



**Wanyonyi v Mauko; Mahava (Interested Party) (Environment & Land  
Case 78 of 2005) [2024] KEELC 6773 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6773 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 78 OF 2005  
EC CHERONO, J  
OCTOBER 11, 2024**

**BETWEEN**

**BENARD WAMALWA WANYONYI ..... PLAINTIFF**

**AND**

**FESTO MUNYASI MAUKO ..... DEFENDANT**

**AND**

**VINCENT SAKWA MAHAHA ..... INTERESTED PARTY**

**RULING**

1. By an amended plaint dated 11<sup>th</sup> December 2017, Bernard Wamalwa Wanyonyi (the plaintiff herein) sought Judgment against Festo Munyasi Mauko (the defendant herein) for: -
  - (a) A permanent injunction restraining the defendant, his agents, representatives, assigns and any person whosoever claiming through him from interfering with the plaintiff's lawful occupation, use and possession of land parcel number East Bukusu/West Sang'alo/3040 and East Bukusu/West Sang'alo/3041 respectively.
  - (b) Costs of the suit.
  - (c) Interest at Court rates.
2. It is the Plaintiff's case that he is the registered proprietor and lawful owner in possession of the land parcels No East Bukusu/West Sang'alo/3040 and East Bukusu/West Sang'alo/3041 (herein after referred to as the 'suit land') which was a resultant sub – division of land parcel No East Bukusu/West Sang'alo/724. That the defendant is a son of one Mauko Khatoro (now deceased) who was the brother to the Plaintiff's father, one Mathias Khatoro. That Mauko Khatoro's owned land parcel No East Bukusu/East Sang'alo/677 measuring 8.12 Ha which he sold to Domiano Wangila and Micheal Mulongo Elima who now own parcel No East Bukusu/East Sang'alo/1250 and 1249 respectively. The



- Defendant and his late father having sold their land parcel No East Bukusu/East Sang'alo/677 have now unlawfully encroached onto the suit land claiming interest and ownership.
3. By an amended defence and Counter – Claim dated 2<sup>nd</sup> November 2018, the Defendant averred that the registration of the Plaintiff as proprietor of land parcel No East Bukusu/West Sang'alo/724 and its subsequent sub – division to create new numbers including the suit land was unlawful and fraudulent. The particulars of fraud against the Plaintiff are set out as follows;
    - a. Misleading the Land Registrar into believing that Matias Wamalwa and Bernard Wamalwa Wanyonyi are one and the same person.
    - (b) Executing a false change of names to procure false registration.
    - (c) Obtaining and/or procuring registration in the names of the plaintiff whilst fully aware of the interest of Mauko Khatoro thereon.
    - (d) Obtaining registration by means of deceit.
    - (e) Obtaining registration by means of false representations.
  4. The defendant denied that his father, Mauko Khatoro was the owner of Land parcel No East Bukusu/ East Sang'alo/677 and that he disposed the same. The Defendant averred that the Plaintiff's father Mathias Khatoro alias Matias Wamalwa was registered as proprietor of the land parcel No East Bukusu/ West Sang'alo/724 to hold in trust for the deceased but in breach of the said trust, the plaintiff fraudulently caused the transfer of the said land in his name. The Defendant's counter claim against the Plaintiff can be deduced as follows: -
    - a. A declaration that the registration of plaintiff as proprietor of the land parcel No East Bukusu/ West Sang'alo/724 and subsequent new numbers created upon sub – division to wit East Bukusu/West Sang'alo 3037, 3038, 3039, 3040 and 3041 was fraudulent, a declaration that the defendant is entitled to 14 acres thereof or and on behalf of the Estate of the deceased from the aforesaid parcels of land, an order for rectification of the register and for partition and eventual transfer of the said 14 acres into the defendant's name in trust for the Estate of the deceased Mauko Khatoro.
    - b. The plaintiff's suit be dismissed.
  5. The plaintiff filed a reply to the amended defence and defence to the Counter – Claim and joined issues with the defendant. The plaintiff denied the allegations of fraud adding that the Counter – Claim was vague and ambiguous. The Plaintiff further denied that the defendant deceased father had any proprietary rights and interest in land parcel No East Bukusu/West Sang'alo/724 during his life – time. The Plaintiff further averred that the process of registration and sub – division of land parcel No East Bukusu/West Sang'alo/724 was lawful and asked the Court to allow his claim and dismiss the defendant's Counter – Claim.
  6. The Interested party filed a reply to the Plaintiff's amended plaint and a counter-claim dated 16<sup>th</sup> May, 2023 where he denied the Plaintiff's set of facts and pleaded that land parcel No. East Bukusu/West Sang'alo/3038 is a sub-division of land parcel No East Bukusu/WEST Sang'alo/724 which is registered in the name of the Plaintiff. In his counter-claim, the Interested party pleaded that he is the bonafide registered owner of land parcel No. East Bukusu/West Sang'alo/3038 having purchased the same from the Plaintiff sometime on 24<sup>th</sup> May, 2018. That prior to the said purchase, he did due diligence and confirmed that the said land was vacant and conducted a search and satisfied himself that the Plaintiff was the absolute and registered owner of land parcel No. East Bukusu/West Sang'alo/3038.



7. That upon purchase, the Interested party went ahead and fenced the land and neither did the Plaintiff or Defendant make an effort to dispossess him. That he was not aware that the land was embroiled in a dispute and that he only became aware of the same when he was served with a letter from the Land Registrar in Bungoma dated 26<sup>th</sup> April, 2022 asking that he surrenders his title to land parcel No. East Bukusu/West Sang'alo/3038 for purposes of implementing the Court's judgment dated 14<sup>th</sup> November, 2019. The Interested Party averred that his purchase was without notice of the Defendants claim and was in good faith, without any knowledge or collusion of fraud with the Plaintiff.
8. The Interested Party further averred that the Plaintiff fraudulently sold him the land without informing him of the pending court case and listed the particulars of fraud and misrepresentation as follows;
  - a. Failing to disclose the existence of the suit herein to the Interested Party.
  - b. Representing to transfer land parcel No. East Bukusu/West Sang'alo/3038 to the Interested Party knowing that the transfer was tainted with irregularities, fraud and illegality.
  - c. Conveying the property to the Interested Party without disclosing the existence of any competing claims or encumbrances.
  - d. Intention to defraud the interested party.
  - e. Negligently misrepresented the status of the property's title, either by providing false information or by failing to disclose material facts that were known to them, such misrepresentation has resulted in harm and financial loss.
9. The Interested party pleaded that being an innocent purchaser for value, his title should not be interfered with and that the same should be vested in him in failure to which he is bound to suffer financial loss, mental distress and additional expenses. He sought for judgment in the following terms;-
  - a. A declaration that the Interested party is a bonafide purchaser of land parcel No. East Bukusu/West Sang'alo/3038.
  - b. That a vesting order should issue, vesting land parcel No. East Bukusu/West Sang'alo/3038 to the interested party.
  - c. That a permanent injunction should be issued restraining the Plaintiff and the Defendant by themselves, their servants and/or agent or anyone whomsoever under their direction, in any means whatsoever, from interfering with the interested party's ownership or possession of land parcel No. East Bukusu/West Sang'alo/3038.
  - d. That in the alternative and without prejudice to the (b) and (c) above, the Plaintiff be compelled to compensate the interested party for the purchase of land parcel No. East Bukusu/West Sang'alo/3038 at the prevailing market value.
  - e. Costs and interests of the suit.
  - f. Any other and/or further orders that this honourable court may deem fit and just to grant.
10. Together with their pleadings, the parties filed their statements including those of their witnesses and list of documents.
11. The trial begun on 19<sup>th</sup> February, 2024 when the Plaintiff BEnard Wamalwa Wanyonyi testified as PW1. He adopted his witness statement dated 11/12/2017 as his evidence in chief where he reiterated his averments as per the amended plaint. He produced his list of documents dated 25/11/2014 which



- contained 8 items as PExhibit 1-8, he produced his further list of documents dated 11/12/2017 which contained 9 items as Pexhibit 9-17. It was his evidence that he had previously sued the Defendant in a suit before the Land District tribunal, which suit was transferred to the High Court and terminated in his favour. It was his evidence that the Defendant's father was in use of 5 acres of the suit land since the year 1969 to 2005.
12. During cross-examination by the Defendant he testified that the suit land is approximately 39.5 acres and belongs to him having inherited the same from his father. He testified that the Defendant's father inherited land parcel no.667. It was his testimony that the Defendant started to use the suit land in the year 1999 and that he (the Plaintiff) was ploughing 8 acres of the suit land while part of the rest of it was being leased out. When cross-examined by the Interested Party, he testified that he sold land parcel No. East Bukusu/West Sang'alo/3038 which was a sub-division of land parcel No. East Bukusu/West Sang'alo/724 to the Interested Party. He admitted to not disclosing to the Interested Party about the pending case between him and the Defendant. He also confirmed that no encumbrances had been placed on the title.
  13. In re-examination PW1 testified that the Defendant was given land i.e land parcel No. East Bukusu/West Sang'alo/667 by his father. It was his evidence that land parcel No. East Bukusu/West Sang'alo/724 was being ploughed by some family members. He testified that at the time of the sale to the Interested Party, there was no stay of transactions over the land.
  14. The Defendant, Sylvester Munyasi Mauko alias Festo testified as DW1 and adopted his witness statement dated 14/9/2005 as his evidence in chief where he reiterated his averments as per the statement of defence and counter-claim. He also produced into evidence his list of documents dated 14/9/2005 which contained 27 items and DExhibit 1-27. He also produced two further lists of documents dated 4/10/2018 and 2/11/2018 which contained 2 and 1 item respectively as DExhibit 28, 29 & 30. DW1 testified that he has been using the suit land since the year 1969 after he was given the same by his father.
  15. When cross examined by the Plaintiff, he testified that his father was in use of the suit land long before the same was registered in the name of PW1's father and later to the Plaintiff's name fraudulently. It was his evidence that he placed a caution over the suit land on 21/10/2004. It was his evidence that his interest in the suit land is as a family member since the suit land is family land being shared by his father and the Plaintiff's father. The witness stated that land parcel No. East Bukusu/West Sang'alo/667 which is 7metres away from the suit land was given to his father by a friend and that he does not know what his father did with the said land.
  16. On cross-examination by the Interested party, DW1 testified that the suit land was first registered in the name of Mathias Wamalwa on 2/8/1969 in trust for himself and for his (the Defendant) father. He testified that he was ploughing the lower part of the suit land while the Plaintiff was ploughing the upper part. He testified that there was a court order issued in CMCC Case No. 570 of 2009 in respect of land parcel No. E.bukusu/W. Sang'alo/724.
  17. In re-examination he testified that land parcel no. E.Bukusu/W.Sang'alo/677 did not belong to his grandfather and that the suit land was shared between the Plaintiff's father and his father. It was his evidence that the land tribunal awarded him 24 acres of the suit land while the trial court issued a temporary injunction pending determination of the award in the tribunal.
  18. The Interested party testified as DW1 Vincent Sakwa Mahoya and recorded his statement dated 16/5/2023 as his evidence in chief. He also produced into evidence his list of documents dated 23/5/2023 which contained 8 items produced as the DExhibit No. 1-8. When cross-examined by the



- Plaintiff he testified that he purchased land parcel no. E.Bukusu/W.Sang'alo/3038 on 24/5/2018 and was registered as the owner on 6/6/2018. He then reiterated the facts as pleaded in his counter-claim.
19. Submissions were thereafter filed both all the parties.
  20. The plaintiff filed submissions dated 29/4/2024 where he submitted on four issues. First, the Plaintiff submitted on the import of Sections 24 and 26(1) of the *Land Registration Act*. Reliance was placed on the case of *Zakaria Mungatsia Anyula vs. Agneta Mmbone Okwemba* (201) eKLR. It was submitted that neither the Defendant nor his father occupied the suit land and moreover the only land registered in the name of the defendant's father was land parcel no. E.Bukusu/W.Sang'alo/677 and therefore the idea of customary trust was remote.
  21. Secondly, it was submitted that the Defendant has not proved any fraud on the part of the Plaintiff a required under Section 107 and 109 of the *Evidence Act*. It was argued that the Plaintiff was registered and the owner of land parcel no. E.Bukusu/W.Sang'alo/724 in 1969 during the adjudication period when the Defendants father was still alive and no challenge was ever made. Reliance was placed in the case of *Yalwala & 3 Others (sued in their capacity as Board of Trustees of Chavakali Yearly meeting of friends (Quakers) v Kadenge & 3 Others* (ELC Case No. 4 of 2021) [2022] (KEELC)2510(KLR).
  22. Thirdly, it was submitted that since the year 1969, the Plaintiff has been in possession of the suit land. Lastly, they urged the court to dismiss the Defendants counter-claim since the same has not been substantiated by evidence.
  23. The Defendants filed their submissions dated 28/6/2024. On behalf of the Defendants, it was argued that the Plaintiff's registration as the proprietor of land parcel no. E.Bukusu/W.Sang'alo/724, through a name change from Matias Wamalwa to his own, was fraudulent, irregular, and unlawful. Reliance was placed on the case of Dan Kyobe vs. Daniel G.B Kibuuka Musoke & Another Ugandan High Court Civil No. 108 of 2011 which cited the case of Lazarus Pearsley [1956] OB 702 AT 712. Secondly, it was submitted that land parcel no. E.Bukusu/W.Sang'alo/724 was shared between the Plaintiff and the Defendants father who were brothers and that neither of them lived on the land save that they leased it out to 3<sup>rd</sup> parties. He quoted the case of Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR, Njenga Chogera v Maria Wanjira Kimani & 2 Others [2005] eKLR. Lastly, it was submitted that the Interested party if at all is only entitled to his prayer (d) since his purchase of land parcel no. E.Bukusu/W.Sang'alo/3038 was made during the pendency of an injunction order.
  24. The interested party filed submissions dated 24/5/2024. Where he submitted that he was a bonafide purchaser for value without notice having conducted due diligence prior to purchasing land parcel no. E.BUKUSU/W.Sang'alo/3038 and occupied the same thereafter. He argued that he holds a certificate of title with regards the said land and that under Section 26(1) and 80 of the *Land Registration Act* protects his title. Reliance was placed in the case of Katana v Omar & 5 Others (ELC 192 of 2017) [2023] KEELC 17293 (KLR) and *Mohamed v Duba & Another (Civil Appeal 83 of 2019)* [2022] KECA 442(KLR).

### Legal Analysis And Decision

25. I have carefully read and considered the pleadings by the parties, the oral and documentary evidence adduced, the rivals written submissions, authorities cited and the relevant provisions of law and find the following issues commend for determination;
  - i. Whether the Plaintiff is the absolute owner of the suit land or whether the Defendant has made a case for existence of a trust over the suit land.
  - ii. Whether the Interested Party is a bona-fide Purchaser for value without notice.



- iii. Whether the Plaintiff had a good title to pass to the Interested Party.
  - iv. Who should bear the cost of the suit?
26. Before considering the outlined issues, I will briefly point out the undisputed facts from the pleadings and evidence. Undoubtedly, Land Parcel No. E.Bukusu/W.Sang'alo/724 was initially registered in the name of Matias Wamalwa. The Plaintiff and the Defendant are cousins, being the children of Mathis Wamalwa Khatoro and Mauko Khatoro, who were brothers. Both Matias Wamalwa Khatoro and Mauko Khatoro are now deceased.

Whether the Plaintiff is the legal owner of the suit land or the Defendant has made a case for existence of a trust over the suit land.

27. The Plaintiff seeks for orders restraining the Defendant, his agents, representatives, assigns and any other persons from interfering with his occupation, use and possession of the suit land which is registered in his name. However, the Defendant contends that the Plaintiff obtained the registration fraudulently and claims entitlement to fourteen (14) acres from the sub-divisions of land parcel No. East Bukusu/West Sang'alo/724, specifically land parcels No. East Bukusu/West Sang'alo/3037, 3038, 3039, 3040, and 3041, which the Plaintiff allegedly holds in trust for the estate of Mauko Khatoro.
28. The Plaintiff asserts that he is the registered owner of the suit land and that the Defendant who is said to have encroached thereon has no beneficial right or interest to be on the land. It is the Plaintiff's case that he was first registered as the owner of land parcel No. East Bukusu/West Sang'alo/724 in the year 1969 during the adjudication period. Indeed, by virtue of being the registered owner of land parcel No. East Bukusu/West Sang'alo/724 and now the suit land, the Plaintiff's title is protected under the law.
29. Sections 27 of the Registered [Land Act](#) Cap 300(now repealed) which have now been mirrored in Section 24 of the [Land Registration Act](#) 2012 as follows; -

24. Subject to this Act

(a)The registration of a person as 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 25(1) which mirrors section 28 of Cap 300(repealed) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) as not requiring noting in the register.

30. The above provisions confer absolute ownership of land parcel No. East Bukusu/West Sang'alo/724 and the subsequent sub-divisions on the Plaintiff. However, ownership of such title is not absolute as the said Certificate of title can be impeached under certain circumstances as contemplated in Section 26 of the [Land Registration Act](#) i.e. 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. Further, that registration does not relieve the holder from any duty or obligation as recognized under Section 28 of the [Land Registration Act](#) which is similar to Section 30 of Cap 300(repealed) provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—



- (a) .....
- (b) trusts including customary trusts;”

31. Since the Plaintiff produced the titles to the suit land, it was up to the Defendant to present evidence challenging the titles in either of the ways referred to under Section 26 or 28 of the Land Registration Act. As earlier mentioned, the Defendant claims that land parcel No. East Bukusu/West Sang’alo/724 thus the resultant sub-divisions amongst them the suit land was trust land registered in the name of Mathias Wamalwa alias Mathis Wamalwa Khatoro and subsequent registration of the Plaintiff as the absolute owner was fraudulent as pleaded in his counterclaim where he itemized the particulars of fraud against the Plaintiff.

32. Section 107 of the Law of Evidence Act Cap 80 Laws of Kenya provides:-

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

33. It is noteworthy that evidential standard for proof of fraud in civil cases is higher than a balance of probabilities but lower than the criminal standard of proof beyond reasonable doubt. Evidence of especially high quality and strength is required to discharge the high burden of proof in a case alleging fraud. See Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others Civil Appeal No. 45 of 1996 where the Court stated:

“Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.” (Emphasis added)

34. Further, in Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi JA as he then was stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

35. To support his claim, the Defendant tendered evidence by way of a green card-DExhibit 1 which indicates that Mathias Wamalwa was the first registered owner of land parcel No. East Bukusu/West Sang’alo/724 having been so registered on 2/8/1969. It was the Defendants testimony, a fact that was confirmed by the Plaintiff that on 7/6/1990, the Plaintiff through an affidavit of change of names obtained registration of land parcel No. East Bukusu/West Sang’alo/724. This is confirmed by the second entry in the green card which indicates that the Plaintiff Benard Wamalwa Wanyonyi became the registered owner on 1/8/1990 by virtue of C/Names which translates to change of names. By this affidavit essentially the Plaintiff asserted that Matias Wamalwa and Bernard Wamalwa Wanyonyi are one and the same person. This as we have seen from the record is false and as such the Plaintiff executed false information and misrepresented the true identity of the legal owner of the suit land. In the current circumstances the only way the Plaintiff would have become a registered owner of land parcel No. East Bukusu/West Sang’alo/724 would have been through transmission. Therefore, it is evident that



the manner in which the Plaintiff became the registered owner of land parcel No. East Bukusu/West Sang'alo/724 and as a result all the resultant sub-divisions was irregular and fraudulent.

36. The other issue to consider under this context is whether parcel No. East Bukusu/West Sang'alo/724 was registered in the name of Matias Wamalwa in trust for Mauko Khatoro, whose estate the Defendant now claims. The Defendant testified that he and his father since the registration of land parcel No. East Bukusu/West Sang'alo/724, have been utilizing the lower part of the land while the Plaintiff has been using the upper part. This set of facts was confirmed by the Plaintiff in his oral testimony where he asserted that the defendants have been utilizing approximately 5 acres.
37. The Plaintiff contends that the Defendant and his father were allowed to use the land because they had disposed of the land that had been allocated to the Defendant's father, specifically parcel No. East Bukusu/West Sang'alo/677. However, the Plaintiff did not provide any evidence in support of this allegation. Instead, he led evidence showing that the two had been utilizing the land from 1969 until 2004, when this suit was filed
38. In the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, it held as follows:

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

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

39. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that while the title of the suit land did not blatantly indicate the suit land was trust land a trust subsists on the suit land in favor of the Defendant's father. That Matias Wamalwa was holding the suit land in trust for his own behalf and his brother Mauko Khatoro, the Defendant's father included.
40. The Defendant in his counter-claim pleaded for 14 acres of parcel No. East Bukusu/West Sang'alo/724. In my considered opinion, this claim has merit, and I hereby grant the award accordingly.

**Whether the Interested Party is a bonafide Purchaser for value without notice.**

41. The Interested Party's claim is for a bona fide purchaser for value without notice where he is the registered owner of land parcel No. East Bukusu/West Sang'alo/3038 having purchased it from the Plaintiff vide a sale agreement dated 24/5/2018 and has attached evidence in support of his case. The



Plaintiff has not denied this fact as he confirmed selling the said portion to the Interested Party and having considered the agreement this court finds that the same is in compliance with Section 3(3) of the Law of Contract Act read together with section 38 of the Land Act, 2012 which provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed. This was the decision of the Court in the case of Machakos District Cooperative Union v Philip Nzuki Kiilu CA No 112 of 1997.

42. A bonafide purchaser has been defined by the Court in the case of Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR as

“a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

43. The Interested party has produced exhibits including an agreement dated 24/5/2018, receipts in proof of payment, application for consent, consent letter and transfer forms. From the record there is no evidence that the Interested party purchased the land in bad faith and with knowledge of the dispute between the Plaintiff and Defendant. However, before purchasing land, it behooves the interested to conduct official search at the lands office and any other encumbrances on the land including customary trust which may not ordinarily be noted in the register. The interested party was required as part of due diligence to go beyond the register and inquire when the suit property was adjudicated and demarcated and whether the original proprietor was registered as an absolute owner or he was to share with other members of the family. The interested party did not do due diligence as required and cannot now seek protection from this court.

44. Having said the above, this Court observes that the interested party in his testimony stated that he bought property based on the evidence of the register. This Court therefore finds and holds that the Interested Party was not a bona fide purchaser for value without notice.

**Whether the Plaintiff had a good title to pass to the Interested Party and what is the Interested party’s remedy.**

45. In the preceding paragraphs, the Court has found that the Plaintiff obtained through irregular and fraudulent manner title to land parcel No. East Bukusu/West Sang’alo/724 and thus land parcel No. East Bukusu/West Sang’alo/3038 which is a sub-division thereof was equally obtained irregularly and fraudulently and that the Defendant has proved the subsistence of a trust over land parcel No. East Bukusu/West Sang’alo/724. The upshot of the above disposition therefore is that the Plaintiff did not have a good title to pass to the interested party. Having said that, this Court has no option than to cancel the Interested Party’s title. The Interested parties claim/remedy therefore lies with the Plaintiff.

46. From the foregoing therefore, the Interested party is entitled to a refund of the advanced consideration. However, I do not find any evidence of the current value before me. From the Attached receipts of



payment it appears that the Interested Party advanced Kshs.2,140,000/= while the sale agreement dated 24<sup>th</sup> May, 2018 shows that the Interested Part purchased the entire land parcel No. East Bukusu/West Sang'alo/3038 in two fold i.e 3acres at Kshs1,670,000/= and 1acre at Kshs.480,000/=. Noting that the Plaintiff never gave evidence to deny the Interested Part's allegation that he had paid him the said sum in connection with the claimed portion of land it is this court's view the Plaintiff's conduct must be deemed to be an admission that he received money from the Interested Party in respect of the suit claimed portion. I proceed to make an order for a refund of the same to the Interested Party by the Plaintiff at courts interest rates.

47. For the avoidance of doubt the following orders are issued;

1. The plaintiff's claim is hereby dismissed
2. The defendant's counter-claim is allowed and a declaration is hereby issued that he is entitled to 14 acres out of the resultant sub-divisions of the original land parcel No.east Bukusu/West Sang'alo/724 including the suit land which is held in trust for the Estate of the late Mauko Khatoro
3. That trust is hereby determined and the plaintiff shall, within 30 days of this Judgment, execute all the relevant transfer documents to facilitate that registration in favour of the defendant and in default, the Deputy Registrar shall do so.
4. The registration of the Interested party herein (Vincent Sakwa Mahaya) as proprietor of the resultant land parcel No. East Bukusu/West Sang'alo/3038 was fraudulent and irregular and the same is hereby cancelled.
5. The Interested party shall within 30 days of this Judgment execute all the relevant transfer documents to facilitate the registration of the defendant as the owner of land parcel No. East Bukusu/West Sang'alo/3038 and in default, the Deputy Registrar to do so.
6. The plaintiff to refund the Interested party the sum of Kenya shillings two million one hundred forty thousand only (KSHS 2,140,000.00 plus interest at court rates from the date of payment till payment in full.
7. The plaintiff shall bear the defendant and the Interested partys' costs of this suit plus interest at court rates

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 11<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Wanyama h/b for Otsiula for plaintiff
2. M/S Masengeli for the defendant
3. M/S Macharia for the Interested party.
4. Bett C/A

