



Shichangi & 4 others (All suing as the legal representatives of the Estate of Wasike Shichangi) v Wangusi & 2 others (Environment & Land Case 122 of 2015 & 97 of 2011 (Consolidated)) [2023] KEELC 18626 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18626 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 122 OF 2015 & 97 OF 2011 (CONSOLIDATED)
BN OLAO, J
JULY 6, 2023

BETWEEN

ANDREW WAFULA SHICHANGI 1ST PLAINTIFF
PETER WASIKE SHICHANGI 2ND PLAINTIFF
EDWARD SIMIYU WASIKE 3RD PLAINTIFF
CHRISTOPHER SICHANGI 4TH PLAINTIFF
ALL SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF WASIKE SHICHANGI

AND

NEWTON WASIKE WANGUSI 1ST DEFENDANT
LAND REGISTRAR BUNGOMA 2ND DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 97 OF 2011

BETWEEN

JOHN WATILA MUNYASIA PLAINTIFF

AND

WASIKE SICHANGI RESPONDENT



JUDGMENT

1. If another example was needed that fits the description of “Hot Air”, then this is a classic one. This refers to both the plaintiffs’ suit and the 3rd defendant’s counter-claim. They both clearly capture the definition of “Hot Air” in the Concise Oxford English Dictionary which is:

“Empty or boastful talk.”

Ideally, this dispute ought to have come to an end on May 31, 2017 when Mr Simiyu W. Amos the County Surveyor Bungoma County, and acting pursuant to orders issued by this Court filed a report in which he categorically stated in the last paragraph as follows:

“In summary, Chwele Plot No 53 does not exist.”

Bungoma ELC Case No 122 of 2015 and Bungoma H.C Case No 97 of 2011 were, with the consent of the parties consolidated for purposes of hearing and final determination.

2. By an amended plaint dated April 29, 2022 Andrew Wafula Sichangi, Peter Wasike Sichangi, Edward Simiyu Wasike and Christopher Sichangi (the 1st, 2nd, 3rd and 4th plaintiffs and suing as the legal representatives of the Estate of WASike Sichangi), sought judgment against Newton Wekesa Wangusi and The Land Registrar Bungoma (the 1st and 2nd defendants respectively) in the following terms:
 - a. The new title deeds issued to the 1st defendant in respect of the land parcel No Bokoli/Chwele/3320 be cancelled.
 - b. Costs of the suit.
 - c. Interests at Court rates.
 - d. Any other relief.
3. The basis of the plaintiff’s suit is that in 1972, Wasike Sichangi (the deceased) was allocated all that parcel of land known as plot No 53 (the suit plot) measuring 60 feet by 100 feet by the then County Council of Bungoma for which he has consistently been paying land rates upto and including the month of November 2010. However, on 5th January 2015, a new register was created for the land parcel No Bokoli/Chwele 3320 measuring 0.19 Hectares and which arose from the land parcel No Bokoli/Chwele/259. That at the time of the creation of the said title No Bokoli/Chwele/3320, the 1st defendant purported and merged the said registration to include the suit plot which had already been fully developed with buildings thereon. That the suit plot No 53 has always been distinct from the neighbouring plots including land parcel No Bokoli/Chwele/3320. That on May 21, 2015, the 1st defendant caused land parcel No Bokoli/Chwele/3320 to be sub-divided to create new titles being Bokoli/Chwele/3368, 3369, 3370, 3371, 3372 and 3373. That the creation of the above sub-divisions was done fraudulently particulars of which have been pleaded in paragraph 13(a) of the amended plaint as follows as against the 1st defendant:
 - a. Obtaining title to parcel No Bokoli/Chwele/3320 and in the process purporting to include plot No 53.
 - b. Presenting forged transfer documents to the 2nd defendant.
 - c. Obtaining title to land parcel No Bokoli/Chwele/3320 without a valid consent from the Land Control Board.



d. Obtaining title thereto basing on a survey exercise and forged transfer forms.

And as against the 2nd defendant, the particulars of fraud were pleaded as:

a. Causing to be issued titles based on forged transfer forms and a wrong survey exercise.

b. Humbly (sic) causing to close and open new register pertaining to land parcel No Bokoli/Chwele/3320 without authenticating the same.

That as a result of that fraudulent transfer, the 1st defendant took possession of the suit plot and has been using the same to his benefit and to the exclusion of the plaintiff who has suffered loss and damage hence this suit.

4. The plaintiffs filed a joint statement in which they averred that they are the children of Sichangi Wasike now deceased and bring this suit as his legal representatives having obtained grant in Bungoma CMC Succession Cause No 678 of 2018. That the deceased was allocated the suit plot by the then Bungoma County Council in 1972 and has been paying land rates upto and including November 2010.
5. On January 5, 2015, a new register for the land parcel No Bokoli/chwele/3320 measuring 0.19 Hectares was opened out of the land parcel No Bokoli/chwele/259. That by creating the land parcel No Bokoli/chwele/3320, the 1st defendant purported and merged it to include the suit plot which had been fully developed. It is their case that the suit plot has always been distinct from the neighbouring plots including the land parcel No Bokoli/Chwele/3320 which was later sub-divided to give rise to six other plots being Bokoli/Chwele/3368, 3369, 3371, 3372 and 3373 (in their statement they have indicated 3371 but I think that is a typographical error which I have taken the liberty to amend).
6. It is their case therefore that by creating title to parcel No Bokoli/Chwele/3320 and in the process including in it the suit plot, the 1st defendant acted fraudulently as particularized in the amended plaint. As a result of that fraud, the 1st defendant took possession of the suit plot which he has been utilizing for his benefit and to the exclusion of the plaintiffs who have suffered loss and damage. They therefrom seek this Court to issue orders cancelling the title deeds to the land parcels No Bokoli/Chwele/3368, 3369, 3370, 3371, 3372 and 3373.
7. The plaintiffs filed two lists of documents in support of their case.
8. The first list dated March 7, 2018 contains the following documents:
 1. Award of a Tribunal whose name is un-known.
 2. Order in Bungoma SPMCC Case No 85 of 2000 adopting the award of the Tribunal on October 30, 2000.
 3. Receipts issued by Bungoma County Council for rent in respect of plot No 53.
 4. Sketch map for parcel No Bokoli/Chwele/3320.
 5. Grant of Letters of Administration issued in Bungoma H. C. Succession Cause No 208 of 2006.
 6. Certificate of Confirmation of Grant issued in Bungoma H.C. Succession Cause No 125 of 2014.
 7. Medical report for one Isaac Munoko dated October 4, 2016.
 8. Copy of register for land parcel No Bokoli/Chwele/3320 in the names of Newton Wekesa Wangusi.



9. Copy of title deed for the land parcel No Bokoli/Chwele/3320 in the name of Newton Wekesa Wangusi.
 10. Consent order issued in Busia ELC Case No 122 of 2015 on March 21, 2017.
 11. Surveyor's report dated May 31, 2017.
 12. Sketch map for Chwele Market.
 13. Assistant County Commissioner's report dated March 9, 2015.
 14. Photographs
9. The plaintiffs filed a further list of documents dated January 15, 2022 containing the following documents:
1. Grant issued in Bungoma CMC Succession Cause No 678 of 2018.
 2. Photographs.
10. Newton Wekesa Wangusi (the 1st defendant) filed a defence dated December 21, 2015 in which he denied the allegations of fraud and pleaded that he purchased a parcel of land measuring 0.19 Hectares from Margaret Nangela Chesekweli and Thomas Wekesa Lumbuku who were the Administrators to the Estate of the late Jesekwell Sichangi alias Chesekwel Sichangi which was to be hived from the land parcel No Bokoli/Chwele/259. Following the Grant of Confirmation in Bungoma High Court Succession Cause No 125 of 2014, he was issued with a title deed to the said parcel of land. He denied that the said parcel of land was merged with the suit plot adding that if the plaintiff was ever allocated with the suit plot, then the said plot is located in land parcel No Bokoli/Chwele/1003 which belongs to the then Bungoma County Council. He pleaded further that the land parcel No Bokoli/Chwele/53 is registered in the names of one Anjelimo Maindo and not the plaintiff. He therefore sought the dismissal of the plaintiff's suit with costs.
11. The 1st defendant also filed two statements dated December 21, 2015 and April 28, 2022.
12. In the statement dated December 21, 2015 he repeated the averments in his defence as to how he had purchased the land parcel No Bokoli/Chwele/3320 following a sub-division of the original land parcel No Bokoli/Chwele/259. He added that he holds a title deed to the said land and that the plaintiff is a total stranger to him.
13. In his statement dated April 28, 2022, he denied having obtained the land parcel No Bokoli/Chwele/3320 through fraudulent means. He stated that he paid full consideration to Margaret Nangila Chesekweli and Thomas Wekesa Lumbuku as Administratrix and Administrator respectively to the Estate of Chesekweli Sichangi who was the proprietor of the land parcel No Bokoli/Chwele/259 which neighbours the land parcel No Bokoli/Chwele/1003 registered in the name of the defunct Bungoma County Council now the County Government of Bungoma. That he is aware that all Chwele Market Plots were created from the land parcel No Bokoli/chwele/1003 which is distinct from the land parcel No Bokoli/Chwele/259. Therefore, if plot No 53 exists at all, it ought to be within the boundaries of the land parcel No Bokoli/chwele/1003. He denied having conducted any survey of the land parcel No Bokoli/Chwele/3320 by including the suit plot.
14. The 1st defendant filed a list of documents dated March 15, 2022 containing the following documents:



1. Sale agreement dated March 16, 2014 between Margaret Nangila Chesekweli and Thomas Wekesa Lumbuku as vendors and Newton Wekesa Wangusi as purchaser of a short of the land parcel No Bokoli/Chwele/259.
2. Application for consent to sub-divide land parcel No Bokoli/Chwele/259.
3. Forms R.L 19 and R.L 16 in respect of the land parcel No Bokoli/Chwele/259.
4. Certificate of Confirmation of Grant issued in Bungoma High Court Succession Cause No 125 of 2014 on December 10, 2014.
5. Coy of mutation for land parcel No Bokoli/Chwele/259.
6. Copy of title deed for the land parcel No Bokoli/chwele/3320.
7. Copy of Green Card for the land parcel No Bokoli/Chwele/3320.
8. Copy of certificate of Official Search for the land parcel No Bokoli/Chwele/1003.
9. Copy of certificate of Official Search for the land parcel No Bokoli/Chwele/53.
10. Copy of surveyor's report.
11. Copy of Registry Index Map.
12. Copy of order issued on April 29, 2016.
13. Copy of order issued on March 21, 2017.
14. Copy of surveyor's report dated May 31, 2017.
15. Copy of Deputy County Commissioner's report dated March 9, 2015.
16. Copy of Order issued on November 15, 2016.

The 1st defendant has earlier filed another list of documents dated December 21, 2015 but which contains the same document as above.

15. The Land Registrar Bungoma filed a defence dated October 27, 2016 in which it is pleaded that according to the records held in their registry, the alleged plot No 53 does not exist. Further, that the land parcel No Bokoli/Chwele/259 was first registered in the name of One Chesekweli Sichangi on August 25, 1964 and transmitted to Margaret Nangila, Thomas Wekesa Lumbuku and Newton Wekesa Wangusi on December 30, 3320 after succession. The title for the land parcel No Bokoli/chwele/259 was closed on January 7, 2015 to create parcels No Bokoli/chwele/3319 and 3320. Parcel No Bokoli/chwele/3320 was subsequently closed after sub-division to create parcel No Bokoli/chwele/3368, 3369, 3370, 3371, 3372 and 3373. The 2nd defendant stated therefore that there is no case of action against it and denied all the allegation of fraud.
16. Following the consolidation of Bungoma ELC Case No 127 of 2015 and Bungoma H.C. Case No 97 of 2011, John Watila Munysia the Applicant in the Originating Summons filed in Bungoma H.C. Case No 97 of 2011 became the 3rd defendant and his claim became the counter-claim.
17. In the said Originating Summons dated October 14, 2011 and filed against Wasike Sichangi the deceased father to the plaintiffs herein, the 3rd defendant citing the provision of Sections 7, 17 and 38 of the *Limitation of Actions Act* claimed that he is entitled to the suit plot measuring 50ft x 100ft by virtue of adverse possession. He therefore sought a determination of the following questions against the deceased:



1. Whether or not the 3rd defendant has been in occupation of the suit plot openly, continuously and peacefully for a period exceeding (12) twelve years.
 2. Whether or not the Deceased's title over the said plot has extinguished by operation of law.
 3. Whether or not the Court should order the 3rd defendant to be registered as proprietor of the suit plot in place of the deceased.
 4. Whether or not the 3rd defendant has become entitled to the suit plot by the concept of adverse possession.
18. Annexed to the said Originating Summons was the 3rd defendant's supporting affidavit in which he deposed, inter alia, that his late father Lubao Wakhungu alias Paul Munyasia Wakhungu lived on and developed the suit plot until his demise in 1990. That during all that time the late Wasike Sichangi was living on plot No 38 Chwele Market also registered in the name of Lubao Wakhungu alias Paul Munyasia Wakhungu. That he put up a posho mill and rental houses in the suit plot from which he was collecting rent until the deceased Wasike Sichangi evicted him in June 2011. The matter was reported to the Clerk Bungoma County Council but was not resolved. That since he has occupied the suit plot exclusively, openly and continuously from 1973, he is entitled to orders in adverse possession.
19. The 3rd defendant filed the following documents in support of his Originating Summons.
1. Letter dated May 31, 2011 from County Council of Bungoma addressed to the deceased Wasike Sichangi.
 2. Letter dated November 11, 2010 addressed to the 3rd defendant and the deceased Wasike Sichangi in respect to plots No 53 and 38 Chwele Market from County Council of Bungoma.
 3. Letter dated February 21, 2011 from County Council of Bungoma and addressed to the deceased Wasike Sichangi and Paul Munyasia.
20. In response to the Originating Summons, the deceased Wasike Sichangi filed a replying affidavit dated October 24, 2011 in which he deposed, *inter alia*, that the 3rd defendant has never developed or occupied the suit plot. That the suit plot was infact allocated to him by the defunct County Council of Bungoma in 1972 and he developed a beer hall thereon. That he and the 3rd defendant's father were also jointly allocated a plot No 38 measuring 50 feet by 100 feet which they shared equally and he took plot No 38B and the 3rd defendant's father took plot No 38A. That since the 3rd defendant's father wanted to operate a club in his plot, the two swapped plots with the 3rd defendant's father utilizing plot No 53 and the deceased Wasike Sichangi utilizing plot No 38A. That arrangement went on until the 1970'S when the Government banned beer clubs and the deceased took back the suit plot. He has been solely responsible for the payment of the rates to the defunct County Council of Bungoma and a claim of adverse possession cannot be made against the said local authority. Therefore the 3rd defendant's suit is incompetent and should be dismissed.
21. The deceased Wasike Sichangi annexed to his replying affidavit the following documents:
1. Sketch map.
 2. Receipts for rent paid to the County Council of Bungoma in respect of the suit plot as well as plot No 38.
 3. Notice from Bukhungu Auctioneers to pay outstanding rent.
 4. Charge drawn against plot No 38 Chwele Market to secure loan of Kshs.25,000 from ICDC.



22. The plenary hearing commenced before me on July 26, 2022 and Peter Wasike Sichangi the 2nd plaintiff testified on behalf of the other plaintiffs while Newton Wekesa Wangusi the 1st defendant was the only witness who testified in support of his defence. Both the Land Registrar Bungoma and John Watila Munyasi the Applicant in Bungoma H. C. Case No 97 of 2011 did not attend Court to testify.
23. Both the 1st plaintiff and the 1st defendant adopted as their respective evidence their statements and also produced the documents filed in support of their cases.
24. Submissions were thereafter filed both by Mr Were instructed by the firm of Were & Company Advocates for the plaintiff and by Mr Maloba instructed by the firm of Hammerton Maloba & Company Advocates for the 1st defendant. I have considered the evidence and submission by counsel.
25. John Watila Munyasia the 3rd defendant did not turn up to prosecute his counter-claim. However, that is a claim that I can determine peremptorily without much ado because even if he had turned up to prosecute his claim, it would have taken monumental efforts to prove his case.
26. Section 38(1) of the *Limitation of Actions Act* which grants this Court the powers to make orders in favour of a party claiming land by way of adverse possession provides that:

38.

- (1) “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.” Emphasis mine.

27. Order 37 Rule 7(1) and (2) on the other hand stipulates that:

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- (1) “An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. Emphasis mine.

It is clear from the above that a claim to land by way of adverse possession can only be made against the proprietor of registered land. In the case of Chevron (K) LTD -V- Harrison Charo Wa Shutu the Court of Appeal emphasised that when it said:

“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner ...” Emphasis mine.

Therefore, where the land in dispute is not registered under any of the known legal regimes, a claim for such land by way of adverse possession cannot be maintained. This is because, the claimant in such a case would be seeking the Court to grant an order extinguishing the title of the registered proprietor to the land in question and register him as the proprietor thereof. Obviously, that cannot be possible if the land itself is not registered and a title issued. What would there be for the Court to extinguish in such a case? It must be remembered that in a claim founded on adverse possession, the Court does not create a new title to land. It simply transfers title from the Applicant to the Respondent.

28. In the circumstances of this case, both parties to the Originating Summons have in their respective affidavits referred to the land in dispute as plot No 53 Chwele Market (the suit plot). It is not registered



under any law and the deceased Wasike Sichangi and, following him, the plaintiffs herein, do not hold any title to the same. If anything, they were simply licensees of the defunct County Council of Bungoma. A claim to land by way of adverse possession cannot lie in favour of a mere licensee.

29. Secondly, receipts have been filed herein showing that rent was being paid to the defunct County Council of Bungoma by the deceased Wasike Sichangi. That means that the suit plot, if it exists, is public land. Section 41 of the *Limitation of Actions Act* excludes public land from a claim of adverse possession. It reads:

“This Act does not -

- (a) enable a person to acquire any title to, or any easement over -
 - (i) Government land or land otherwise enjoyed by the Government”.

In the case of *Sammy Mwangangi & 10 Others -V- Commissioner of Lands & 3 Others* 2018 eKLR, the Court of Appeal reiterated the above provisions and said:

“It is trite law that one cannot claim adverse possession against Government land by virtue of Section 41 of the *Limitation of Actions act.*”

30. Finally, it is on record that with the consent of the parties, this dispute was referred to the County Surveyor to prepare a report. In his report dated May 31, 2017, the said surveyor Mr Simiyu W. Amos states in the last paragraph that:

“In summary, Chwele plot No 53 does not exist.”

On September 25, 2019, the surveyor attended Court at the request of counsel who wanted to cross-examine him and he reiterated that plot No 53 does not exist. An order in adverse possession cannot be made in respect of land which does not exist.

31. It follows from all the above that the 3rd defendant’s counter-claim is incompetent. It is dismissed.
32. The plaintiffs’ case against the 1st and 2nd defendants on the other hand is that the title deed issued to the 1st defendant in respect to the land parcel No Bokoli/Chwele/3320 be cancelled for having been obtained fraudulently. The allegations of fraud levelled against the 1st defendant as per paragraph 13 of their amended plaint are:

- a. Obtaining title to land parcel No Bokoli/Chwele/3320 and in the process purporting to include plot 53.
- b. Presenting forged transfer documents to the 2nd defendant.
- c. Obtaining title to land parcel No Bokoli/chwele/3320 without a valid consent from the Land Control Board.
- d. Obtaining title thereto basing on a survey exercise and forged transfer form.

As against the 2nd defendant, the allegations of fraud were set out as:

- a. Causing to be issued a title based on forged transfer forms and a wrong survey exercise.
- b. Causing to close and open new register pertaining to land parcel No Bokoli/Chwele/3320 without authenticating the same.



33. The 2nd defendant did not call any witness to testify. However, the 1st defendant filed a defence denying all the allegations, of fraud stating that he purchased the land parcel No Bokoli/Chwele/3320 from Margaret Nangila Chesekweli and Thomas Wekesa Lumbuku as Administrators to the Estate of Jesekwel Sichangi alias Chesekwel Sichangi. In his two statements dated December 21, 2015 and April 28, 2022 which he adopted as his evidence during the trial, he repeated those averments adding that if the suit plot exists at all, it ought to be within the boundaries of land parcel No Bokoli/Chwele/1003. And among the documents he produced in his defence were the sale agreement between himself, Margaret Nangila Chesekweli and Thomas Wekesa Lumbuku dated March 16, 2014 in respect of the purchase of a portion of land out of the land parcel No Bokoli/Chwele/259 at a consideration of Kshs.200,000. He also produced the relevant application for consent of the Land Control Board and the letter of consent all duly executed as well as the mutation form and the copy of title to the land parcel No Bokoli/Chwele/3320. Among the documents filed by the 1st defendant is a copy of the title deed to the land parcel No Bokoli/Chwele/53 which shows that it was first registered in the name of one Anjelimo Maindo on August 25, 1964.

34. Having pleaded fraud on the part of the 1st and 2nd defendants, the duty was on the plaintiff to prove those allegations. That is clear from Sections 107, 108 and 109 of the Evidence Act which read:

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(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.”

108: “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109: “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the case of R.G. Patel -V- Lalji Makanji 1957 E.A. 314 the Court of Appeal said the following as regards the standard of proof in fraud:

“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.”

In Vijay Morjaria -v- Nansingh Madhusing Darbar & another 2000 eKLR, Tunoi JA stated as follows with regard to allegations of fraud:

“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 pleadings. 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 proved and it is not allowable to leave fraud to be inferred from the facts.”

It must also be remembered that a certificate of title issued by the Registrar is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land although



the title can be challenged on grounds of fraud to which the proprietor was a party – Section 26 of the [Land Registration Act](#).

35. The plaintiffs specifically pleaded fraud as against the 1st and 2nd defendants in paragraph 13 of their amended plaint. However, their testimony fell far below the required standard of proof required to prove allegations of fraud. In paragraphs 6 and 7 of their joint statement dated March 23, 2022 which was adopted by Peter Wasike Sichangi (PW1) during the hearing, this is what he said with regard to the allegations of fraud against the 1st and 2nd defendants:

“Particulars of fraud on the part of the 1st defendant were obtaining title parcel No Bokoli/Chwele/3320 and in the process purporting to include plot 53, presenting forged transfer documents to the 2nd defendant, obtaining title to land parcel Bokoli/Chwele/3320 without a valid consent from the Land Control Board and obtaining title thereto basing on a survey exercise and forged transfer forms.

Particulars of fraud on the part of the 2nd defendant was causing to be issued title basing on forged transfer forms and a wrong survey exercise and humbly (sic) causing to close and open new register pertaining to land parcel No Bokoli/Chwele/3320 without authenticating the same.”

However, notwithstanding all the above assertions, the plaintiffs did not lead any evidence as to how the transfer forms, application for consent of the Land Control Board, the consent or indeed the title deed to the land parcel No Bokoli/Chwele/3320 were forged. A forged document is defined in Black’s Law Dictionary 10th Edition as:

“A document that is fraudulent esp, either one that has been fabricated to seem genuine or a real document that has been altered to seem genuine as altered.”

Forged is defined in the same Dictionary as:

“The act of fraudulently making a false document or altering a real one to be used as if genuine.”

Peter Wasike (PW1) was hard pressed to demonstrate which of the documents filed herein were forged. Indeed when he was cross-examined by Mr Maloba and asked to show any evidence of fraud, he could only say:

“I have sued the 1st defendant for fraudulently obtaining the parcel No Bokoli/chwele/3320 which included our plot No 53. The evidence of fraud is found in the County Surveyor’s report dated 31st May 2017. I have read the report. The last paragraph states that Chwele Plot No 53 does not exist.”

I too have read the said report. There is nothing in it to support the assertions made by Peter Wasike Sichangi (PW1) that the creation of land parcel No Bokoli/Chwele/3320 included plot No 53. In the penultimate paragraph of that report, Mr Simiyu W. Amos the County Surveyor Bungoma makes the following findings with respect to plot No 53:

“It is therefore evident that after demarcation of the parcel Bokoli/chwele/1003 for Chwele Market, the market plots which had demarcated basing on the provisional Sketch plan were not adjusted to fit into Bokoli/chwele/1003. This then led to plot No 53 encroaching on parcel Bokoli/Chwele/259. But since the RIM overwrites (sic) the Provisional Sketch Plan,



then the position meant for No 53 is validly and currently occupied by parcels Bokoli/chwele/3368-3373.”

36. As is clear from the above report produced by the plaintiffs, even if plot No 53 was subsumed, it was occupied by the land parcel No Bokoli/Chwele/3368 to 3373 and not the 1st defendant’s land parcel No Bokoli/Chwele/3320.
37. The bottom line therefore is that the plaintiffs have only made vague allegations of fraud as against the 1st and 2nd defendants in the manner in which the title to the land parcel No Bokoli/Chwele/3320 was created. There is however no iota of cogent evidence placed before this Court to prove, as pleaded in paragraph 13 of the amended plaint, that there was fraud in creating the title to the land parcel No Bokoli/Chwele/3320 on the part of the 1st and 2nd defendants and that in doing so, plot No 53 was included in that parcel.
38. The up-shot of all the above is that the plaintiffs suit is also for dismissal.
39. Ultimately therefore and having considered all the evidence herein this court makes the following disposal orders:
 1. The plaintiffs suit is dismissed with costs to the 1st defendant.
 2. The 3rd defendant’s counter-claim is dismissed with costs to the plaintiffs.

BOAZ N. OLAO

JUDGE

6TH JULY 2023

JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC BY WAY OF ELECTRONIC MAIL ON THIS 6TH DAY OF JULY 2023 AND WITH NOTICE TO THE PARTIES. RIGHT OF APPEAL

BOAZ N. OLAO

JUDGE

6TH JULY 2023

Explanatory note:

The delay in delivery of this judgement was as a result of my transfer from Bungoma to Busia shortly after the completion of the hearing. The same is regretted.

BOAZ N. OLAO

JUDGE

6TH JULY 2023

