.280,000 or that he took vacant possession of the same. He added that infact he is a dependent of Apulunary and a beneficiary of his Estate and the fact that Apulunary left behind no wife or child is no leeway for the defendant to fraudulently take the suit land away.

26. The plenary hearing commenced before Kaniaru J on 20th May 2019. He took the evidence of Barasa (PW1) who adopted as his evidence, the contents of his statement dated 10th May 2017 as his testimony and produced the documents filed herein as his documentary evidence. Thereafter, Omollo J heard the testimony of Patrick Ochieng Okech (PW2), George Pamba Onial (PW3) and Phanice Norocho



Khusala (PW4) on 14th October 2019. They too adopted as their testimony the contents of their statements which I have already summarized above.

27. I took over the hearing of the case on 19th April 2023 and heard the evidence of the plaintiff Charles Ajuma Obango (PW5), Violet Lamu (PW6) and also that of the defendant and his witness Mark Swaka Obanda (DW2). They too adopted as their testimony the contents of their un-dated statements which I have already summarized above. The defendant also produced the documents filed vide his list of documents dated 7th July 2017 as his documentary evidence.
28. I need to point out that although the defendant was first represented by the firm of A.g. Opiyo & Company Advocates who filed his defence before the firm of Obura – Obwatinya & Company took over and finally the firm of N. Moruri & Associates came on record for him on 16th February 2022, by the time the plenary hearing came to a close, he was acting in person having filed a Notice to that effect on 19th April 2023.
29. Submissions were thereafter filed both by MR Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the plaintiff while the defendant filed his submissions in person.
30. I have considered the evidence by the parties and the submissions by MR Onsongo and those by the defendant.
31. In order to resolve the dispute over the suit land, I find that the following issues need to be determined:
 - a. Whether the defendant holds a valid title to the suit land or if the same should be cancelled for having been obtained fraudulently.
 - b. If the answer to (a) above is that the title was obtained fraudulently, what remedies should this court grant the plaintiff.
 - c. Who meets the costs of this suit.
32. With regard to issue NO (a), it is not in dispute that the first registered proprietor of the suit land on 4th December 1985 was Apulunary. The register shows that on 5th June 2009 it was transferred to the defendant at a consideration of Kshs.250,000. On 7th November 2016, a restriction was registered on the title by Barasa. As the registered proprietor of the suit land, the defendant enjoys the protection provided under Section 24(a) of the *Land Registration Act* which reads:

24: “Subject to this Act –

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto ...”

Section 26(1) of the same Act also provides that a title to land confers upon the person in whose name it is registered, absolute and indefeasible ownership of such land. However, the title can be challenged if obtained through inter alia a fraudulent process. It reads:

26:

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



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Although the suit land is registered in the name of the defendant, the plaintiff has pleaded that the said registration was obtained through a fraudulent process orchestrated by the defendant. Particulars of that fraud have been pleaded in paragraph 13(i) to (ix) of the further amended pleadings. The defendant has in paragraph 2 of his amended defence denied those allegations of fraud. He has pleaded thus:

2: “The defendant denies contents of paragraph (13) of the amended pleadings and in particular denies particulars of fraud attributed to him and shall require the plaintiff to tender proof of his allegation of the hearing hereof.”

And in paragraph 3 of the same amended defence, he has added that:

3: “The defendant followed due process in obtaining title documents to the suit land and the plaintiff attempt to mislead the court into cancelling his title deed is misplaced.”

Having pleaded fraud on the part of the defendant, the onus was on the plaintiff to prove those allegations to the required standard. In the case of *Arthi Highway Developers Ltd -v- West End Butchery Ltd & 6 Others C.a. Civil Appeal No 246 of 2013 [2015 eKLR]* the Court of Appeal described that standard of proof as follows in paragraph 53:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

Similarly, in the case of *Koinange & 13 Others -v- Charles Karuga Koinange 1986 KLR 23* at page 44, *AMIN J* cited the case of *Ratilal Patel -v- Lalji Makanji 1957 EAR 314* wherein it was stated thus:

“... allegation 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 balance of probabilities is required.”

Finally, in the case of *Kinyanjui Kamau -v- George Kamau 2015 eKLR*, it was held that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo -v- Ndolo 2008 1 KLR (G&F) 742* wherein the Court stated that “... we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases”.

It is clear therefore that the burden of proving the allegations of fraud as levelled against the defendant lay on the plaintiff to the standard set out above.

33. Even though the burden of proving fraud was on the plaintiff, the defendant was also under a duty to demonstrate that his acquisition of the title to the suit land was beyond reproach. It is not enough for him to simply claim, as he has done at the commencement of his statement, that;

“I am the defendant herein and conversant with the material facts. That I bought land from one APULUNARI Makokha Okwako the initial owner by way of land sale agreement and



further to this without any coercion the seller transferred 1.81 Ha to myself and which was never disputed and or objected by anybody.”

He too had a duty as was set out in the case of *Munyu Maina -v- Hiram Gathiha Maina* 2013 eKLR where it was held:

“We state that when a registered proprietor’s root of title is under challenge, 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 on the register.”

Guided by the above, this court must now interrogate whether the plaintiff has proved fraud in the manner in which the defendant acquired the ownership of the suit land. That must of course be juxtaposed with the defendant’s explanation as set out in the case of *Munyu Maina -v- Hiram Gathiha Maina* (supra).

34. I must start with the evidence of Violet Lamu (PW6) the Land Registrar Busia who would have been expected to be a key witness in proving fraud. She produced the register of the suit land as well as the transfer form. On the face value, she could not detect any fraud in the documents and was honest enough to say so. When she was cross-examined by the defendant, she said:

“I have the register for the land. They are genuine. I also have the transfer form which is genuine. In my view, all the documents filed by the plaintiff are genuine as far as I can see. On the face value they are genuine. They show that there was a transfer. They also show that there was a complaint by one Barasa Obango Okwako. He complained about the documents. But that can only be confirmed through forensic evidence. I was told the minutes were taken to the Archives. I was not able to get them.”

The plaintiff’s case however is that the defendant stole the identity card of Apulunary and other documents to forge transfer documents and have the suit land registered in his name. While it is conceded that prior to his demise, Apulunary had sold 1 acre of land to the defendant, it is the transfer of the whole of the suit land to the defendant which is under scrutiny. This is how Charles Ajuma Obango (PW5) has put it in paragraphs 7, 8, 9 and 10 of his statement which he adopted as his testimony during the trial:

- “7: “Mine is to add that Alex fraudulently had L.R Bukhayo/Matayos/1340 whole transferred to himself from my late uncle Apulunari Makokha Okwako by way of fraud.”
- 8: “The fraud was actuated by the defendant who stole Apulunary’S ID card and title deed form Apulunary and forged transfer to himself.”
- 9: “The defendant took advantage of Apulunary’S blindness to fraudulently transfer the land to himself.”
- 10: “The defendant fraudulently obtained or forged the consent of the Land Control Board without the deceased attending the Land Control Board to obtain consent.”



While it is true that no forensic evidence was made available to show that the defendant forged any documents, there is evidence that sometime in 2009, Apulunary went to attend his nephew's funeral leaving the keys to his house with the defendant. When he returned 3 days later, he found it had been ransacked and some of his documents including his identity card had been stolen. This is how Patrick Ochieng Okech (PW2) put it in paragraphs 11 and 12 of his statement:

- 11: "Then in 2009 around April, Apulunary lost his nephew. He left for the funeral and left his house keys with one Alex Wandera Makokha who was also a buyer like myself and a neighbor to him to help him take care of his homestead in his absence."
- 12: "On coming back from the funeral after about 3 days, one Barasa Obango came to me and reported that the documents his uncle APULUNARI had got from the lands office together with his I.D had gotten lost."

The evidence that runs throughout the plaintiff's witnesses' testimonies is that the defendant requested Apulunary to leave him the keys to his house so he could take care of it while Apulunary went to attend a nephew's funeral. When he returned, however, he found his documents including identity card and title deed to the suit land missing. Whereas no-one saw the defendant forge the documents to facilitate the transfer of the suit land into his names, it cannot be a coincidence that the transfer of the suit land was done on 5th June 2009 the same year in April when Apulunary left the defendant with the keys to his house only to find his documents missing. The Land Registrar Busia Violet Lamu (PW6) said it needed "forensic evidence" to confirm the complaint of Barasa Obango Kwako (PW1) to the effect that the documents used in transferring the suit land to the defendant were forged. However, the fact that the transfer was done around the same time that Apulunary's house was ransacked and his documents including his identity card and title deed to the suit land stolen in sufficient circumstantial evidence to prove the allegations of fraud against the defendant. Evidence need not only be direct. As LORD Heward CJ stated in the case of R.v. Taylor, Weaver & Donovan 1928 CR. APP R 21:

"It has been said that the evidence against the Appellant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics". Emphasis mine.

It is the defendant who now holds the title to the suit land. Therefore, only he had the opportunity and motive to steal the original title from the house of Apulunary and, using other documents stolen from the said house, to transfer the suit land into his name.

35. Secondly, there is the direct evidence by Charles Ajuma Obango (PW5) that Apulunary, Barasa and his wife Roseline Barasa were buried on the suit land where their children were born and have grown up. This is what the witness has stated in paragraph 12 of his statement dated 10th February 2023:

- 12: "The late Apulunary Makokha Okwako, Barasa Obango Okwako and his wife Roseline Osinya Barasa died and were buried on the land. Their children who were born on the land are now grown up stay on the land with their families".



When he was cross-examined by Mr Onsongo, the defendant confirmed that indeed Barasa who was the first to file this suit and his wife were buried on the suit land. This is what he said:

“The 1st Plaintiff and his wife were utilizing part of the land but on the lower side. The 1st Plaintiff is now deceased. He was buried on the lower part of the land. His wife was also buried on the lower part of the land. The 1st plaintiff who is deceased is Barasa Obango Okwako. His son who is now the plaintiff is called Charles Obango. I have never evicted either Barasa Obango or Charles Obango or tried to evict them”.

The fact that Apulunary, Barasa and his wife Roseline were all buried on the suit land where their children still live and no attempt has been made to evict them is clear evidence that Apulunary could not have sold the whole of the suit land to the defendant although it is conceded that he purchased only 1 acre thereof for the consideration of a bicycle. It certainly would not add up that Apulunary would sell the whole of the suit land and still remain in-situ and even be buried thereon. Although the defendant claims that Apulunary had no wife or children to inherit him, the fact that Barasa obtained a Limited Grant of Letters of Administration in respect of his Estate in Busia Chief Magistrate’s Court Succession Cause No 8 of 2017 without any challenge, is an illustration that he had an interest in the Estate of Apulunary. It is not the law that only a spouse or child can have an interest in the Estate of a deceased person. In any event, Barasa said he is a nephew to Apulunary and therefore part of his family. It is highly unlikely that Apulunary would have wanted to sell the whole of the suit land to the defendant leaving his nephew Barasa and other family members who had an interest therein to remain as destitute.

36. I am persuaded from all the above to find that the allegations of fraud on the part of the defendant in the manner in which he obtained the suit land have been proved. The title should therefore be cancelled.

37. With regard to issue NO (b), it is clear that the plaintiff concedes that the defendant is entitled to 1 acre out of the suit land which the defendant purchased from Apulunary in return for a bicycle. Indeed paragraph 15 of the further amended plaint is pleaded thus:

15: “The plaintiff further prays that the court do order the County Surveyor Busia to survey and confirm the boundaries as placed in the lifetime of the deceased and the defendant to separate the defendant’s one acre that he bought from the remainder of the land and the defendant be permanently stopped from encroaching, interfering with boundaries on panel of land causing the whole land panel to be transferred to himself.”

It is clear therefore that whereas the plaintiff seeks the cancellation of the title to the suit land in the defendant’s name, he recognizes the defendant’s interest in a portion thereof measuring 1 acre. This court will take that into account in the final disposal orders.

38. The prayer for eviction and injunction in respect to the portion of the suit land which the defendant is not entitled to must therefore issue as prayed.

39. With regard to costs, the defendant shall meet the plaintiff’s costs.

40. The upshot of all the above is that having considered the evidence by the parties as well as their submissions, there shall be judgment for the plaintiff as against the defendant in the following terms:

1. The title to the suit land and all the illegal entries in the register to the land parcel NO Bukhayo/Matayos/1340 in the name of the defendant are cancelled forthwith.
2. The defendant shall within 45 days of this Judgment deliver to the Land Registrar Busia the original title deed to the land parcel NO Bukhayo/Matayos/1340 for cancellation.



3. The Land Registrar Busia and the County Surveyor shall apportion out of the land parcel NO Bukhayo/Matayos/1340 a portion measuring one (1) acre to be registered in the name of the defendant. That portion should as much as possible include where the defendant has his house and utilizes, if at all.
4. The defendant shall thereafter vacate the portion of the suit land which shall remain after the apportionment of his one (1) acre and which shall be registered in the name of the plaintiff to hold in trust for the family of Apulunary.
5. In default of (4) above, the defendant shall be evicted and permanently enjoined by himself, his family, agents, servants or any other persons acting through him from interfering with the plaintiff's occupation and possession of the portion of the land to be registered in his name in trust.
6. The parties shall meet the costs of survey and registration of their respective parcels of land in their names.
7. The defendant shall meet the plaintiff's costs of this suit.

BOAZ N. OLAO

JUDGE

1ST OCTOBER 2024

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
1ST DAY OF OCTOBER 2024 WITH NOTICE TO THE PARTIES.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

1ST OCTOBER 2024

