



Maurice & another v Khaseke & 3 others (Environment & Land Case 58 of 2016) [2023] KEELC 19842 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 58 OF 2016
BN OLAO, J
SEPTEMBER 19, 2023**

BETWEEN

NYONGESA WANDERA MAURICE 1ST PLAINTIFF

AFRIKANUS ABRAHAMS EGESA 2ND PLAINTIFF

AND

ALFRED EDWIN DIDYMUS KHASEKE 1ST DEFENDANT

OUMA ONYANGO 2ND DEFENDANT

JUDITH BWIRE KHASEKE 3RD DEFENDANT

JOSEPH OKUKU NAMBOKA 4TH DEFENDANT

JUDGMENT

1. It is tragic and sad that a suit instituted in June 2016 seeking orders inter alia, to restrain the Defendants from interring the remains of one Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1880 and instead allowing Afrikanus Abraham (the 2nd Plaintiff) and his co-trustee Colomitina Namboka Juma to inter those remains on the land parcel NO BUKHAYO/MATAYOS/1882 is being determined seven (7) years later. And all this time, an order of injunction issued on 14th December 2016 injuncting the Defendants from burying the deceased, remains in place. Those concerns have also been shared by MR. J. V. JUMA counsel for the Defendants in his submissions dated 8th May 2023. While it is the duty of the Court to ensure the expeditious disposal of cases, counsel and their clients also have a role to play in that regard. In my view, although the ruling dated 14th December 2016 granted an order of permanent injunction pending the hearing of this suit,



that must have been in error because in the Notice of Motion dated 23rd June 2016, the prayer which was sought in paragraph 2 of that application was:

2. “That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents, their servants, agents and/or employees from deterring (sic) the remains of the late Jackson Okoth Khaseke (deceased) on the applicants L.R. BUKHAYO/MATAYOS/1880 pending the hearing and determination of this suit.”

I have perused the record herein and have not seen any order extending the order of temporary injunction in terms of the provisions of Order 40 Rule 6 of the Civil Procedure Rules which reads:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reasons the Court orders otherwise.”

2. Ideally, therefore, the remains of Jackson Okoth Khaseke ought to have been interred as far back as 14th December 2017. By that time, not a single witness had testified in this case. But that is now clearly water under the budge. I must however associate myself with the opening paragraph of Mr. J. V. Juma’s submissions wherein he has said:

1. “The events and the motivation for filing this suit were both tragic and sad. The suit was initiated to stop the remains of Jackson Okoth Khaseke (jackson), the elder brother of the 3rd Defendant, from being interred where his late father Francis Bwire Khaseke, was buried.
2. Due to this rather sad situation, the body of the deceased has stayed in the morgue for 8 years now.”

3. This judgment is in respect to two consolidated suits. These are Busia ELC Case No 58 of 2016 and Busia ELC Case No 19 of 2016.

4. In Busia ELC Case No 58 of 2016 and which is the lead file, Nyongesa Wandera Maurice And Afrikanus Abraham Egesa, (the 1st and 2nd Plaintiffs respectively), sought judgment against Alfred Edwin Didymus Khaseke, Ouma Onyango, Judith Bwire Khaseke And Joseph Okuku Namboka (the 1st, 2nd, 3rd and 4th Defendants respectively) in the following terms vide an amended plaint dated 4th October 2017 and filed herein on 9th October 2017:

A A permanent injunction restraining the Defendants, their servants, agents and/or employees from interring the remains of the late Jackson Okoth Khaseke (deceased) on the 1st Plaintiff’s land parcel NO BUKHAYO/MATAYOS/1880 or in any way interfering with the 1st and 2nd Plaintiff’s quiet possession/occupation of land parcels NO BUKHAYO/MATAYOS/1880 and 1882 respectively.

B The 2nd Plaintiff and his co-trustee one Colomitina Namboka Juma be allowed to inter the deceased as his closest relatives on his inheritance being land parcel NO BUKHAYO MATAYOS/1882 which they hold in trust for the deceased and his sister Judith Bwire Khaseke the 3rd Defendant.



- BB Eviction of the 1st and 2nd Defendants from the land parcels BUKHAYO/MATAYOS/1880 and BUKHAYO/MATAYOS/1886 respectively.
- C The 1st Defendant to release the 3rd Defendant who he is illegally detaining in his home to the 2nd Plaintiff who is the closest relative to her and one of the trustees holding land parcel NO BUKHAYO/MATAYOS/1882 in trust for her and his late brother.
- D Costs of the suit.
5. The basis of the Plaintiffs' case is that the 1st Plaintiff is the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/1880 having purchased it from the Administrators to the Estate of the late Juma Odundo Khaseke now deceased. The 2nd Plaintiff is one of the administrators to that Estate and is, in conjunction with one Colomitina Namboka Juma, holding the title to the land parcel NO BUKHAYO/MATAYOS/1882 in trust for the late Jackson Okoth Khaseke (herein after the deceased) and who is the grandson of the late Juma Odundo Khaseke (hereinafter Khaseke).
6. The Plaintiffs pleaded further that on or about 21st June 2016 the deceased passed away and the Defendants have threatened to inter his remains on the 1st Plaintiff's land parcel NO BUKHAYO/MATAYOS/1880. The 2nd Defendant has during the pendency of this suit illegally erected dwelling structures on the land parcel NO BUKHAYO/MATAYOS/1880 without the consent of the 1st Plaintiff yet the deceased had the land parcel NO BUKHAYO/MATAYOS/1882 earmarked for him and which is held in trust for his benefit by one Colomitina Namboka Juma (hereinafter Colomitina). The Defendants are, without any colour of right, preparing to inter the remains of the deceased on the 1st Plaintiff's land parcel NO BUKHAYO/MATAYOS/1880 yet they are not relatives of the deceased. It is the Plaintiffs' case that the 2nd Plaintiff and one Colomitina are holding the land parcel NO BUKHAYO/MATAYOS in trust for the deceased and his sister Judith Bwire Khaseke (the 3rd Defendant). The 4th Defendant who is the village elder of Bwicha Village has continued encouraging the 1st and 2nd Defendants to occupy and erect illegal structures on the land parcels NO BUKHAYO/MATAYOS/1880 and 1882. The 2nd Plaintiff adds that following the death of his cousin brother one Francis Bwire Khaseke who was the father of the deceased and the 3rd Defendant, it was him who took up the responsibility of living and taking care of them as they (deceased and 3rd Defendant) were then still minors. Even during his life-time, the said Francis Bwire Khaseke was not keen in taking care of his children thus forcing the 2nd Plaintiff to go to the children's office to claim them and undertake to carter for them. It is the Plaintiffs' case that if the Defendants are not permanently enjoined as sought, they will suffer an injustice and substantial loss and that the 1st Defendant is illegally detaining the 3rd Defendant at his home and should be ordered to release her to the 2nd Plaintiff who is her closest relative and also one of the trustees holding the title to the land parcel NO BUKHAYO/MATAYOS/1882 in trust for the 3rd Defendant as well as the deceased.
7. In support of their case, the Plaintiffs' filed their statements basically a summary of their pleadings and list of documents.
8. The 1st Plaintiff (PW1) filed a statement dated 23rd June 2016 in which he confirm that the is the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/1880 which he purchased from the 2nd Plaintiff and one Colomitina being the Administrators to the Estate of the deceased. That in doing so, he adhered to all the procedures with regard to land sale and transfer. That the deceased who died on 21st June 2016 was the grandson of one Juma Odundo Khaseke also deceased. That the Defendants are preparing to inter the remains of the deceased on his land parcel NO BUKHAYO/



MATAYOS/1880 without any colour of right. That as far as the 1st Plaintiff is concerned, the deceased is supposed to be buried on the land parcel NO BUKHAYO/MATAYOS/1882 which is his inheritance and which is held in trust for him and for his sister the 3rd Defendant by Colomitina and the 2nd Plaintiff. That if the Defendants are not stopped from burying the deceased on the land parcel NO BUKHAYO/MATAYOS/1880, it will cause him injustice and substantial loss.

9. The 2nd Plaintiff (PW2) in his statement dated 30th June 2016 states that he and Colomitina are the Administrators to the Estate of Juma Odundo Khaseke the grandfather to the deceased. That they therefore hold the title to the land parcel NO BUKHAYO/MATAYOS/1882 in trust for the deceased and Juma Okoth Khaseke and the 3rd Defendant until they reach the age of majority. However, 1st Defendant in conjunction with the other Defendants are illegally conspiring to inter the remains of the deceased in the 1st Plaintiff's land parcel NO BUKHAYO/MATAYOS/1880 so that they can illegally acquire the land parcel NO BUKHAYO/MATAYOS/1882 from the rightful beneficiaries. That action amounts to intermeddling with the Estate of a deceased person and which should not be entertained by this Court. That the 1st Defendant has also confused and detained the 3rd Defendant in his homestead with a view of illegally acquiring the land parcel NO BUKHAYO/MATAYOS/1882 from her brother the deceased. It is therefore the prayer of the 2nd Plaintiff and his co-trustee Colomitina to be allowed to bury the deceased on the land title NO BUKHAYO/MATAYOS/1882 which they hold in trust being the closest relatives to the deceased.
10. Linus Egesa Wanjala (PW3) filed a statement in Busia ELC Case No 19 of 2016 [the case No is wrongly captured as NO 18 of 2016]. He claims that outside relatives want to unlawfully take the property of the deceased and the 3rd Defendant. It was therefore decided that the Plaintiffs do succession and hold the property in trust for the deceased and the 3rd Defendant which would later be released to them. That he was the chairman of those proceedings which were done in good faith.
11. Francis Khaseke (PW4) also in his statement dated 16th March 2016 and filed in Busia ELC Case No 19 of 2016 says he is a brother to the 1st Defendant but adds that the land in dispute does not belong to the said 1st Defendant but rather, it belongs to the deceased and the 3rd Defendant as children of the original owner. That the Plaintiffs were given the right to carry out succession which was in accordance with the law.
12. The Plaintiffs filed the following documentary exhibits as per their lists of documents dated 16th March 2016, 30th July 2016 and 4th October.
 1. Copy of Title Deed for the land parcel NO BUKHAYO/MATAYOS/1882 in the name of Colomitina and the 2nd Plaintiff.
 2. Certificate of Official Search for the land parcel NO BUKHAYO/MATAYOS/1882.
 3. Chief's letter dated 30th June 2016.
 4. Letter dated 26th January 2007 from the District children's officer Busia.
 5. Certificate of death for Francis Bwire Khaseke.
 6. Copy of Title Deed for the land parcel NO BUKHAYO/MATAYOS/1880.
 7. Certificate of death for Penina Anyango.
 8. Certificate of death for Anjela Juma.



9. Certificate of death for Juma Odungo Khaseke.
 10. Certificate of official search for the land parcel NO BUKHAYO/MATAYOS/1595.
 11. Mutation Form for the land parcel NO BUKHAYO/MATAYOS/1595.
 12. Photographs.
 13. Certificate of confirmed Grant to the Estate of Juma Odundo Khaseke issued to the 2nd Plaintiff and Colomitina.
 14. Letter dated 10th December 2008.
 15. Letter dated 13th October 2015.
 16. Demand letter dated 1st March 2016.
 17. Copy of Title Deed for the land parcel NO BUKHAYO/MATAYOS/1882.
 18. Certificate for Jackson Okoth issued by Bukura Energy Centre on 5th December 2008.
13. The 1st, 2nd, 3rd and 4th Defendants filed their defence in BUSIA ELC NO 58 of 2016 in which they pleaded that the registration of the 2nd Plaintiff and Colomitina as proprietors of the land parcel NO BUKHAYO/MATAYOS/1882 as well as the registration of the 1st Plaintiff as the proprietor of the land parcel NO BUKHAYO/MATAYOS/1880 were both done fraudulently and in order to pervert the cause of justice. That the said registration was being challenged in High Court Succession Cause No 336 of 2013 which was scheduled for hearing on 12th September 2016. They denied that the 1st Plaintiff had lawfully purchased the land parcel NO BUKHAYO/MATAYOS/1880 adding that the said land was not available for sale and whoever sold it had no capacity to do so. They pleaded further that the 1st Plaintiff was in fact part of the scheme to dispossess the deceased and the 3rd Defendant of their land. They admitted that they intend to inter the remains of the deceased on the land parcel NO BUKHAYO/MATAYOS/1880 since it is the rightful land of the deceased and the 3rd Defendant. They pleaded that it is the alleged Administrators of the Estate who either through ignorance or fraud tried to dispossess the deceased as the 3rd Defendant of their land. With regard to the land parcel NO BUKHAYO/MATAYOS/1882, they added that it belongs to the 1st Defendant and the deceased cannot be buried on it when his (deceased's) father had his own land where he should be buried.
 14. The Defendants filed replying affidavits rather than witness statements in support of their case.
 15. In his replying affidavit dated 5th July 2016 and which he adopted as his evidence during the plenary hearing, the 1st Defendant deposed, inter alia, that the 1st Plaintiff was part of the scheme to defraud the children of Francis Bwire Khaseke or he was misled or conned into purchasing the land parcel NO BUKHAYO/MATAYOS/1880. That Francis Bwire Khaseke and John Opiyo were two sons of Juma Odundo Khaseke who was the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/1880 and when he died, the said land was partitioned between his two sons on the ground but that was not formalised at the Lands Registry. That John Opiyo sold his portion to the 1st Defendant and went to live elsewhere. That the 1st Defendant resides on that portion. That Francis Bwire Khaseke sold part of his portion to the 2nd Defendant and resides on the other portion. That when Francis Bwire Khaseke who was his cousin died, his portion was to be inherited by his two



- children namely the deceased and Maureen Akinyi Bwire Khaseke Alias Judith Bwire Khaseke (the 3rd Defendant herein).
16. That the 2nd Plaintiff and Colomitina took advantage of the fact that the mother to the deceased and the 3rd Defendant was also deceased and that they (the deceased and the 3rd Defendant) were living with their maternal grandmother and therefore they (2nd Plaintiff and Colomitina), applied for the Grant of Letters of Administration on behalf of the deceased and the 3rd Defendant yet they were already adults. The 2nd Plaintiff and Colomitina then caused the sub-division of the land parcel NO BUKHAYO/MATAYOS/1595 to create the land parcels NO BUKHAYO/MATAYOS/1880 and 1882. That on the ground, the land parcel NO BUKHAYO/MATAYOS/1880 represents the land occupied by the 2nd Defendant, the father to the deceased and the 3rd Defendant while he occupies the land parcel NO BUKHAYO/MATAYOS/1882 which he purchased. It is therefore only proper and fair that the deceased be buried on his father's land which is parcel NO BUKHAYO/MATAYOS/1880 as there is no other land on which he can be buried. He added that the 1st Plaintiff has not taken possession of the land parcel NO BUKHAYO/MATAYOS/1880.
 17. The 2nd Defendant swore an affidavit dated 18th October 2017 and which he adopted as his testimony during the trial on 19th January 2023. He deposed therein, inter alia, that in 2007 he purchased $\frac{3}{4}$ acre of land from the father to the deceased out of the land parcel NO BUKHAYO/MATAYOS/1880. That the deceased's father retained the other portion and at the time of the purchase, the deceased's father was the proprietor of the said land where he was buried in 2012. Therefore, the deceased should also be buried on the land parcel NO BUKHAYO/MATAYOS/1880. He added that the fraud committed by the Plaintiffs was reported to the Directorate of Criminal Investigations [DCIO] office in Busia and the 1st Defendant named the 2nd Defendant as the person behind the scheme.
 18. The 3rd Defendant who is also known as Maureen Akinyi Bwire Khaseke swore a replying affidavit dated 5th July 2016 and which she also adopted as her evidence during the hearing. She deposed therein that she and the deceased are children of Francis Bwire Khaseke who was the son of Juma Odundo Khaseke their grandfather who was the proprietor of the land parcel NO BUKHAYO/MATAYOS/1595. The said land was sub-divided to create parcels NO BUKHAYO/MATAYOS/1880 which was given to the deceased and the parcel NO BUKHAYO/MATAYOS/1882 which was given to the deceased's brother John Opiyo. That John Opiyo sold his portion to the 1st Defendant and moved elsewhere. The land parcel NO BUKHAYO/MATAYOS/1880 was to be inherited by the deceased, the 3rd Defendant and the 2nd Defendant to whom the deceased had sold a portion prior to his demise. The 2nd Defendant continues to reside on the land parcel NO BUKHAYO/MATAYOS/1880 together with the 3rd Defendant. That there is no other place for the deceased to be buried other than the land parcel NO BUKHAYO/MATAYOS/1880 and that a fraud was committed by persons who unlawfully obtained a Grant in respect to the estate of their grandfather Juma Odundo Khaseke. She refuted the contents of the 1st Plaintiff's statement to the effect that the land parcel NO BUKHAYO/MATAYOS/1882 was not the land of Juma Odundo Khaske. She added that the deceased had discovered the fraud and immediately filed summons for the revocation of the Grant issued in Busia High Court Succession Cause No 336 of 2013. That the 1st Plaintiff was misled into purchasing land belonging to the deceased and 3rd Defendant's father and that the land purportedly held in trust for her and the deceased is occupied by the owner thereof.
 19. The 4th Defendant signed his statement dated 19th January 2023 and which he also adopted as his evidence during the hearing on 14th February 2023. He stated therein that the 2nd Plaintiff is his cousin while the 3rd Defendant is his nephew (he must have meant niece). He added that following the demise of the deceased, the family gathered at the home of his (deceased's) father being the land parcel NO



BUKHAYO/MATAYOS/1880 where they proceeded to construct a house since the house belonging to the deceased's father was dilapidated. They knew all along that the deceased would be buried on that land since it belonged to his father. However, the area chief informed them that the land parcel NO BUKHAYO/MATAYOS/1880 had been sold to one Maurice and that they should stop the construction. Later, he was served with summons in this suit. That Juma Khaseke Odundo demarcated his land into two portions. One for Francis Bwire Khaseke and the other smaller portion where he lived with his son John Opiyo. He however did not know about the particular registration numbers of the said parcels of land.

20. John Opiyo OwinO (DW5) recorded two affidavits in support of the Defendants' case. He adopted both as his testimony.
21. In the first affidavit dated 31st August 2016, he deposed that in 1992, his late father Juma Odundo Khaseke divided his land into two portions prior to his demise. That he was given the upper portion where his father was buried while his brother Francis Bwire Khaseke was given the lower portion. That on 18th April 2004, he sold his portion to the 1st Defendant. That his father died in 1998.
22. In his second affidavit dated 22nd October 2017, he reiterated that he is the surviving son of the late Juma Odundo Khaseke who had two sons being himself and Francis Bwire Khaseke. That prior to his demise, his late father was the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/1595 which he divided into two portions being land parcel NO BUKHAYO/MATAYOS/1880 and 1882.
23. The witness was given the land parcel NO BUKHAYO/MATAYOS/1882 which in 2004 he sold to the 1st Defendant. Francis Bwire Khaseke was given the land parcel NO BUKHAYO/MATAYOS/1880 a portion of which he sold to the 2nd Defendant and retained the other portion where he continued to live until his demise. That un-known to him, the 2nd Plaintiff who is his cousin had instituted Busia High Court Succession Cause No 336 of 2013 and convinced the witness's sister who is married and resides in Uganda to join him (2nd Plaintiff) in the case. The said sister was illiterate and did not know what was happening. The filing of the succession cause was done fraudulently and aimed at depriving the family of their land as both the deceased and the 3rd Defendant were both adults at that time. That when the fraud was discovered, the deceased filed summons for the revocation of the Grant issued to both the 2nd Plaintiff and Colomitina but he died before the application could be heard. That on 9th March 2017, he applied to be substituted in the succession case instead of the deceased which application was coming up on 20th November 2017. That the deceased should be buried on the land parcel NO BUKHAYO/MATAYOS/1880 since it was his inheritance together with his sister the 3rd Defendant.
24. The Defendants filed the summons for revocation or annulment of the Grant issued to Colomitina and the 2nd Plaintiff in Busia High Court Succession Cause No 336 of 2013 in respect to the Estate of Juma Odundo Khaseke. The application was filed by the deceased and one Alfred Edwin Didimus Khaseke and is annexed to the affidavit of the 3rd Defendant dated 5th July 2016.
25. The hearing commenced before OMOLLO J on 20th April 2021 who heard the evidence of the Plaintiffs and their witnesses. Thereafter, I heard the evidence of the Defendants and their witnesses from 19th January 2023 upto 14th February 2023. The parties and their witnesses adopted as their evidence the contents of their respective affidavits and statements which I have already referred to above. They also produced as part of their evidence the documents filed herein.
26. Submissions were thereafter filed both by Mr Obwatinya instructed by the firm of Obura-obwatinya & Company Advocates for the Plaintiffs and by Mr J. V. Juma instructed by the firm of J. V. Juma & Company AdvocateS for the Defendants.



27. I have considered the evidence by the parties and their witnesses including the documents filed as well as the submissions by counsel.

28. At the commencement of this judgment, I set out the remedies sought by the Plaintiffs in this case. Prayer NO C and which I shall cite in extensor is worded as follows:

C “The 1st Defendant to release the 3rd Defendant who he is illegally detaining in his home to the 2nd Plaintiff who is the closest relative to her and one of the trustees holding land parcel NO BUKHAYO/MATAYOS/1882 in trust for her and his late brother.”

29. The jurisdiction of this Court is set out in Section 13 of the *Environment and Land Court Act* as well as in Article 16(2) (b) of *the Constitution* 2010. Broadly, this Court’s jurisdiction is to determine disputes relating to the environment, use, occupation and title to land. It does not extend to issuing orders for the release of any person being illegally detained by another. I must therefore decline any invitation to usurp the jurisdiction of another Court by downing my tools with respect to prayer NO C of the amended plaint and keep to my lane.

30. Having said so, I consider the issues for my determination in this dispute to be the following:

1. Whether the Defendants or their servants, agents, employees or any person acting through them should be permanently enjoined from interring the remains of the deceased Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1880.
2. Whether the Plaintiffs are entitled to quiet possession and occupation of the land parcel NO BUKHAYO MATAYOS/1882.
3. Whether the 2nd Plaintiff and his co-trustee Colomitina should be allowed to inter the remains of the deceased Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1882.
4. Whether the 1st and 2nd Defendants should be evicted from the land parcels NO BUKHAYO/MATAYOS/1880 and 1882.
5. Who bears the costs of this suit?

31. In my view, the answers to the determination of all the above issues are to be found in the certificate of confirmed Grant issued by Tuiyott J (as he then was) in Busia High Court Succession Cause No 336 of 2013 on 18th February 2015. In that confirmed Grant which was in respect to the Estate of the late Juma Odundo Khaseke the grandfather to the deceased and the 3rd Defendant, the estate of the said Juma Odundo Khaseke, and which was being administered by the 2nd Plaintiff and one Colomitina was distributed as follows:

1. Nyongesa Wandera Mourice
BUKHAYO/MATAYOS/1880 – 0.066 HA
Whole Share
2. Colomitina Namboka Juma & Africanus Abraham Egesa
BUKHAYO/MATAYOS/1882 – 0.11 HA



To Hold Trust For The Minors Jackson Okoth Khaseke & Judith Bwire
Khaseke Until They Attain The Age Of 18 Years

F. Tuiyott

Judge Of The High Court.”

32. It is clear from the above confirmed Grant dated 18th February 2015 that the 2nd Plaintiff acquired ownership of the land parcel NO BUKHAYO/MATAYOS/1880 by way of transmission. This is recognised by Section 50(1) of the Land Act 2012 which provides that:

“Transmission On Death Of A Sole Proprietor Or Proprietor In Common

1. If a sole proprietor or a proprietor in common dies, the proprietor’s personnel representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executive of the will of (deceased)” or “as administrator of (deceased)” as the case may be.
2. Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission –
 - a. any transfer by the personal representative;
and
 - b. any surrender of a lease or discharge of a charge by the personal representative.
3. In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be of the deceased proprietor.”

33. It is clear from the register that the land parcel NO BUKHAYO/MATAYOS/1880 was fully registered in the names of Juma Odundo Khaseke on 18th November 1991 following the sub-division of the original land parcel NO BUKHAYO/MATAYOS/1595. Following the conclusion of the succession proceedings in Busia High Court Succession Cause No 336 of 2013, it was registered in the names of Colomitina and the 2nd Plaintiff as personal representatives of the said Juma Odundo Khaseke on 4th August 2015 and on the same day, it was transferred to the 1st Defendant who now holds the title deed thereto issued on 17th September 2015. It is his case that he purchased it from the Administrators to the Estate of the said Juma Odundo Khaseke yet the Defendants want to inter the remains of the deceased thereon. The Defendants’ case is that infact the registration of Colomitina and the 2nd Plaintiff as proprietors of the land parcel NO BUKHAYO/MATAYOS/1880 was procured through a fraudulent process and that the Grant of Letters of Administration issued to them in Busia High Court Succession Cause No 336 of 2013 was being challenged and at the time of filing their defence, an application seeking the annulment/revocation of the said Grant was coming up on 12th September 2016. It appears



that the said application was infact dismissed. This is clear from paragraph 14 of the submissions by Mr J. V. Juma where he states.

- 14 “While he was still alive, the late Jackson had applied to have the Grant revoked but died before his application for revocation was heard. John Opiyo then in his own right applied for revocation but his application was dismissed on a technicality that the application by Jackson had not been officially withdrawn. John Opiyo appealed against that decision and the appeal is still pending for hearing.”

Counsel did not indicate the particulars of that appeal and it’s status at least by the time he was filing his submissions.

34. The fact, however, is that the 1st Defendant obtained registration of the land parcel NO BUKHAYO/MATAYOS/1880 following a judicial process which was done by a competent Court and whose decision has not been reviewed or set aside on appeal. And although the Defendants allege fraud, this law is that allegations of fraud must be specifically pleaded and proved – see R.G. Peter -v- Lalji Makanji 1957 E.A 314, Kinyanjui Kamau -v- George Kamau 2015 eKLR and Ndolo -v- Ndolo 2008 1 KLR (G & F) 742. The Defendants neither pleaded nor proved fraud as against the Plaintiffs in the manner in which the 1st Plaintiff obtained registration of the land parcel NO BUKHAYO/MATAYOS/1880 in his names. And it would have been an almost insurmountable task to impeach the 1st Plaintiff’s title to the land parcel NO BUKHAYO/MATAYOS/1880 given the chronology of events above. Indeed the Defendants had no counter-claim.

35. In paragraph 34 of his submissions, Mr J. V. Juma has stated thus:

“Your Ladyship, the 1st Plaintiff asserts that he got his title through the process of succession having allegedly “bought” it from the daughters of the late Juma and/or the administrators of the estate of the late Juma. It is therefore apparent that the 1st Plaintiff acquired title to land NO 1880 through the process of transmission. However, merely because the 1st Plaintiff got his title through the process of transmission does not mean that the 1st Plaintiff’s title to land NO 1880 is un-impeachable.”

That is of course true. Section 26(1) of the *Land Registration Act* 2012 makes it clear that a certificate of title issued by the Registrar upon registration or to a purchaser upon a transfer or transmission is only prima facie evidence that the person named as proprietor is the absolute and indefeasible owner of the land. Such title can however be impeached if it is proved that the same was obtained through fraud or misrepresentation to which the person was a party or where it is shown to have been acquired illegally, unprocedurally or through a corrupt process. However, as I have already stated above, the Defendants neither pleaded nor proved fraud as required in law. In paragraph 4 of the defence, it is pleaded thus:

- 4 “The Defendants aver that the registration of land parcel NO BUKHAYO/MATAYOS/1882 in the name of the 2nd Plaintiff and one Colomitina Namboka Juma and the registration of the land parcel BUKHAYO/MATAYOS/1880 in the names of the 1st Plaintiff were both fraudulent and done to pervert the cause of justice.”

36. The process leading to the application for the Grant of Letters of Administration to the Estate of Juma Odundo Khaseke by the 2nd Plaintiff and Colomitina in Bungoma High Court Succession Cause No 336 of 2013 may or may not have been perpetrated through fraud. In his affidavit dated 25th January



2016 in support of the application for the annulment and/or revocation of the Confirmed Grant issued by Tuiyott J (as he then was) on 18th February 2015, the deceased who was then the Applicant averred, inter alia, that the Grant was obtained fraudulently since neither he nor his sister the 3rd Defendant were consulted yet they are beneficiaries to the said Estate. Further, that both he and the 3rd Defendant were adults and not minors as the Court was made to believe. Obviously those are weighty issues which the Judge hearing the application for revocation or annulment would have considered. However, as is now clear, the application was dismissed and the fate of the subsequent appeal remains un-clear. That notwithstanding, the said Grant can only be challenged in the succession Court. Indeed that is a matter which was well known to the deceased and that is why his first point of call was in Busia High Court Succession Cause No 336 of 2013 followed by an Appeal to the Court of Appeal. This Court has no jurisdiction to interrogate that Grant as to do so would not only amount to sitting on appeal over a decision of another Judge but most fundamentally, usurping a jurisdiction which I do not have. I am not about to do that.

37. Having said so, as the registered proprietor of the land parcel NO BUKHAYO/MATAYOS/1880, the 1st Plaintiff enjoys the rights protected under Article 40(1) of *the Constitution*. That includes the right to obtain orders injuncting the Defendants by themselves, their agents, servants or any other persons acting through them from interring the remain of the deceased Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1880.
38. With regard to whether the 1st and 2nd Plaintiffs are entitled to any quiet possession and occupation of the land parcel NO BUKHAYO/MATAYOS/1882, it is clear from the title deed to that parcel that the 2nd Plaintiff and Colomitina hold the said title in trust for the deceased and the 3rd Defendant until they attain 18 years of age. I have no doubt that the 3rd Defendant has attained that age. That was confirmed by John Opiyo Owino (DW5) at paragraph 8 of his affidavit dated 22nd October 2017 where he said:

8 “That the filing of Succession cause was fraudulent and aimed at depriving the family of their land as I am alive and my brother Francis had left behind 2 children Jackson Okoth Juma Khaseke and Judith Bwire Khaseke who were both adults at the time.”

Colomitina and the 2nd Plaintiff cannot continue being trustees holding the title to the land parcel NO BUKHAYO/MATAYOS/1882 in trust for the deceased and the 3rd Defendant in perpetuity. That trust must now be brought to an end. I therefore direct that the title deed to the land parcel NO BUKHAYO/MATAYOS/1882 in the names of Colomitina and the 2nd Plaintiff be cancelled forthwith and the same be registered in the names of the 3rd Defendant and the legal representative of the deceased. Thereafter, Colomitina, the 1st and 2nd Plaintiffs, their agents, servants or any other persons acting through them shall be permanently injuncted from interfering with the said parcel of land. The 3rd Defendant and those acting through her shall be at liberty to inter the remains of the deceased on the land parcel NO BUKHAYO/MATAYOS/1882 or any other land of their choice other than the land parcel NO BUKHAYO/MATAYOS/1880.

39. The 2nd Defendant has deposed in paragraph 3 of his affidavit that in 2007, he purchased from Francis Bwire Khaseke $\frac{3}{4}$ of acre out of the land parcel NO BUKHAYO/MATAYOS/1880. In 2007, the said parcel of land was still registered in the name of John Odundo Khaseke and a restriction had been registered on the same pending the succession proceedings. Francis Bwire Khaseke had no interest in the said parcel of land which he could transfer to the 2nd Defendant or indeed to any other person. Both the 1st and 2nd Defendants must therefore vacate the land parcels NO BUKHAYO/MATAYOS/1880 and 1882 as in any event they made no counter-claim with respect to the same.



40. The prayer seeking this Court's intervention in ordering the 1st Defendant to release the 3rd Defendant to the 2nd Plaintiff has already been declined for want of jurisdiction.
41. On the issue of costs this is a sad case where the relatives of the deceased will now have to meet mortuary charges and other funeral expenses which must now be enormous. The most prudent order to make in the circumstances is that each party shall meet their own costs.
42. Ultimately therefore, and having considered all the evidence herein, I proceed to make the following disposal orders:
 1. An order of permanent injunction is hereby issued injuncting the Defendants by themselves, their agents, servants or any other persons acting through them from interring the remains of the deceased Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1880.
 2. The Plaintiffs have no right to occupy or possess the land parcel NO BUKHAYO/MATAYOS/1882 or any part thereof.
 3. The names of the 2nd Plaintiff and Colomitina shall be cancelled from the register of the land parcel NO BUKHAYO/MATAYOS/1882 as trustees. They shall within 30 days of this judgment surrender the original title deed of the said parcel of land to the Land Registrar Busia for cancellation and issuance of a new title deed in the names of the 3rd Defendant and the legal representative of the deceased Jackson Okoth Khaseke. The trust is hereby terminated.
 4. Thereafter Colomitina, the Plaintiffs and those acting through them shall permanently be injuncted from interfering with the land parcel NO BUKHAYO/MATAYOS/1882.
 5. The 3rd Defendant, her relatives and those acting through them shall be at liberty to inter the remains of the deceased Jackson Okoth Khaseke on the land parcel NO BUKHAYO/MATAYOS/1882 or any other land of their choice other than the land parcel NO BUKHAYO/MATAYOS/1880.
 6. The 1st and 2nd Defendants, their agents servants or any other persons acting on their behalf shall within 30 days of this judgment vacate the land parcels NO BUKHAYO/MATAYOS/1880 and 1882 or be evicted therefrom.
 7. The parties shall meet their own costs of this suit.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF SEPTEMBER 2023
BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

BOAZ N. OLAO

JUDGE

