



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**CIVIL CASE NO. 17 OF 2009**

**ABUBAKAR SALIM MACHIRI.....PLAINTIFF**

**VERSUS**

**FRANCIS JUMA MUTORO.....1<sup>ST</sup> DEFENDANT**

**SAMWEL SICHANGI.....2<sup>ND</sup> DEFENDANT**

**GREGORY MUGODO.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

Although **ABUBAKAR SALIM MACHIRI** (the plaintiff) has in paragraph **6A** of his amended plaint referred to **FRANCIS JUMA MUTORO** (the 1<sup>st</sup> defendant) as a fraud, that appears to me to be an understatement. In my view, if a convention of fraudsters was held today to market their tools of trade, the 1<sup>st</sup> defendant will have a place reserved for him at the High table.

The 1<sup>st</sup> defendant's tools of trade would no doubt include the Gazette Notice **No 6454** dated 19<sup>th</sup> November 1999. And because of its significance in this matter, I shall reproduce it in extensor: -

**“GAZETTE NOTICE No 6454**

**THE REGISTERED LAND ACT**

**(CAP 300 Section 33)**

**REGISTRATION OF INSTRUMENT**

**Whereas WAMBULU M. MULONGO**

**of P. O. BOX 62 KIMILILI**

**in the Republic of Kenya is registered as proprietor of that piece of land known as parcel NO BUNGOMA/KAMAKOIWA/ 2165 situate in the district of BUNGOMA, and whereas the Resident Magistrate's Court of KIMILILI in CIVIL SUIT No 17 of 1999 has ordered that the said piece of land be transferred to FRANCIS JUMA MUTORO of P. O. Box 62 KIMILILI and whereas the Executive officer of the Court has in pursuance to an order of the said Court executed a transfer of the said piece of land in favour of FRANCIS JUMA MUTORO of P. O. BOX 62 KIMILILI, and whereas all efforts made to compel the registered proprietor to surrender the land title deed issued in respect of the said piece of land to the Land Registrar have failed, notice is given that after the expiration of thirty (30) days from the date hereof provided that no valid objection has been received within that period, I intend to dispense with the production of the said land title deed and proceed with the registration of the said instrument of transfer and issue a land title deed to the said FRANCIS JUMA MUTORO, and upon such registration the land title deed issued earlier to the said WAMBULULU M. MULONGO, shall be deemed to be cancelled and of no effect.**

**Dated the 19<sup>th</sup> November 1999**

**D. M. MUHANJI**

**Land Registrar**

**BUNGOMA DISTRICT.”**

However, as will shortly become clear in this Judgment, no such order had been issued by the **KIMILILI SENIOR RESIDENT MAGISTRATE’S COURT** in **CIVIL CASE No 17 of 1999** as was clarified in the letter by **HON. R. O. OIGARA – SENIOR RESIDENT MAGISTRATE KIMILILI** dated 9<sup>th</sup> July 2009 and addressed to the **DEPUTY COMMISSIONER OF LANDS**. More on this later.

The plaintiff moved to this Court vide his amended plaint dated 7<sup>th</sup> October 2019 in which he sought Judgment against the 1<sup>st</sup> defendant, **SIMON KABURU SICHANGI** and **GREGORY MDOGO** (the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) in the following terms: -

- (a) A declaration that the entries in the second register cancelling title number BUNGOMA/KAMAKOIWA/2165 are null and void.**
- (b) An order for cancellation of the same entries number 7, 8 and 9 of the register for land parcel NO L.R NO BUNGOMA/KAMAKOIWA/2165 and all other subsequent titles in respect of L.R NO BUNGOMA/ KAMAKOIWA/4436 and 4437, L.R NO BUNGOMA/KAMAKOIWA /4079 and 4080, L.R NO BUNGOMA/KAMAKOIWA/4081, 4082 and BUNGOMA KAMAKOIWA/3223.**
- (c) A declaratory order that the plaintiff is the sole owner of L.R NO BUNGOMA/KAMAKOIWA/2165.**
- (d) An eviction order to issue against the defendants, their agents, relatives, servants and all persons claiming through or under them from the said parcel of land as they are trespassers.**
- (e) An order to exhume the remains of JOSEPHINE SICHANGI alias JOSEPHINE NAKHUMICHA CHESA (deceased) interred on L.R NO BUNGOMA/KAMAKOIWA/2165.**
- (f) Any other suitable or alternative relief this Honourable Court may deem fit and just to grant.**

The basis of the plaintiff’s suit is that he is the sole registered proprietor of the land parcel **NO L.R BUNGOMA/KAMAKOIWA/2165** (hereinafter the suit land) having acquired registration on 20<sup>th</sup> September 2007. However, without his knowledge, consent or authority, the defendants have moved into the suit land and started ploughing and erecting temporary structures thereon. The plaintiff has asked the defendants to peacefully move out but in vain and they have pulled down the plaintiff’s house and continued to trespass on the suit land. That on 19<sup>th</sup> November 1999, the 1<sup>st</sup> defendant fraudulently caused to be issued a Gazette Notice No 6454 which resulted in the erroneous cancellation of the title to the suit land.

The particulars of fraud on the part of the 1<sup>st</sup> defendant are pleaded in paragraph **6A** of the amended plaint as follows: -

- (a) Misleading the Government Printer that there existed KIMILILI CIVIL SUIT No 17 of 1999 wherein the Court had ordered one WABULULU MULONGO (then the registered proprietor) to transfer the suit land to him which fact he knew to be false.**
- (b) Indicating that the Court had ordered the said transfer which fact he knew to be false.**
- (c) Causing to be opened two entries at the lands office with one indicating that the title to the suit land herein had been cancelled from WABULULU MULONGO into his names which entries he knew to be fraudulent.**
- (d) Proceeding to sub – divide the suit land and transferring to third parties based on fraudulent transactions.**

Based upon the foregoing fraudulent transactions, the Land Registrar Bungoma proceeded to close the said title and issued new numbers to the defendants. That pleas to have the defendants vacate the suit land have gone unheeded thus necessitating this suit.

Together with the amended plaint, the plaintiff also filed his statements dated 16<sup>th</sup> May 2013 and 18<sup>th</sup> December 2019. He also filed the following lists of documents:

- 1. List dated 24<sup>th</sup> May 2010**
- 2. List dated 16<sup>th</sup> May 2013**
- 3. List dated 7<sup>th</sup> June 2017.**
- 4. List dated 8<sup>th</sup> November 2019, and**
- 5. List dated 24<sup>th</sup> February 2020.**

The plaintiff similarly filed the statements of the following witnesses in support of his case: -

**1. JULIUS WANJALA TANDASI (PW 2)**

**2. WABULULU MULONGO (PW 3)**

**3. ELISHA WANYONYI MUTORO (PW 4).**

In his statements, the plaintiff states that he is the registered proprietor of the suit land which he purchased on 21<sup>st</sup> June 2007 from **WABULULU MULONGO** having done an official search at the Lands Registry. He was subsequently issued with a title deed after complying with all the relevant procedures. He then took possession of the suit land. Sometimes in the year 2009, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants also moved onto the suit land and demolished his house without justifiable cause. It was then that he discovered that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had obtained other titles being **BUNGOMA/KAMAKOIWA/4080, 4082, 4437, 4079, 3223, 4081 and 4437** without his knowledge yet a search at the Lands Registry showed that the suit land was still registered in his name. No explanation was given to him as to how the 2<sup>nd</sup> and 3<sup>rd</sup> defendants obtained their titles yet the suit land had not been sub – divided. He therefore wrote a complaint letter to the Permanent Secretary Ministry of Lands who upon investigations, discovered that the title to the suit land had been cancelled purportedly as a result of orders obtained in **KIMILILI SENIOR RESIDENT MAGISTRATE’S COURT CIVIL CASE No 17 of 1999**. The said Court however confirmed that the said case did not relate to any land dispute but was a dowry claim and therefore the District Criminal Investigation Officer Bungoma was directed to investigate the matter. The Ministry of Lands informed him that his title was genuine and he was advised to seek the remedy of cancellation of the other titles and the eviction of the defendants.

That upon the death of the 2<sup>nd</sup> defendant’s wife one **JOSEPHINE NAKHUMICHA CHESA**, he filed an application seeking to restrain him from burying the deceased on the suit land. The Court nonetheless allowed the 2<sup>nd</sup> defendant to inter the remains of the deceased on the land parcel **NO BUNGOMA /KAMAKOIWA/4080** yet it had been procured in an irregular and fraudulent manner.

In his statement dated 16<sup>th</sup> May 2013, **JULIUS WANJALA TANDASI (PW 2)** confirms that the 1<sup>st</sup> defendant is his neighbour and also the Administrator of the Estate of his late father **ZACHARIA MAKAELE**. That the family of the late **ZACHARIA MAKAELE** requested him to be the secretary during the distribution of the deceased’s land parcel **NO BUNGOMA/KAMAKOIWA/254** measuring approximately 38.9 acres. Previously, the family of **ZAKARIA MAKAELE** had sold 2 acres out of the land parcel **NO BUNGOMA/ KAMAKOIWA/254** to **WABULULU MULONGOP** to off – set the Settlement Fund Trustees’ loan. Thereafter, the following sold portions of the same land to **WABULULU MULONGO** as follows: -

**1. ELISHA WANYONYI MUTORO - 2 acres**

**2. FRANCIS JUMA MUTORO - 2 ½ acres**

**3. BENSON WANJALA MUTORO - 2 ½ acres**

In total therefore, **WABULULU MULONGO** purchased 9 acres form the family of **ZAKARIA MAKAELE** and the remaining 29.9 acres was shared as follows: -

**1. ELISHA WANYONYI MUTORO - 10 acres**

**2. FRANCIS JUMA MUTORO - 9.4 acres**

**3. BENSON WANJALA MUTORO - 8.5 acres**

**4. REBECCA MUTORO - 2 acres**

That the boundaries were demarcated and he recorded the schedule of distribution which was signed by all the beneficiaries. It is his evidence therefore that **WABULULU MULONGO** legitimately purchased land from the family of **ZAKARIA MAKAELE**.

In his statement also dated 16<sup>th</sup> May 2012 **WABULULU MULONGO (PW 3)** confirms that in 1993, he purchased 2 acres of land from the family of the late **ZAKARIA MAKAELE** at a consideration of Kshs. 100,000/= which was used to off – set a loan to the Settlement Fund Trustees. Then between 1994 to 1996, he purchased more land from the following members of **ZAKARIA MAKAELE**’s family: -

**1. ELISHA WANYONYI MUTORO - 2 acres**

**2. FRANCIS JUMA MUTORO - 2½ acres**

**3. BENSON WANJALA MUTORO - 2½ acres**

On 20<sup>th</sup> April 1996, the family of **ZAKARIA MAKAELE** distributed his land among the beneficiaries and recognized him as purchaser of 9 acres. The deceased’s land parcel **NO BUNGOMA/ KAMAKOIWA/254** was later sub – divided by **FRANCIS JUMA MUTORO** as the Administrator of the deceased’s Estate to create parcels **NO BUNGOMA/ KAMAKOIWA/2161 – 2165**. That the suit land was registered in his name and he obtained the title on 3<sup>rd</sup> April 1998.

On 11<sup>th</sup> March 1999, the 1<sup>st</sup> defendant and his brothers lodged a complaint at the Land Dispute Tribunal at **NAITIRI** seeking a total of Kshs.

107,000/= being the balance of the purchase price. The Tribunal ordered him to pay the said sum and after the award had been adopted as a Judgment of the **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT**, he paid the amount and was issued with a receipt No 290133. In the year 2003, the 1<sup>st</sup> defendant lodged another complaint at the Land Disputes Tribunal seeking a return of the title to the suit land. His claim was allowed but the witness filed an appeal at the **PROVINCIAL LAND DISPUTES APPEALS TRIBUNAL** in **KAKAMEGA** which allowed his appeal and set aside the decision of the **TRIBUNAL**.

In the year 2007, he sold the suit land to the plaintiff. Later, the 1<sup>st</sup> defendant alleged that the title to the suit land had been cancelled through the Gazette Notice No 6454 following orders issued in **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No 17 of 1999**. Upon perusal of the file relating to that case, he discovered that it involved a dowry dispute and not a claim to land. It is his evidence therefore that the plaintiff is the legitimate owner of the suit land.

**ELISHA WANYONYI MUTORO (PW 4)** in his statement dated 3<sup>rd</sup> July 2019 confirmed that he is the eldest son of **ZAKARIA MAKAELE MUTORO** and that the 1<sup>st</sup> defendant is his brother. That prior to his death, their father owned the land parcel **NO BUNGOMA/KAMAKOIWA/254** but had a loan pending at the Settlement Fund Trustees. That on 5<sup>th</sup> December 1993, his family including the 1<sup>st</sup> defendant met and agreed to sell 2 acres to **WABULULU MULONGO** to enable them settle the outstanding loan with the Settlement Fund Trustees. In addition to that, he also sold out of his share, 2 acres to **WABULULU MULONGO** while the 1<sup>st</sup> defendant and **BENSON WANJALA** each also sold 2½ acres to **WABULULU MULONGO** making a total of 9 acres which the family sold to the said **WABULULU MULONGO**. On 20<sup>th</sup> April 1996, the family of **ZAKARIA MAKAELE** finally distributed his Estate as follows: -

1. **ELISHA WANYONYI MUTORO - 10 acres**
2. **FRANCIS JUMA MUTORO - 9.4 acres**
3. **BENSON WANJALA MUTORO - 8.5 acres**
4. **REBECCA MUTORO - 2 acres**
5. **WABULULU MULONGO - 9 acres**

That all the beneficiaries were in agreement with the above distribution and as the Administrator of the Estate, the 1<sup>st</sup> defendant sub – divided the land parcel **NO BUNGOMA/KAMAKOIWA/254** to create parcels **NO BUNGOMA/ KAMAKOIWA /2161 to 2165** and subsequently transferred the suit land to **WABULULU MULONGO** who obtained a title and demarcated his portion. Sometime in September 2007, **WABULULU MULONGO** informed him that he had transferred the suit land to the plaintiff. Later, the defendants demolished the house which the plaintiff had constructed on the suit land and they were arrested and charged at the **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT** in **CRIMINAL CASE No 226 of 2009**. That to his knowledge, the transfers of the suit land to **WABULULU MULONGO** and subsequently to the plaintiff were all done above board and without any fraud. However, the purported sub – division of the title to the suit land by the 1<sup>st</sup> defendant to create parcels **NO BUNGOMA/KAMAKOIWA/3220 – 3223** and later the sub – division of parcel **NO BUNGOMA/KAMAKOIWA/3220** to create parcels **NO BUNGOMA/ KAMAKOIWA/4079 – 4080** and the sub – division of parcel **NO BUNGOMA/ KAMAKOIWA/3222** to create parcels **NO BUNGOMA/KAMAKOIWA/4081 – 4082** and finally the sub – division of parcel **NO BUNGOMA/KAMAKOIWA /3221** to create parcels **No 4436 and 4437** were done illegally. That he supports the plaintiff's case for the cancellation of the above sub – divisions and new titles.

In support of his case, the plaintiff filed the following documents: -

**LIST DATED 24<sup>TH</sup> MAY 2010: -**

1. **Certified copy of the Register to land parcel NO BUNGOMA/ KAMAKOIWA/2165.**
2. **Copy of title deed to the land parcel NO BUNGOMA/KAMAKOIWA /2165.**

**LIST DATED 16<sup>TH</sup> MAY 2013: -**

1. **Proceedings and ruling of the Provincial Land Dispute Tribunal in case No 25 of 2003.**
2. **Certified copy of the Court order in Land Dispute Case No 32 of 2003.**
3. **Copy of the title deed as previously issued in the names of WABULULU MULONGO.**
4. **Letter from the Permanent Secretary Ministry of Lands dated 22<sup>nd</sup> May 2012.**
5. **Letter from the Permanent Secretary Ministry of Lands addressed to the District Land Registrar Bungoma dated 25<sup>th</sup> January 2012.**
6. **Letter from the DEPUTY COMMISSIONER OF LANDS addressed to the SENIOR RESIDENT MAGISTRATE KIMILILI COURT dated 25<sup>th</sup> June 2009.**

7. Letter from the SENIOR RESIDENT MAGISTRATE KIMILILI COURT addressed to the DEPUTY COMMISSIONER OF LANDS dated 9<sup>th</sup> July 2009.
8. Letter from the SENIOR RESIDENT MAGISTRATE KIMILILI COURT addressed to the DEPUTY COMMISSIONER OF LANDS dated 29<sup>th</sup> July 2009.
9. Certified copy of order issued in land case No 17 of 1999 dated 28<sup>th</sup> July 2009.
10. Letter from the CHIEF LAND REGISTRAR addressed to the DISTRICT LAND REGISTRAR BUNGOMA dated 11<sup>th</sup> December addressed to the DISTRICT LAND REGISTRAR BUNGOMA.
11. Certified copies of the Register for the land parcel NO BUNGOMA/ KAMAKOIWA/2165.
12. Letter from the DCIO BUNGOMA to the SENIOR RESIDENT MAGISTRATE KIMILILI COURT dated 31<sup>st</sup> March 2010.

**LIST DATED 7<sup>TH</sup> JUNE 2017: -**

1. Copy of agreement dated 5<sup>th</sup> December 1993.
2. Copy of agreement dated 30<sup>th</sup> November 1993.
3. Copy of receipt dated 17<sup>th</sup> September 1999 for Kshs. 107,000/=.
4. Copy of schedule of distribution of Plot No. 254 dated 20<sup>th</sup> April 1996.
5. Copy of Mutation of the land parcel NO BUNGOMA/KAMAKOIWA /254.
6. Copy of Certificate of Official Search for the land parcel NO BUNGOMA/KAMAKOWA/4437.
7. Copy of Certificate of Official Search for the land parcel NO BUNGOMA/KAMAKOIWA/4436.
8. Copy of the proceedings and Judgment in KIMILILI LAND DISPUTES TRIBUNAL case No 4 of 1999.
9. Copy of the adoption order in KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE No 17 of 1999.
10. Certificate of Official Search for the land parcel NO BUNGOMA/ KAMAKOIWA/2165 registered in the names of the plaintiff and WABULULU MULONGO.
11. Copy of the land sale agreement dated 2<sup>nd</sup> February 2000.
12. Copies of the acknowledgements dated 21<sup>st</sup> June 2007, 26<sup>th</sup> May 2000, 16<sup>th</sup> June 2000, 24<sup>th</sup> August 2002, 18<sup>th</sup> June 2006, 16<sup>th</sup> May 2006 and 25<sup>th</sup> September 2006.

**LIST DATED 8<sup>TH</sup> NOVEMBER 2019: -**

1. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/254.
2. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/3221.
3. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/3220.
4. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/4081.
5. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOWA/4082.
6. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/4080.
7. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/4079.
8. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/3223.

**9. Certified copy of register for the land parcel NO BUNGOMA/ KAMAKOIWA/3222.**

**LIST DATED 24<sup>TH</sup> FEBRUARY 2020: -**

**1. Copy of letter dated 17<sup>th</sup> February 2010 from the DISTRICT LAND OFFICER BUNGOMA to the DISTRICT CRIMINAL INVESTIGATION OFFICE BUNGOMA.**

Two defences were filed by the defendants.

Having filed a Memorandum of Appearance on 23<sup>rd</sup> February 2009 as “*ADVOCATES FOR THE DEFENDANTS*”, the firm of **BULIMO & COMPANY ADVOCATES** filed a “*JOINT STATEMENT OF DEFENCE*” dated 5<sup>th</sup> March 2009 in which the defendants, while admitting the descriptive contents of the plaint, they denied that the plaintiff is the registered proprietor of the suit land. They pleaded that the suit land was registered in the names of the 1<sup>st</sup> defendant and was closed upon sub – division on 4<sup>th</sup> January 2000. They added that the 1<sup>st</sup> defendant is the registered proprietor of the land parcels **NO BUNGOMA/KAMAKOIWA/4436, 4081 and 3223** while the 2<sup>nd</sup> defendant is the registered proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA/4080** and the 3<sup>rd</sup> defendant is the registered proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA/4437** all being sub – divisions of the land parcel **NO BUNGOMA/KAMAKOIWA/2165**. They pleaded that the plaintiff is a stranger to them and denied having demolished his house. They urged the Court to dismiss the plaintiff’s suit with costs.

On the other hand, on 24<sup>th</sup> November 2010, the firm of **WABWILE & COMPANY ADVOCATES** filed an amended defence on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In the short five (5) paragraph defence, they pleaded that the registration of the plaintiff as the proprietor of the land parcel **NO BUNGOMA/ KAMAKOIWA/2165** on 20<sup>th</sup> September 2007 was null and void since the said land was vested to the 1<sup>st</sup> defendant vide Gazette Notice **No 6454 of 1999**. They denied the particulars of fraud as an afterthought which cannot change the Judgment and Decree in **BUNGOMA HIGH COURT CIVIL CASE No 55 of 2006 WABULULU MULONGO .V. FRANCIS JUMA MUTORO & KOROFIA SICHANGI**. They therefore sought the dismissal of the plaintiff’s suit because the reliefs sought are not available.

During the plenary hearing however, **MS RATEMO** appeared for the 1<sup>st</sup> defendant, **MR JUMA** for the 2<sup>nd</sup> defendant and **MR KUNDU** for the 3<sup>rd</sup> defendant.

The 1<sup>st</sup> defendant filed two statements one dated 1<sup>st</sup> July 2013 and the second dated 14<sup>th</sup> January 2021.

The statement dated 1<sup>st</sup> July 2013 is brief. He simply describes himself therein as a resident of **KAMUKUYWA SCHEME** adding that he knows the plaintiff as a business man who has never set foot nor put up structures on the suit land which after all, does not exist.

In the longer statement dated 14<sup>th</sup> January 2021, he states that he has never involved himself in any transaction with the plaintiff who is a stranger to him. He adds that he only sold 2 acres to **WABULULU MULONGO** and that following his appointment as the Administrator of the Estate of his later father **ZAKARIA MAKAELE**, he sub – divided the land parcel **NO BUNGOMA/KAMAKOIWA /254** (in his statement, he wrongly refers to it both as **BUNGOMA/ KAMAKOIWA/2154 and 264**) into five portions being **BUNGOMA/ KAMAKOIWA/2161, 2162, 2163, 2164 and 2165**. That he allocated **WABULULU MULONGO** 2 acres which he had initially purchased from him. That surprisingly, on 3<sup>rd</sup> April 1998 **WABULULU MULONGO** caused the whole land parcel **NO BUNGOMA/KAMAKOIWA/2165** to be transferred into his name rather than the 2 acres which the 1<sup>st</sup> defendant had sold to him. The matter ended up at the **LAND DISPUTES TRIBUNAL** in **CASE No 4 of 1999** where it was ordered that the 1<sup>st</sup> defendant gives **WABULULU MULONGO** 2 acres. The 1<sup>st</sup> defendant therefore cancelled the title deed in respect to the suit land and sold portions to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He states finally that the plaintiff has no cause of action against him and his suit should be dismissed with costs.

The 1<sup>st</sup> defendant’s list of documents dated 14<sup>th</sup> January 2021 comprised the following documents: -

- 1. Proceedings of the LAND DISPUTES TRIBUNAL.**
- 2. Land Sale agreement dated 30<sup>th</sup> November 1993.**
- 3. Chief’s letter dated 23<sup>rd</sup> October 1999.**
- 4. Ruling in KIMILILI SENIOR RESIDENT MAGISTRATE’S COURT CRIMINAL CASE No 226 of 2009.**
- 5. Proceedings and Ruling in KIMILILI SENIOR RESIDENT MAGISTRATE’S COURT CIVIL CASE No 17 of 1999.**
- 6. Ruling and Decree in BUNGOMA HIGH COURT CIVIL CASE No 55 of 2006.**

The 2<sup>nd</sup> defendant recorded a statement dated 12<sup>th</sup> November in which he stated that sometime in 2004, the 1<sup>st</sup> defendant offered to sell him a portion of the land parcel **NO BUNGOMA/KAMAKOIWA/3220**. They agreed on a purchase price of Kshs. 155,000/= which he paid in full and he obtained a title deed for his portion measuring 0.588 Ha on 26<sup>th</sup> July 2006 which is parcel **NO BUNGOMA/ KAMAKOIWA/4080**. He denied that he had ploughed the suit land and added that he is a stranger to the plaintiff’s allegations of trespass.

He filed his list of documents dated 12<sup>th</sup> November 2019 comprising of the following documents: -

- 1. Official Certificate of Search of the land parcel NO BUNGOMA/ KAMAKOIWA/3220.**
- 2. Land Sale agreement.**
- 3. Title deed for the land parcel NO BUNGOMA/KAMAKOIWA/4080.**
- 4. Green Card.**

He also filed a statement for his witness one **EMMANUEL WAFULA KHISA** who did not however testify during the trial.

The 3<sup>rd</sup> defendant filed a statement dated 8<sup>th</sup> September 2016 in which he confirmed that on 20<sup>th</sup> July 2002, he entered into a land sale agreement with the 1<sup>st</sup> defendant who had sub – divided the land parcel **NO BUNGOMA/ KAMAKOIWA/2165** following the Gazette Notice **No 6454** of 19<sup>th</sup> November 1999. That he purchased four (4) acres being parcels **NO BUNGOMA/ KAMAKOIWA/3222, 3220 and 3221**. That he obtained the necessary consent of the **LAND CONTROL BOARD at TONGAREN** and the respective titles were processed in his names.

He filed the following documents as per the list dated 8<sup>th</sup> September 2016: -

- 1: Sale agreement dated 20<sup>th</sup> July 2002.**
- 2: Sale agreement dated 17<sup>th</sup> June 2006.**
- 3: Sale agreement dated 14<sup>th</sup> January 2001.**
- 4: Title deeds for the land parcels NO BUNGOMA/KAMAKOIWA/3710, 4079, 4437 and 4082.**

The hearing commenced on 18<sup>th</sup> January 2021 and the plaintiff testified and called his witnesses. He also produced his documentary evidence as per the lists filed. He and his witnesses adopted as their evidence the statements referred to above.

The defence case was heard on 1<sup>st</sup> July 2021. The defendants adopted as their evidence their respective statements and produced their documents as per their lists filed.

Submissions were thereafter filed both by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff, **MR ONKANKI** instructed by the firm of **D. O. ONKANKI & COMPANY ADVOCATES** for the 1<sup>st</sup> defendant, **MR JUMA** instructed by the firm of **PAUL JUMA & COMPANY ADVOCATES** for the 2<sup>nd</sup> defendant and **MR KUNDU** instructed by the firm of **BULIMO & COMPANY ADVOCATES** for the 3<sup>rd</sup> defendant.

I have considered the evidence by the parties as well as the submissions by Counsel.

I consider the following to be the issues for my determination in this dispute:-

- 1. Did the 1<sup>st</sup> defendant as the Administrator of the Estate of ZAKARIA MAKELA pass a valid title in the suit land to WABULULU MULONGO?**
- 2. Did WABULULU MULONGO transfer a valid title in the suit land to the plaintiff or was the plaintiff's title properly cancelled through a Gazette Notice?**
- 3. Who as between the plaintiff and the 1<sup>st</sup> defendant acquired a valid title to the suit land and have the allegations of fraud been established?**
- 4. Are the 2<sup>nd</sup> and 3<sup>rd</sup> defendants innocent purchasers of their respective parcels of land?**
- 5. What disposal orders should this Court make?**
- 6. Who shall bear the costs of the suit?**

Before I consider the evidence herein, there is one issue which the 1<sup>st</sup> and 2<sup>nd</sup> defendants raised, though not so elegantly, in their amended defence dated 24<sup>th</sup> November 2010 but which I must nonetheless address. This is because if that pleading is correct, then this suit is infact res – judicata. The plaintiff did not specifically address that issue in his reply to defence. However, I take the view that res – judicata being an issue of law, can be raised and determined by the Court on it's own motion so long as there is sufficient evidence to support that plea.

In paragraph 3A of their amended defence the 1<sup>st</sup> and 2<sup>nd</sup> defendants have pleaded as follows: -

**3A “Particulars of fraud are an afterthought and cannot change Judgment and decree in BUNGOMA H.C.C.C No 55 of 2006 WABULULU MULONGO .V. FRANCIS MUTORO & KOROFIA SICHANGI.”**

That pleading suggests that infact this suit is barred by the provisions of **Section 7** of the **Civil Procedure Act** which provides that: -

**“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”**

The duty is always on the party pleading res – judicata to produce all the relevant evidence to support that assertion.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants produced the Ruling of **KARANJA J** (as she then was) in **BUNGOMA H.C.C.C No 55 of 2006** and the Decree dated 23<sup>rd</sup> May 2008 as part of their documentary evidence. It is clear from the said Ruling and Decree that the case involved **WABULULU MULONGO** as plaintiff and **FRANCIS JUMA MUTORO** and **KOROFIA SICHANGI** as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. However, that case cannot be cited as authority for rendering this suit res – judicata because the plaintiff herein was not a party in those proceedings. Secondly, there is nothing to suggest that any of the parties in that case was litigating on behalf of the plaintiff in this case because as is manifestly obvious, **BUNGOMA H.C.C.C No 55 of 2006** was filed in 2006 a year before the plaintiff purchased the suit land on 21<sup>st</sup> June 2007. Finally, the defendants herein did raise the plea of res – judicata before **OMOLLO J** vide an application dated 18<sup>th</sup> April 2011. Having considered various authorities cited before her, and for completely different reasons, **OMOLLO J** in a ruling dated 7<sup>th</sup> February 2013 dismissed the application and said: -

**“I do therefore find the matter as not res – judicata thus not an abuse of the Court process. I proceed to dismiss the application dated 18<sup>th</sup> April 2011 as lacking in merit with costs to the Plaintiff/Respondent.”**

No appeal appears to have been preferred against that ruling and on my part and for the reasons stated above, I hold that the plea of res – judicata as raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their amended defence is wholly un – meritorious and I hereby dismiss it.

I shall now consider the plaintiff’s case on it’s merits.

It is common ground that the suit land was a resultant sub – division of the land parcel **NO BUNGOMA/KAMAKOIWA/254** which was the property of **ZAKARIA MAKAELE** the late father of the 1<sup>st</sup> defendant, **ELISHA WANYONYI MUTORO (PW 4)**, **BENSON WANJALA MUTORO** and **REBECCA MUTORO**. It is the testimony of **WABULULU MULONGO (PW 3)** that as far back as 1993, the family of late **ZAKARIA MAKAELE** sold to him 2 acres out of the original land parcel **NO BUNGOMA/KAMAKOIWA/254** at a consideration of Kshs. 100,000/= to enable them off – set an outstanding loan with the Settlement Fund Trustees. The sale agreement dated 30<sup>th</sup> November 1993 was signed by **WABULULU MULONGO** and the 1<sup>st</sup> defendant and is part of the documents produced by both of them in this case. Relying on that agreement, the 1<sup>st</sup> defendant has stated in his statement dated 14<sup>th</sup> January 2021 that **WABULULU MULONGO** thereafter cheated his family and allocated to himself the whole of the suit land measuring 9 acres yet he was only entitled to 2 acres. This is what he says: -

**“That surprisingly, on 30/4/1998 MR WABULULU M. MULONGO being a civil servant caused land parcel NO BUNGOMA/KAMAKOIWA/2165 to be transferred into his names without my consent which parcel of land I had allocated to daughters being the beneficiaries of the deceased Estate. The said MR WABULULU MULONGO transferred land parcel NO BUNGOMA KAMAKOIWA/2165 measuring approximately 3.36 HA (9 acres) instead of land parcel measuring 2 acres which I sold to him.”**

That testimony has however been rebutted by **WABULULU MULONGO (PW 3)** who in his testimony told this Court that even after he had bought 2 acres in 1993, he proceeded to purchase from the sons of **ZAKARIA MAKAELE** additional parcels of land between 1994 and 1996 being: -

1. **ELISHA WANYONYI MUTORO (PW 4) – 2 acres**
2. **FRANCIS JUMA MUTORO (1<sup>st</sup> defendant) – 2 ½ acres**
3. **BENSON WANJALA MUTORO – 2 ½ acres**

This made his total purchase 9 acres and his interest in the Estate of **ZAKARIA MAKAELE** was fully recognized by **MAKAELE**’s family when on 20<sup>th</sup> April 1996, the clan distributed the deceased’s Estate and allocated to him 9 acres. This was duly formalized when the 1<sup>st</sup> defendant, as the Administrator of the deceased’s Estate sub – divided the original land parcel **NO BUNGOMA/KAMAKOIWA/254** into parcels **NO BUNGOMA/KAMAKOIWA/2161 – 2165** and the suit land was registered in his names after the survey and he acquired the title deed on 11<sup>th</sup> March 1999. That evidence was corroborated by **JULIUS WANJALA TANDASI (PW 2)** a neighbour to the 1<sup>st</sup> defendant and who acted as the secretary when the Estate of **ZAKARIA MAKAELE** was being distributed.

The 1<sup>st</sup> defendant’s elder brother **ELISHA WANYONYI MUTORO (PW 4)** further corroborated that testimony. In his statement dated 3<sup>rd</sup>

July 2019 and which he also adopted as his testimony, he says in paragraphs 6, 7 and 8 as follows: -

**6: “That on 5/12/1993 we the family of the later ZAKARIA MAKAELE MUTORO to wit JUSTINO WANYONYI, ELISHA W. MUTORO, FRANCIS JUMA MUTORO and BENSON WANJALA mutually agreed to dispose of 2 acres of land to WABULULU MULONGO for purpose of off – setting the loan of the Settlement Fund Trustees.”**

**7: “That on my part, I sold WABULULU MULONGO a portion of land measuring 2 acres out of my share comprised in L.R NO BUNGOMA/KAMAKOIWA/254 whereas my brothers FRANCIS JUMA MUTORO and BENSON WANJALA sold WABULULU MULONGO 2 ½ and 2 ½ respectively out of their shares comprised in L.R. NO BUNGOMA/KAMAKOIWA/254.”**

**8: “That in total, WABULULU MULONGO purchased 9 acres from LR NO KIMILILI (sic)/KAMAKOIWA /254.”**

When he was cross – examined by Counsel for the plaintiff **MR MURUNGA**, the 1<sup>st</sup> defendant insisted that other than the 2 acres which he sold to **WABULULU MULONGO** to help off – set the Settlement Fund Trustees loan and another ½ acre which he also later sold **WABULULU MULONGO**, his family did not sell any other land to **WABULULU MULONGO** and certainly not the 9 acres alleged. However, I did not hear the 1<sup>st</sup> defendant cast any aspersions on the integrity of **WABULULU MULONGO (PW 3)**, and **JULIUS WANJALA TANDASI (PW 2)** an independent witness for that matter and whose only role was to act as secretary to the clan meeting when the land parcel **NO BUNGOMA/ KAMAKOIWA/254** was being distributed to create the suit land or even his own brother **ELISHA WANYONYI MUTORO (PW 4)**. There is no reason why those three (3) witnesses would gang up against the 1<sup>st</sup> defendant to give false testimony with regard to how **WABULULU MULONGO** acquired ownership of the suit land. This Court is satisfied that their evidence is congenial and truthful and that their testimony, rather than that of the 1<sup>st</sup> defendant, is a true reflection of how **WABULULU MULONGO** was registered as the proprietor of the suit land. That acquisition was clearly well above board.

There is evidence that in the process of acquiring the suit land from the family of **ZAKARIA MAKAELE, WABULULU MULONGO** did not fully pay the whole of the agreed consideration. He still owed **ELISHA WANYONYI MUTORO (PW 4)** Kshs. 32,000/= and the 1<sup>st</sup> defendant Kshs. 75,000/=. This prompted the 1<sup>st</sup> defendant to file a suit at the **CHIEF’S OFFICE NAITIRI** on 21<sup>st</sup> April 1999 claiming the balance of Kshs. 107,000/=. The **TRIBUNAL** sitting at the said office agreed with him and made an award that **WABULULU MULONGO** pays the outstanding balance of Kshs. 107,000/=. That award was subsequently adopted as a Judgment of the **RESIDENT MAGISTRATE’S COURT KIMILILI** in **LAND CASE No 17 of 1999** where **WABULULU MULONGO** paid the Kshs. 107,000/= and was issued with a receipt No B 290133 which is part of the plaintiff’s documents dated 7<sup>th</sup> June 2017. When he was cross – examined by **MR MURUNGA**, the 1<sup>st</sup> defendant admitted that indeed he filed that case at the Chief’s office claiming the said sum. It is also instructive to note that in the said case where he was the **CLAIMANT** and **WABULULU MULONGO** was the **OBJECTOR**, the 1<sup>st</sup> defendant is recorded as saying the following: -

**“However, as we were selling him three brothers of the family ELISHA WANJALA, FRANCIS JUMA and BENSON WAANJALA MUTORO. ELISHA still claims balance of Kshs. 32,000/= but BENSON WANJALA was cleared. As for me, I still demand Kshs. 75,000/= (seventy-five thousand only) from the objector. So we agreed to give him the nine acres in all provided that he gives us our balances. I have handed in a number of exhibits (I – XVII).”**

Those proceedings were recorded on 21<sup>st</sup> April 1999 and his claim now that **WABULULU MULONGO** only purchased 2 acres from the family of **ZAKARIA MAKAELE** can only be an act of dishonesty. It is a poor attempt to try and renege on an agreement through which **WABULULU MULONGO** acquired the title to the suit land on 3<sup>rd</sup> April 1998.

I am satisfied that **WABULULU MULONGO** obtained a valid title to the suit land from the family of **ZAKARIA MAKAELE** through the 1<sup>st</sup> defendant.

**Issues No 2 and 3 can be considered together.**

In the year 2002, the 1<sup>st</sup> defendant launched another case at the **TONGAREN LAND DISPUTES TRIBUNAL** being case No 32 of 2002 against **WABULULU MULONGO** insisting that he only sold 2½ acres of land to **WABULULU MULONGO** and demanding the return of the title deed to the suit land. After hearing both parties, the **TRIBUNAL** ordered that the title to the suit land be cancelled and that **WABULULU MULONGO** be awarded only 2½ acres. Aggrieved by the decision, **WABULULU MULONGO** filed appeal No. 25 of 2003 at the then **PROVINCIAL APPEALS COMMITTEE in KAKAMEGA** which allowed his appeal and directed that the suit land be given to him. That order was adopted by the **SENIOR RESIDENT MAGISTRATE’S COURT BUNGOMA** on 5<sup>th</sup> August 2005. **WABULULU MULONGO** thereafter transferred the suit land to the plaintiff in the year 2007 who was issued with the title deed on 20<sup>th</sup> September 2007. The Greed Card to the suit land confirms that. However, it is clear from the documents provided herein that another Green Card had been opened with new entries No 8 and 9 which read as follows: -

**“ENTRY DATE**

**8 4.1.2000 Entry No 6 cancelled. See Gazette Notice No 6454 of 19.11.1999.**

**9 4.1.2000 Title closed on sub – division now see Nos 3220, 3221, 3222, 3223 CIVIL SUIT No 17 of 1999 KIMILILI COURT.”**

The opening of two Green Cards at the Lands Office could only have been a scheme hatched and perpetrated by the 1<sup>st</sup> defendant in convenience with Officers at the Land Registry in Bungoma in order to deprive the plaintiff of his rightful ownership of the suit land. When

he discovered this fraud, the plaintiff conducted a search at the Lands Registry in Bungoma on 24<sup>th</sup> October 2008, 2<sup>nd</sup> February 2009 and 10<sup>th</sup> March 2009 which confirmed that he was still the registered proprietor of the suit land yet the second Green Card showed that it had been sub – divided to create other titles being **BUNGOMA/KAMAKOIWA/3220, 3221, 3222, 3223, 4079, 4080, 4081, 4082** registered in the names of the defendants. The only person who had an interest in the cancellation of the plaintiff's title to the suit land is the 1<sup>st</sup> defendant. He admitted as much in his oral testimony in which he said that he had another title deed to the suit land and the plaintiff had refused to surrender his title for cancellation and that is why he sought the publication of the Kenya Gazette Notice **No 6454**. This is what he said when cross – examined by **MR MURUNGA**: -

*“WABULULU MULONGO got the title for land parcel NO BUNGOMA/KAMAKOIWA/2165 when I already had another title for the same parcel of land in my names. Even the Land Registrar asked him to return that title deed for cancellation but he refused. That was in 1999 and I complained and the title was cancelled by Gazette Notice No 6454 of 19<sup>th</sup> November 1999. The Gazette Notice refers to a Court order issued in case No 17 of 1999.”*

When the plaintiff took up the matter regarding the Court order issued by the **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT** in **CIVIL CASE No 17 of 1999**, he discovered that no such order had been issued. **HON. R. O. OIGARA** the **SENIOR MAGISTRATE KIMILILI COURT** in a letter dated 9<sup>th</sup> July 2009 and addressed to the **DEPUTY COMMISSIONER OF LANDS** addressed the issue as follows: -

*“RE CIVIL SUIT 17 of 1999*

*We acknowledge receipt of your letter dated 25<sup>th</sup> June 2009 on the above subject.*

*We wish to point out that CIVIL CASE No 17/1999 does not relate to land parcel number BUNGOMA/KAMAKOIWA/2165 or the Kenya Gazette Notice number 6454 of November 1999. The above case revolves around dowry claim according to Bukusu customary law the parties being MASINDE LUKORITO WABUKE .V. ERICK WEKESAKHA & ANOTHER.*

*The case that might relate to the above parcel and the Kenya Gazette Notice is Land Dispute Tribunal LDT CASE 17 of 1999 but there is no vesting order issued by this Court in respect to the above parcel.*

*In any case, one WABULULU M. MULONGO has filed an application in this Court on 19.6.09 challenging the cancellation of title which is scheduled for hearing on 14.07.09 which application he must serve your Ministry.*

*We do hope that the information in our response shall service (sic).”*

**R. O. OIGARA**

**SENIOR RESIDENT MAGISTRATE**

**KIMILILI.”**

The Magistrate followed up on this letter by issuing an order dated 28<sup>th</sup> July 2009 asking the **DCIO BUNGOMA** to investigate how the suit land was registered. No doubt the Court that had issued the order purporting to cancel the plaintiff's title to the suit land was the one best placed to confirm if indeed such an order had been issued. And the response by the **SENIOR RESIDENT MAGISTRATE KIMILILI COURT** vide his letter dated 9<sup>th</sup> July 2009 leaves no doubt that no such order was issued by his Court. Having procured the cancellation of the plaintiff's title deed through the illegal order and the subsequent Gazette Notice **No 6454** of 19<sup>th</sup> November 1999, the 1<sup>st</sup> defendant proceeded, no doubt with the aid of fraudsters in the Lands Registry of **BUNGOMA**, to sub – divide and create new titles some of which were transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. There can be no doubt that the allegations of fraud levelled against the 1<sup>st</sup> defendant in paragraph **6A** of the amended plaint have been established to the standard of proof required in civil cases.

Since there was no Court order cancelling the plaintiff's title to the suit land, it follows that the Gazette Notice **No 6454** dated 19<sup>th</sup> November 1999 was an illegal notice and of no effect. It is also trite law that the Land Registrar Bungoma had no powers to cancel any title deed to land. That power was vested in the Courts under the provisions of **Section 159** of the repealed **Registered Land Act** under which the title to the suit land was issued. Such power could not be exercised through a Gazette Notice – **KURIA GREENS LTD .V. REGISTRAR OF TITLES & ANOTHER 2011 eKLR**.

It must be clear from all the above therefore that the plaintiff holds a valid title to the suit land and the purported cancellation thereof through a Gazette Notice was null and void. The subsequent creation of a second Green Card to the suit land through which the suit land was sub – divided and portions thereof transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were also acts that had no foundation in the law and were null and void ab – initio.

It is also common knowledge that following the illegal cancellation of the plaintiff's title to the suit land, the 1<sup>st</sup> defendant purported to sub – divide and transfer the resultant sub – divisions as follows: -

**1. BUNGOMA/KAMAKOIWA/3220 – 1<sup>st</sup> defendant**

2. BUNGOMA/KAMAKOIWA/3221 - 1<sup>st</sup> defendant

3. BUNGOMA/KAMAKOIWA/3223 – 1<sup>st</sup> defendant

Title NO BUNGOMA/KAMAKOIWA/3220 was divided to create parcels NO BUNGOMA/KAMAKOIWA/4079 and 4080 which were transferred as follows: -

1. BUNGOMA/KAMAKOIWA/4079 - 3<sup>rd</sup> defendant

2. BUNGOMA/KAMAKOIWA/4080 - 2<sup>nd</sup> defendant

3. BUNGOMA/KAMAKOIWA/4081 - 1<sup>st</sup> defendant

4. BUNGOMA/KAMAKOIWA/4082 - 3<sup>Rrd</sup> defendant

3<sup>rd</sup> defendant also acquired BUNGOMA/KAMAKOIWA/3710 and 4437.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have testified on how they purchased their respective parcels and hold titles thereto. The issue that I need to interrogate is whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were innocent purchasers for value.

In his submissions, MR JUMA Counsel for the 2<sup>nd</sup> defendant said the following on that issue at page 6: -

*“On this issue, we submit that the 2<sup>nd</sup> defendant is a bonafide purchaser of land parcel number BUNGOMA/KAMAKOIWA/4080 which was hived from the parcel number BUNGOMA/KAMAKOIWA/3220 without any notice of defect in title .....*”

Counsel cites the decision of MUTUNGI J in the case of EUNICE GRACE NJAMBI .V. ATTORNEY – GENERAL & OTHERS 2013 eKLR.

Were the 2<sup>nd</sup> and 3<sup>rd</sup> defendants innocent purchasers for value?

The Court of Appeal in the case of WESTON GITONGA & OTHERS .V. PETER RUGU GIKANGA & ANOTHER 2017 eKLR adopted the following definition of bona fide purchaser in BLACK’S LAW DICTIONARY 8<sup>TH</sup> EDITION.

*“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice or prior adverse claims.”* Emphasis added.

In the case of KATENDE .V. HARIDAR & COMPANY LTD 2008 2 E.A 173, the Court of Appeal of Uganda described the doctrine of bona fide purchaser as follows: -

*“For the purpose of this appeal, it suffices to describe a bona fide purchaser as 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 that: -*

- (a) he holds a certificate of title;*
- (b) he purchased the property in good faith;*
- (c) he had no knowledge of the fraud;*
- (d) he purchased for valuable consideration*
- (e) the vendors had apparent valid title*
- (f) he purchased without notice of any fraud*
- (g) he was not party to any fraud.”*

The above case has been followed in this country including in the case of LAWRENCE P. MUKIRI (Attorney of FRANCIS MUROKI MWAURA) .V. ATTORNEY GENERAL & OTHERS 2017 eKLR.

In his oral testimony, the plaintiff told the Court that after buying the suit land, he put up a house which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants demolished. This is what he said when cross – examined by **MS RATEMO**: -

***“I was not aware that the 1<sup>st</sup> defendant owned the land when I bought it. I never took possession because the three defendants demolished my house. I filed a criminal case at KIMILILI being case No 226 of 2009 against all the three defendants and two others for malicious damage of my house which I had already built on the land so I had already taken possession of the land.”***

In his statement dated 16<sup>th</sup> May 2013, the plaintiff states at paragraph 10 as follows: -

***10 “That when I moved to occupy the land sometimes in the year 2009, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants also moved into the suit land and demolished my house without any justifiable cause.”***

It is of course correct that the defendants and two others were charged at **KIMILILI SENIOR RESIDENT MAGISTRATE’S COURT** in **CRIMINAL CASE NO 226 of 2009** for the offence of maliciously damaging the plaintiff’s house on 5<sup>th</sup> February 2009 at **MFUPI VILLAGE KAMUKUYWA LOCATION** of **KIMILILI DISTRICT**. They were acquitted principally on the basis that the prosecution had not proved the ownership of the land where the house was built. This is how the trial Magistrate ruled in the last paragraph of his Judgment delivered on 24<sup>th</sup> February 2012: -

***“Before I rest my Judgment as I observed herein about the Court in this case was not called upon to determine issue of ownership of land subject matter in this case from where the structures were demolished but if the accused in this case maliciously damaged the complainant’s house.”***

I am not persuaded that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acted diligently in the manner in which they acquired their various parcels of land from the 1<sup>st</sup> defendant. Enquiries would have revealed to them the prior interests of the plaintiff. The 3<sup>rd</sup> defendant in particular appears to have had knowledge of the contentious Gazette Notice No 6454 of 1999 before he purchased the land parcels **NO BUNGOMA/KAMAKOIWA/3220, 3221, and 3222**. In his statement dated 8<sup>th</sup> September 2016, he says at paragraphs 4, 5 and 6 as follows: -

***4: “That after Gazette Notice 6454 of 19<sup>th</sup> November 1999, one FRANCIS JUMA MUTORO went and sub – divided 2165 into four portions i.e. 3220, 3221, 3222 and 3223.”***

***5: “That the proprietor after Gazette Notice remained FRANCIS JUMA MUTORO who then decided to sale me 4 acres of the said parcel of land i.e. from BUNGOMA/KAMAKOIWA/3221 also 1 acre”***

***6: “That I was taken before the Land Control Board Tongaren by the vendor FRANCIS JUMA MUTORO.”***

With due diligence, the 3<sup>rd</sup> defendant would have found out from the **KIMILILI COURT** that there was no order cancelling the plaintiff’s prior title to the suit land. The chronology of events herein depicts the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as parties who knew, or ought to have known, that the 1<sup>st</sup> defendant was involved in fraudulent activities with regard to the suit land but were not bothered to confirm the true position. For instance, although the 3<sup>rd</sup> defendant states that he obtained the consent of the Tongaren Land Control Board, no such consent was produced meaning that no such consent was sought and obtained. The only explanation for failure to do so is that the Tongaren Land Control Board would have been made aware by the 1<sup>st</sup> defendant’s siblings about the prior transfer of the suit land to **WABULULU MULONGO** and thereafter to the plaintiff.

Further, the plaintiff has testified as to how the 2<sup>nd</sup> and 3<sup>rd</sup> defendants demolished a house that he had put up on the suit land. They were of course acquitted for the offence of malicious damage to property for reasons contained in the Judgment. However, for purposes of this suit, what is important is that by the time the 2<sup>nd</sup> and 3<sup>rd</sup> defendants moved onto the suit land, it must have been obvious to them that it was not vacant. That was a red alert and destroys any plea that they were innocent purchasers.

It is also instructive to note that the plea of innocent purchaser was not even pleaded by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Indeed, in their amended defence, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants appear to vouch for the validity of the 1<sup>st</sup> defendant’s title to the suit land as against the plaintiff’s. They have pleaded in paragraph 3 of the said defence as follows: -

***3: “The purported registration of the plaintiff as a sole proprietor on the 20.9.2007 is null and void as the land parcel NO BUNGOMA/KAMAKOIWA/2165 was vested to the 1<sup>st</sup> defendant vide Gazette Notice 6454 of 1999.”***

Similarly, in the joint defence filed by the firm of **BULIMO & COMPANY ADVOCATES** on behalf of all the defendants, there was no mention of the plea of innocent purchasers. They have pleaded in paragraph 3 of the said joint defence as follows: -

***3: “The defendants deny the contents of paragraph 3 and specifically that the plaintiff is the registered proprietor of land parcel NO BUNGOMA/KAMAKOIWA/2165 as the same was registered in the names of the 1<sup>st</sup> defendant and it was closed on sub – division on 4.1.200.”***

Given those averments, I do not see how the 2<sup>nd</sup> and 3<sup>rd</sup> defendants can hide under the shield of innocent purchasers. An innocent party does not usually intend to take sides in a dispute. He usually acknowledges the positions of both combatants but goes on to add that he acted in good faith without the benefit of knowing all the relevant facts regarding the matter in dispute. He does not take sides and neither does he

become belligerent. Rather, he will demonstrate remorse even as he pleads for his case. The term **innocent** is defined in **BLACK'S LAW DICTIONARY** as follows: -

***“Free from guilt, acting in good faith and without knowledge of incriminatory circumstances or of defects or objections.”***

By the time they were filing their defences, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were no doubt already aware about the challenges being raised by the plaintiff with regard to the 1<sup>st</sup> defendant's title to the suit land. They were made aware that the plaintiff was laying a claim to the same land. However, rather than leave to the Court the issue of who between the two combatants holds the valid title to the suit land, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have taken sides in a manner that can only lead to the inevitable conclusion that they were determined at all costs to acquire their portions of land from the 1<sup>st</sup> defendant notwithstanding any defects, real or imagined, in the 1<sup>st</sup> defendant's title. Those are not the parties who the phrase ***“innocent purchasers”*** was meant to protect.

Finally, on the issue of innocent purchaser, I must emphasize that I have only addressed it out of caution because it has been raised in submissions. However, it must be noted that submissions are not evidence on which a decision of the Court can be based. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants never pleaded nor raised that issue in their case and they cannot therefore rely on it to strengthen their case through submissions – see **DANIEL TOROITICH arap MOI .V. MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR**.

In addition to the above, this Court must also state that having found that the plaintiff held a valid title to the suit land transferred to him by **WABULULU MULONGO**, it follows that the 1<sup>st</sup> defendant had no interest legal or equitable, in the said land which he could purport to transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant basically stole the suit land from the plaintiff and as was held by the Court of Appeal in the case of **JANE GACHOKI GATHECA .V. PRISCILLA NYAWIRA GITUNGU & ANOTHER 2008 eKLR**: -

***“A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”***

The titles which the 1<sup>st</sup> defendant acquired and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be protected by **Article 40(1)** of the **Constitution** because **Article 40(6)** of the same **Constitution** provides that: -

**40(6) “The rights under the Article do not extend to any property that has been found to have been unlawfully acquired.”**

On the other hand, **WABULULU MULONGO** having confirmed that he voluntarily transferred the suit land to the plaintiff and has no further claim to it, the plaintiff's title cannot be impeached. It is protected both by **Article 40(1)** of the **Constitution** and **Sections 24 and 26** of the **Land Registration Act**. That title can therefore only be impeached on the grounds set out in **Section 26(1)** of the **Land Registration Act** that is, if it was obtained through fraud, misrepresentation, illegally un - procedurally or through a corrupt scheme. There is no such evidence placed before this Court on which such a conclusion can be arrived at. On the other hand, there is sufficient evidence upon which this Court has concluded that the cancellation of the title issued to **WABULULU MULONGO** was fraudulent and all the subsequent sub - divisions of the title **NO BUNGOMA/ KAMAKOIWA/2165** and the transfers to the defendants were all null and void ab - initio.

In paragraphs 3, 4 and 5 of his further statement dated 18<sup>th</sup> December 2019, the plaintiff has stated as follows: -

**3: “That upon the death of the 2<sup>nd</sup> defendant's wife one JOSEPHINE NAKHUMICHA CHESA, I filed an application in Court seeking to restrain him from interring the remains of his deceased wife on land parcel NO BUNGOMA/KAMAKOIWA/2165.”**

**4: “That the Court herein upon allowed the 2<sup>nd</sup> defendant to inter the remains of his deceased wife notwithstanding that the 2<sup>nd</sup> defendant's title to which land parcel NO BUNGOMA/KAMAKOIWA/4080 was procured in an irregular and fraudulent manner.”**

**5: “That I pray upon cancellation of BUNGOMA/ KAMAKOIWA/4080, the remains of the 2<sup>nd</sup> defendant's wife buried on the suit land be exhumed.”**

It is indeed true that by a Notice of Motion dated 8<sup>th</sup> April 2019, the plaintiff sought an order of injunction to restrain the 2<sup>nd</sup> defendant from burying the body of **JOSEPHINE SICHANGI** on the land parcel **NO BUNGOMA/ KAMAKOIWA/2165**. In response to that application, the 2<sup>nd</sup> defendant filed a replying affidavit in which he deponed, inter alia, that he had no interest in the land parcel **NO BUNGOMA/KAMAKOIWA/2165** and that he intended to bury the deceased in the land parcel **NO BUNGOMA/KAMAKOIWA/4080**. This Court therefore dismissed the application.

It must be remembered that an application for a temporary injunction pending trial is ordinarily determined on the basis of prima facie evidence. At that point, the Court does not closely examine the merits of the parties' respective cases. The 2<sup>nd</sup> defendant had the title to the land parcel **NO BUNGOMA/ KAMAKOIWA/4080** and therefore, in terms of the provisions of **Section 26(1)** of the **Land Registration Act**, he was, prima facie, the indefeasible owner of that parcel of land. It would therefore have been improper for this Court to injunct him from burying his wife ***“on his own land.”*** However, in rejecting the plaintiff's application for temporary injunction, I addressed myself as follows in the ruling delivered on 25<sup>th</sup> April 2019: -

***“I have perused the pleadings herein and it is true that among the issues that this Court will be called upon to determine at the trial is whether land parcel NO BUNGOMA/KAMAKOIWA /4080 was a sub - division of land parcel NO BUNGOMA***

*/KAMAKOIWA/2165 and was fraudulently registered in the names of the 2<sup>nd</sup> defendant. That will be a matter for determination at the main trial by evidence. It is not an issue to be determined at this interlocutory stage.”*

In so doing, I sought guidance from the case of **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012 [2014 eKLR]**. Well, having now had the opportunity to closely examine the evidence herein, the plaintiff, as I will shortly be ordering, has been fully vindicated. He is entitled to all the remedies sought in his amended plaint.

With regard to costs, they follow the event. There is no reason why the plaintiff should be denied the costs plus interest as prayed in the amended plaint.

Ultimately therefore and having considered the evidence by all the parties, I enter Judgment for the plaintiff against the defendants jointly and severally in the following terms: -

**(a) A declaration that the entries in the second register cancelling title NO BUNGOMA/KAMAKOIWA/2165 are null and void.**

**(b) An order for the cancellation of the entries number 7, 8 and 9 for the land parcel NO BUNGOMA/KAMAKOIWA/2165 and all other subsequent titles in respect of parcel NO BUNGOMA/KAMAKOIWA/ 4436, 4437, 4079, 4080, 4081, 4082 and 3223.**

**(c) A declaratory order is hereby issued that the plaintiff is the sole owner of parcel NO BUNGOMA/KAMAKOIWA/2165.**

**(d) The defendants, their agents, relatives, servants and all persons claiming through or under them are hereby ordered to vacate from the land parcel NO BUNGOMA/KAMAKOIWA/2165 within six (6) months from the date of this Judgment as they are trespassers thereon. And in default, they be evicted therefrom.**

**(e) The 2<sup>nd</sup> defendant is further ordered to exhume the remains of JOSEPHINE SICHANGI alias JOSEPHINE NAKHUMICHA CHESA interred on the land parcel NO BUNGOMA/KAMAKOIWA/2165 within six (6) months from the date of this Judgment. The 2<sup>nd</sup> defendant shall contact the Public Health officer Bungoma to assist and give advice on the exhumation process and in default, the plaintiff shall be at liberty to enforce compliance of the exhumation order under the supervision of the Public Health officer Bungoma and with the aid of the Officer Commanding Station (OCS) Bungoma providing security.**

**(f) The defendants shall meet the costs of the suit together with interest.**

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**4<sup>th</sup> November 2021.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**Boaz N. Olao.**

**J U D G E**

**4<sup>th</sup> November 2021.**

**Explanatory note: -**

This Judgment was due on 5<sup>th</sup> October 2021 but I was un – well and away from the station.

The delay is regretted.

**Boaz N. Olao.**

**J U D G E**

**4<sup>th</sup> November 2021.**