



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 163 OF 2016**

**VIOLET LUCY SIKUKU .....1<sup>ST</sup> PLAINTIFF**

**PATRICK OBARA .....2<sup>ND</sup> PLAINTIFF**

**RAPHAEL SIKUKU WAMBUKHA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MARTIN SIKUKU WAMBUKHA .....1<sup>ST</sup> DEFENDANT**

**YUSUFU ALI AKINA .....2<sup>ND</sup> DEFENDANT**

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

Pleadings drawn by prose litigants are invariably difficult to comprehend and for obvious reasons. They can cause the Judge, Magistrate or Kadhi severe headache even before one starts applying the law to the facts. However, as Judicial Officers called upon to determine disputes, we must always exhibit patience, proper temperament compassion, humility and understanding even as we try to render sound legal decisions. This is because **Article 50(1)** of the **Constitution** entitles all persons to a fair trial.

Land disputes can be very emotive. Perhaps it is now time for the state to consider the issue of pro – bono legal services where deserving litigants can also be assisted as is the case with capital offences. In my view, such prose litigants have an even stronger case for legal aid.

**VIOLET LUCY SHIKUKU, PATRICK OBARA and RAPHAEL SHIKUKU WAMBUKHA** (the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs respectively) are siblings and children of **MARTIN SIKUKU WAMBUKHA** (the 1<sup>st</sup> defendant herein). They believe that the land parcels **NO WEST BUKUSU/SOUTH MATEKA 4922 and 4926** are ancestral land being sub – divisions of land parcel **NO WEST BUKUSU /SOUTH MATEKA/11** and that the defendant was registered as the proprietor thereof to hold the same in trust for the family. However, on or about the year 2014, the 1<sup>st</sup> defendant fraudulently and without the consent of the family entered into a sale agreement with **YUSUF ALI AKINA** (the 2<sup>nd</sup> defendant herein) and sold to him the land parcel **NO WEST BUKUSU/SOUTH MATEKA/4926**. The 2<sup>nd</sup> defendant has in turn sub – divided the land parcel **NO WEST BUKUSU /SOUTH MATEKA/4926** to create parcels **NO WEST BUKUSU/ SOUTH MATEKA/5169 – 5189**. The particulars of fraud are pleaded in paragraph 4 of the plaint as follows: -

**(a) Sub – dividing the land without the knowledge of the occupants (owner).**

**(b) Pretending to be the beneficiary of the land of the deceased on land parcel NO WEST BUKUSU/SOUTH MATEKA/11 by sub – dividing a portion measuring approximately 1.02 Ha.**

**(c) Fraudulently obtaining Land Control Board Consent vide land parcel NO WEST BUKUSU/SOUTH MATEKA/4926 and registering it in his name without the knowledge of the plaintiffs herein.**

**(d) Sub – dividing land parcel NO WEST BUKUSU/SOUTH MATEKA (sic) to a portion to wit WEST BUKUSU/SOUTH MATEKA/4926 purporting it to be a sub – division from WEST BUKUSU/SOUTH MATEKA/4922.**

**(e) Fraudulently forging transfer documents for presentation to the land offices.**

**(f) Transferring the land without a sale agreement.**

Arising out of the above pleadings, the plaintiffs sought Judgment against the defendants in the following terms: -

*“Reasons whereof the plaintiffs pray for Judgment against the defendant for: -*

*(a) Cancellation of the title deed of land parcel WEST BUKUSU/SOUTH MATEKA/4926 and it's sub – divisions that wits WEST BUKUSU/SOUTH MATEKA/5169 – 5189 (7) and the same an order of preservation be issued to allow the resurveying of land parcel WEST BUKUSU/SOUTH MATEKA/4922 reverting the approximated 1.02ha of the sub – division of WEST BUKUSU/SOUTH MATEKA/4922 reverting the approximated 1.02ha of the sub – division of WEST BUKUSU/SOUTH MATEKA/5169 – 5189 (7) from WEST/BUKUSU/SOUTH MATEKA/4926 to approximate to 1.24 Ha registered to the name of the 1<sup>st</sup> defendant to wit WEST BUKUSU/SOUTH MATEKA/4922 and the same permanent injunction against the second defendant and his servant from occupying the same land.*

*(b) Costs of application.*

*(c) Interest on the above (a) and (b).”*

As can be seen, this is quite a mouthful. Together with their plaint, the plaintiffs filed the list of documents dated 19<sup>th</sup> December 2016 and their statements and those of their witnesses. However, the 2<sup>nd</sup> plaintiff appears not to have filed any statement.

The plaintiffs filed the following documents: -

1. Land sale agreement dated 18<sup>th</sup> March 2015 between 1<sup>st</sup> and 2<sup>nd</sup> defendants for land parcel NO WEST BUKUSU/SOUTH MATEKA/4926.
2. Land sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants for land parcel NO WEST BUKUSU/SOUTH MATEKA/4926 dated 6<sup>th</sup> November 2016.
3. Certificate of Search for land parcel NO WEST BUKUSU/SOUTH MATEKA/4926.
4. Mutation form and maps for land parcel NO WEST BUKUSU/SOUTH MATEKA/11.
5. A valuation report dated 11<sup>th</sup> October 2018 and prepared by EDWIN O. ODUOR the COUNTY VALUER KAKAMEGA, VIHIGA, BUNGOMA & BUSIA COUNTIES on land parcels NO WEST BUKUSU/SOUTH MATEKA 4922 and 4926 on the instructions of the 1<sup>st</sup> plaintiff.

In her statement dated 20<sup>th</sup> January 2021, the 1<sup>st</sup> plaintiff says she is the daughter to the 1<sup>st</sup> defendant. That the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** are sub – divisions of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** which was family land belonging to her grandfather. That the 1<sup>st</sup> defendant fraudulently sold the said land parcels to the 2<sup>nd</sup> defendant without a sale agreement leaving the family landless. That the 2<sup>nd</sup> defendant was never a beneficiary to their grandfather's Estate during the succession process. The only beneficiaries to the said Estate were two buyers namely one **HUSSEIN** and one **WALUKHA**. That the sub – division of the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** to give rise to the land parcel **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** was therefore fraudulent.

In his statement also dated 20<sup>th</sup> January 2021 **RAPHAEL SHIKUKU WAMBUKHA** the 3<sup>rd</sup> plaintiff confirms that he is the 7<sup>th</sup> son of the 1<sup>st</sup> defendant and was not aware about the transaction involving the selling and buying of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That the 1<sup>st</sup> defendant sold the family land leaving them desperate and they now live in rental houses.

Their witnesses **LAVIN SHIKUKU (PW 3)**, **EDWIN SHIKUKU WAMBUKHA (PW 4)** and **JUSTIN OTIPA (PW 5)** also recorded their statements.

In his statement dated 19<sup>th</sup> December 2016 **LAVIN SHIKUKU (PW 3)** states that he is the sole beneficiary of the land parcels **NO WEST BUKUSU/ SOUTH MATEKA/4922** and **4926** which were sub – divisions of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** and which was ancestral land. That the 2<sup>nd</sup> defendant encroached upon the said land parcel **NO WEST BUKUSU/ SOUTH MATEKA/11** which he then sub – divided yet he is not part of their family. He then forcefully and without the knowledge of the family entered into an agreement with the 1<sup>st</sup> defendant and registered the land parcel **NO WEST BUKUSU/SOUTH MATEKA/4926** in his names.

**EDWIN SHIKUKU (PW 3)** recorded a statement dated 10<sup>th</sup> February 2020 in which he stated that he is the last son of the 1<sup>st</sup> defendant and that the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** are ancestral land which was fraudulently acquired by the 2<sup>nd</sup> defendant without their knowledge. That as a result, he has been unable to proceed with his education and is struggling with life in rental houses. He therefore urged this Court to do justice.

**JUSTIN OTIPA OFISI (PW 5)** also recorded his statement dated 10<sup>th</sup> February 2020 in which he stated that he is an uncle to the plaintiffs. That during the succession process, the land parcel **NO WEST BUKUSU/SOUTH MATEKA /11** was shared among the family members and the 2<sup>nd</sup> defendant is not part of their family. That he was surprised to learn that the 2<sup>nd</sup> defendant had purchased the land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** from the 1<sup>st</sup> defendant yet it was family land. That the family is now living a poor life in rental houses with no – one to pay school fees for their brothers and sisters.

By their joint statement of defence dated 2<sup>nd</sup> June 2017, the defendants denied that the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** being sub – divisions of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** were ever family land. They also denied the allegations of fraud adding that the suit is un – merited, un – sustainable and bad in law.

They also filed their statements, the statement of their witness **QUEEN NAFULA SHIKUKU (DW 3)** as well as their list of documents the first dated 6<sup>th</sup> October 2020 and a supplementary list of documents dated 22<sup>nd</sup> February 2021.

In his statement dated 5<sup>th</sup> June 2017, the 1<sup>st</sup> defendant confirmed that the 1<sup>st</sup> plaintiff is his daughter and the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are his sons all being adults with their families. He added that the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** are his properties. That on or about 28<sup>th</sup> March 2015 he together with his wife **QUEEN NAFULA SHIKUKU** who is the mother to the plaintiffs as well as the other children had a meeting and agreed to sell the said parcels of land proceeds of which would be utilized in buying land and constructing permanent houses for each of them. That the 1<sup>st</sup> plaintiff was not involved because she is married and lives in **EKERO MUMIAS SUB – COUNTY** together with her husband. That since the said parcels of land were his and he was not holding them in trust for anybody, he was entitled to dispose them off by way of a sale. That after disposing off the said parcels of land, the purchaser also sub – divided them and sold them to third parties who now have their own title deeds.

The 2<sup>nd</sup> defendant in his statement dated 5<sup>th</sup> June 2017 confirmed that he bought the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** and paid Kshs. 3,700,000/= (three million seven hundred thousand). That at the time of the purchase, the said parcels of land were vacant and nobody raised any objection. That he is therefore an innocent purchaser and the plaintiffs who are adults have no share in the said land. That this suit is misconceived, lacking in merit and should be dismissed.

In her statement dated 6<sup>th</sup> October 2020, **QUEEN NAFULA SHIKUKU (DW 3)** states that she is the legal wife of the 1<sup>st</sup> defendant who was the registered proprietor of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** which were sold to the 2<sup>nd</sup> defendant between 18<sup>th</sup> March 2015 and 6<sup>th</sup> November 2016 with her consent. Thereafter, they relocated and established their home elsewhere. That the said parcels of land were vacant at the time of the transfer to the 2<sup>nd</sup> defendant. That the plaintiffs had been informed about the transaction to which they did not object. That the plaintiffs only changed their minds following a disagreement among the family. That the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** were not held in trust by the 1<sup>st</sup> defendant and were sold to the 2<sup>nd</sup> defendant with her consent. That the plaintiffs have filed this suit in bad faith with the aim of frustrating the 2<sup>nd</sup> defendant and their suit should be dismissed.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants also filed the following documents: -

1. **Land sale agreement dated 18<sup>th</sup> March 2015 between the 1<sup>st</sup> and 2<sup>nd</sup> defendants with respect to the land parcel NO WEST BUKUSU/SOUTH MATEKA/4922.**
2. **Land sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 6<sup>th</sup> November 2016 with respect to the land parcel NO WEST BUKUSU/SOUTH MATEKA/4926.**
3. **Affidavit by QUEEN NAFULA SHIKUKU dated 18<sup>th</sup> March 2015.**
4. **Mutation forms for parcel NO WEST BUKUSU/SOUTH MATEKA/11.**
5. **Bank statements.**
6. **Motor vehicle sale agreement.**
7. **Certificate of Search in respect of land parcel NO WEST BUKUSU/SOUTH MATEKA/4926 in the names of the 2<sup>nd</sup> defendant.**
8. **Certificates of Search in respect of the land parcels NO WEST BUKUSU/SOUTH MATEKA/5169, 5171, 5174, 5176, 5177, 5178, 5181, 5182, 5183, 5185 and 4922.**

The trial commenced and ended on 25<sup>th</sup> February 2021. The 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs testified and adopted as their evidence their statements already referred to above. They called as their witnesses **LAVIN SHIKUKU (PW 3)**, **EDWIN SHIKUKU (PW 4)** and **JUSTIN OTIPA OFISI (PW 5)** who also adopted their statements. They also proceed as their documentary evidence the documents listed above.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants similarly adopted their statements during the plenary hearing and called as their witness **QUEEN NAFULA SHIKUKU (DW 3)** who is the wife to the 1<sup>st</sup> defendant. They too produced as their documentary evidence the list of documents referred to above.

The record shows that the plaintiffs filed their submissions as far back as 3<sup>rd</sup> November 2020 even before the trial commenced. When I asked the plaintiffs if those were indeed their submissions, the 1<sup>st</sup> plaintiff confirmed the same saying she did not want to forget. **MR WAMALWA** Counsel for the defendants confirmed that he had indeed been served with those submissions. He subsequently filed the defendants' submissions on 26<sup>th</sup> March 2021.

I have considered the evidence by all the parties including the documents filed. I have also considered the submissions filed by the plaintiffs who are acting in person as well as those by **MR WAMALWA** instructed by the firm of **SIKUTA & ASSOCIATES ADVOCATES** for the defendant.

At the commencement of this Judgment, I alluded to the challenges that Courts encounter in handling pleadings drawn by lay persons. The plaint drawn by the plaintiffs herein is what is commonly referred to as a **“home – made plaint.”** Most of the time, it is not clear what exactly the cause of action being prosecuted is. It appears however that the plaintiffs’ claim against the defendants is premised on trust and also fraudulent disposition of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. Whereas the plaintiffs allege that the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/11** which gave rise to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** was ancestral land held in trust for them by the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant has denied that stating that the land parcels were his properties and were disposed off to the 2<sup>nd</sup> defendant following a family meeting. That his wife **QUEEN NAFULA SHIKUKU (DW 3)** as well as his other children **KENNEDY SHIKUKU** and **TITUS SHIKUKU** were aware about the sale transactions. The copies of the sale agreements indicate that indeed **KENNEDY SHIKUKU** and **TITUS SHIKUKU** were witnesses to the two sale agreements dated 18<sup>th</sup> March 2015 and 6<sup>th</sup> November 2016 between the 1<sup>st</sup> and 2<sup>nd</sup> defendants with respect to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926**. The 1<sup>st</sup> defendant’s testimony has been corroborated by that of his wife **QUEEN NAFULA SHIKUKU**. On the other hand, the plaintiffs’ witnesses did not appear to know much about this case. **LAVIN SHIKUKU (PW 3)** told the Court when cross – examined by **MR WAMALWA** that: -

**“I am not married. In my statement, I have said that my father the 1<sup>st</sup> defendant was forced to sell the land.”**

On the other hand, the 3<sup>rd</sup> plaintiff **RAPHAEL SHIKUKU NAMBUKHA (PW 2)** states in his statement dated 20<sup>th</sup> January 2021 as follows: -

**“That the 1<sup>st</sup> Respondent sold the whole family land leaving the family desperate without land.”**

On the other hand, **JUSTIN OTIPA OFISI (PW 5)** a cousin to the plaintiffs said he was not aware that the 1<sup>st</sup> defendant’s wife **QUEEN NAFULA SHIKUKU (DW 3)** had given her consent to the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He then proceeded to add in cross – examination that the said **QUEEN NAFULA SHIKUKU (DW 3)** has a weakness with alcohol and will sign anything when given alcohol. It is noteworthy that the 2<sup>nd</sup> plaintiff **PATRICK OBARA** another son to the 1<sup>st</sup> defendant did not turn up to support their siblings’ case. Bearing in mind the un – controverted fact that two other siblings of the plaintiffs were witnesses to the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants makes it more plausible that indeed the family agreed to the transactions and, as stated by **QUEEN NAFULA SHIKUKU (DW 3)** in her statement dated 6<sup>th</sup> October 2020: -

**“The plaintiffs only came to change their minds after we had disagreements among ourselves not with the 2<sup>nd</sup> defendant herein and after the said parcels of land had already been transferred to the 2<sup>nd</sup> defendant herein.”**

A party claiming land through trust or alleging fraud must lead cogent evidence to that effect. In **MBOTHU & OTHERS .V. WAITIMU & OTHERS 1986 KLR 171**, the Court stated thus: -

**“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”**

And with regard to fraud, it was held in **R. C. PATEL .V LALJI MAKANJI 1957 E.A 314** that: -

**“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”**

The allegations that the 1<sup>st</sup> defendant abused the trust bestowed upon him with respect to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/11** and the subsequent sub – divisions being land parcels **NO WEST BUKUSU/SOUTH MATEKA/4922** and **4926** or that he acted fraudulently in transferring those sub – divisions looks rather tenuous in the circumstances. It looks more plausible than not, that the plaintiffs as well as the other siblings were aware about the transactions involving the 1<sup>st</sup> and 2<sup>nd</sup> defendants over the said parcels of land but for some un – disclosed reasons, have had a change of mind. I find it highly un – likely that **QUEEN NAFULA SHIKUKU (DW 3)** and who is a mother (not step mother) to the plaintiffs would have wished to render them destitute. I am persuaded from the totality of the evidence herein that even if the land in dispute was previously family land, the family agreed to dispose of it to the 2<sup>nd</sup> defendant. That would effectively bring to an end any trust and also negate any fraud. The plaintiffs claim must therefore collapse.

Most significantly however, there is un – controverted evidence from the valuation report prepared by **MR EDWIN O. ODUOR** at the request of the 1<sup>st</sup> plaintiff that the land parcel **NO WEST BUKUSU/SOUTH MATEKA/4922** has been registered in the names of **THE BENEDICTINE SISTERS OF OUR LADY OF GRACE & COMPASSION** since 12<sup>th</sup> July 2017. Similarly, the title to land parcel **NO WEST BUKUSU/SOUTH MATEKA/4926** was closed on 28<sup>th</sup> September 2015 upon sub – division to give rise to parcels **NO WEST BUKUSU/ SOUTH MATEKA/5169** to **5187**. The relevant Certificates of Search for those new sub – divisions were among the documents filed vide the defendant’s further list of documents dated 22<sup>nd</sup> February 2021 and show that those parcels are registered in the names of other persons who are not parties to this suit. It is not clear why the plaintiffs did not enjoin them in this suit. What is clear however is that if this Court grants the plaintiffs the orders sought which include the cancellation of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/4926 5169 – 5189**, it would amount to a violation of those registered proprietors’ rights to property without giving them an

opportunity to be heard. That would be an infringement of **Article 40(1)** of the **Constitution** which protects the right to own property. On that basis, the plaintiffs' suit is for dismissal.

On the issue of costs, the prime combatants in this suit are family. The order that commends itself to make is that each party meets their own costs.

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**15<sup>th</sup> July 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 15<sup>th</sup> day of July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines. The record shows further that the plaintiffs appeared before the Deputy Registrar on 31<sup>st</sup> March 2021 and elected to have the Judgment dispatched to them via whats App on telephone No 0717564738. The Court shall oblige and send the Judgment through that means.

**Boaz N. Olao.**

**J U D G E**

**15<sup>th</sup> July 2021.**