



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 79 OF 2013**

**CHARLES WAKHU OTOKOMA.....PLAINTIFF**

**VERSUS**

**JOYCE MALALA.....1<sup>ST</sup> DEFENDANT**

**MICHAEL ASUMBA.....2<sup>ND</sup> DEFENDANT**

**VINCENT MUYEYI .....3<sup>RD</sup> DEFENDANT**

**PROTUS MUKABANA.....4<sup>TH</sup> DEFENDANT**

**DANIEL OKELLO.....5<sup>TH</sup> DEFENDANT**

**MOSES MALALA..... 6<sup>TH</sup> DEFENDANT**

**MARTIN NABWIRE.....7<sup>TH</sup> DEFENDANT**

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

The parties herein are family. **CHARLES WAKHU OTOKOMA** (the plaintiff) is a step – son to **JOYCE MALALA** (the 1<sup>st</sup> defendant) and step – brother to **MICHAEL ASUMBA**, **VINCENT MUYEYI**, **PROTUS MUKUBANA**, **DANIEL OKELLO**, **MOSES MALALA** and **MARTIN BWIRE** (the 2<sup>nd</sup> to 7<sup>th</sup> defendants respectively). Their late father **PIUS MALALA WAKHU** a former Senior Assistant Commissioner of Police died on 11<sup>th</sup> February 2012.

By a plaint filed herein on 27<sup>th</sup> March 2013, the plaintiff sought Judgment against the defendants in the following terms: -

- 1. A permanent injunction do issue against the defendants, their servants and or agents or any other person acting on their behalf or authority from tilling, erecting structures, alienating, building on, wasting, occupying, planting trees or crops or in any other way dealing with all that parcel of land known as L.R BUNGOMA/KIMININI/164.**
- 2. Eviction of the defendants from the land parcel NO BUNGOMA/ KIMININI 164.**
- 3. Costs of the suit.**

The basis of the plaintiff’s case is that at all times relevant to the suit, he is the registered proprietor of the land parcel **NO BUNGOMA/KIMININI/164** measuring 27 acres or thereabout (the suit land). That on diverse dates between January and March 2013, the defendants jointly and without any permission from the plaintiff or colour of right trespassed onto the suit land and started digging in readiness for the planting season. Despite the plaintiff’s efforts to persuade the defendants to peacefully leave the suit land, the defendants have refused and/or neglected to stop their acts thereon hence this suit.

Together with the plaint, the plaintiff filed his statement and that of his witness **CECILIA MUYEYI MALALA (PW 2)** as well as list of the following documents: -

- 1. Certificate of Search for land parcel NO BUNGOMA/KIMININI/164.**

**2. Allotment letter from the Settlement Fund Trustees dated 22<sup>nd</sup> October 1965.**

Following a consent order dated 12<sup>th</sup> May 2015, the parties were directed to file and serve paginated documents on or before 13<sup>th</sup> June 2015. The plaintiff filed bound and paginated documents on 24<sup>th</sup> June 2015 containing the following: -

- 1. Title deed for land parcel NO BUNGOMA/KIMININI/164 in the name of CHARLES WAKHU OTOKOMA.**
- 2. Allotment letter from the Settlement Fund Trustees in the name of WAKHU OTOKOMA.**
- 3. Loan repayment receipts and Statement of Accounts from Settlement Fund Trustees.**
- 4. Certificate of Search in respect of land parcel NO NORTH WANGA/LUNGAYIRO/126 in the names of NABWIRE WAKHU.**
- 5. Land Sale agreement dated 13<sup>th</sup> January 2010 in respect of land parcel NO NORTH WANGA/LUNGANYIRO/758.**
- 6. Title deed in respect of land parcel NO NORTH WANGA/ LUNGANYIRO/1237 in the name of PIUS MALALA WAKHU.**
- 7. Title deed in respect of land parcel NO NORTH WANGA/ KOYONZO/387 in the name of PIUS MALALA WAKHU.**
- 8. Green Card for land parcel NO NORTH WANGA/KOYONZO/387.**
- 9. Land Sale agreement dated 15<sup>th</sup> July 1991 in respect of the land parcel NO NORTH/NAMAMALI/1140.**
- 10. Land Sale agreement dated 19<sup>th</sup> January 1990 in respect of land parcel NO NORTH WANGA/NAMAMALI/..... dated 19<sup>th</sup> October 1990.**
- 11. Land Sale agreement dated 30<sup>th</sup> September 1978 in respect of land parcel NO NORTH WANGA/LUNGANYIRO/125.**
- 12. Land Sale agreement dated 1<sup>st</sup> January 1988 in respect to commercial plots at KOYONZO.**
- 13. Land Sale agreement dated 16<sup>th</sup> November 2011 in respect of commercial plots at KOYONZO.**
- 14. Land Sale agreement dated 17<sup>th</sup> February 1997 for commercial plots at KOYONZO dated**
- 15. Land Sale agreement dated 3<sup>rd</sup> July 1997 for commercial plots of LUNGANYIRO.**
- 16. Land Sale agreement dated 12<sup>th</sup> November 2004 for commercial plots at LUNGANYIRO.**
- 17. Land Sale agreement for commercial plots dated 10<sup>th</sup> December 2004 at LUNGANYIRO.**
- 18. Land Sale agreement dated 9<sup>th</sup> December 2005 for commercial plots at LUBANGA.**
- 19. Land Sale agreement dated 15<sup>th</sup> September 2004 for commercial plot at NYAPWAKA.**
- 20. Land Sale agreement dated 25<sup>th</sup> September 2007 for commercial plot at KOYONZO.**
- 21. Letter dated 20<sup>th</sup> July 2008 from JULIANA MALALA & FAMILY addressed to the CHAIRMAN LUBANG SECONDARY SCHOOL.**
- 22. Letter dated 26<sup>th</sup> February 2015 by BRIGID NEKESA MALALA, JULIANA ADHIAMBO MALALA & JOYCE AYIEKO MALALA addressed to the DISTRICT LAND REGISTRAR KAKAMEGA.**
- 23. Letter dated 17<sup>th</sup> June 2011 by PIUS MALALA WAKHU addressed to his family members.**
- 24. Proceedings of the TONGAREN LAND DISPUTES TRIBUNAL CASE.**
- 25. Decree in KIMILILI SRMC LAND CASE No 9 of 2011.**
- 26. Memorandum of Appeal to the WESTERN PROVINCE APPEALS COMMITTEE CASE No 50 of 2011.**

**27. Letter dated 24<sup>th</sup> May 2011 from the WESTERN PROVINCE APPEALS COMMITTEE addressed to the SENIOR RESIDENT MAGISTRATE COURT KIMILILI.**

**28. Application for stay of Execution of the decision of the TONGAREN LAND DISPUTES TRIBUNAL.**

**29. Proceedings of the KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT in LAND CASE No 9 of 2011.**

In his statement dated 22<sup>nd</sup> March 2013 as filed in the bound documents following the consent order, the plaintiff states that he is the registered proprietor of the suit land which measures 27 acres or thereabout. That the defendants who are his step – mother and step brothers have forcefully and without any colour of right trespassed onto 24 out of the 27 acres comprised in the suit land which is neither family nor ancestral land. That the defendants have not only become rowdy but have also threatened him with dire consequences should he stop them from tiling the suit land and have even chased away his driver when he went to plough the suit land. That the defendants have no right to interfere with his land as this is a recipe for anarchy and lawlessness.

The plaintiff then goes on to give a history of the suit land which he claims was acquired through his mother **CECILIA MUYEYI MALALA (PW 2)** in 1965. That in 2011, the defendants entered the suit land purportedly in execution of a decree issued in **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE No 9 of 2011**. However, that case which had been filed by his father **PIUS MALALA WAKHU** against his mother **CECILIA MUYEYI MALALA (PW 2)** at the **TONGAREN LAND DISPUTES TRIBUNAL** was in relation to another parcel of land being land parcel **NO BUNGOMA/ KIMININI/156** and not the suit land. The **TONGAREN LAND DISPUTES TRIBUNAL** decided to go overboard and made adverse orders which affected the suit land belonging to the plaintiff. That the plaintiff was not a party to that case and the suit land was obtained long before his father married his mother. That the 2<sup>nd</sup> to 7<sup>th</sup> defendants were all born after 1970 long after the suit land had been acquired in 1965 and they were raised in **LUBANGA VILLAGE KOYONZO LOCATION of KAKAMEGA COUNTY**. That the 1<sup>st</sup> defendant has her matrimonial home on land parcel **NORTH WANTGA/KOYONZO/387** measuring 9 acres where she lives with her children being the 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants. That the 2<sup>nd</sup> defendant also inherited from his father another parcel of land being **NORTH WANGA/KOYONZO** --- measuring 2 acres. That his other step mother **BRIGID NEKESA MALALA** has her matrimonial home on the land parcel **NO NORTH WANGA/LUNGANYIRO/758** measuring 3 acres where she lives with her children including the 3<sup>rd</sup> defendant. That the parcel of land was purchased by their father **PIUS MALALA WAKHU**. That the 4<sup>th</sup> and 5<sup>th</sup> defendants are sons to **JULIANA ADHIAMBO MALALA** who has her matrimonial home on the land parcel **NO NORTH WANGA/ LUNGANYIRO /1237** measuring 2½ acres as well as five (5) commercial plots at **LUBANGA MARKET in KAKAMEGA COUNTY**.

That the defendants are also entitled to the land parcel **NO NORTH WANGA/LUNGANYIRO/126** measuring 10 acres where **PIUS MALALA WAKHU** was buried although it is registered in the name of his paternal uncle **BENJAMIN NABWIRE WAKHU**. That the defendants are also entitled to nine (9) commercial plots at **LUNGANYIRO MARKET** along the **MUMIAS – BUSIA HIGH WAY** which form part of the Estate of **PIUS MALALA WAKHU**. That he and his two brothers **ANTHONY OWATA MALALA** and **CHRISTOPHER NABWIRE MALALA** have no land in **KAKAMEGA COUNTY** and therefore the defendants have no right to leave their **KOYONZO** home and encroach on the suit land.

In her statement, **CECILIA MUYEYI MALALA (PW 2)** confirmed that the plaintiff is her son while the 1<sup>st</sup> defendant is her co – wife and the 2<sup>nd</sup> to 7<sup>th</sup> defendants the children of the 1<sup>st</sup> defendant and the other co – wives namely **BRIGID NEKESA** and **JULIANA ADHIAMBO**. That the plaintiff is the registered proprietor of the suit land which was allotted to him on 10<sup>th</sup> May 1966 through her efforts long before her late husband **PIUS MALALA WAKHU** got married to the 1<sup>st</sup> defendant and before the 2<sup>nd</sup> to 7<sup>th</sup> defendants were born. That the suit land is therefore private property and not family land as the defendants would want this Court to believe. That had the suit land been the property of her late husband, nothing would have stopped him from registering it in his names.

That in 2013, the defendants forcefully entered the suit land and started cultivating it on the pretext that it was family land. That in doing so, the defendants purported to be executing the Judgment in **KIMILILI SRMC LAND CASE NO 9 of 2011** which had been instituted against her by her late husband under the influence of the defendants claiming the land parcel **NO BUNGOMA/ KIMININI/158**. That the panel of elders who heard that case purported to determine a dispute involving the suit land and another parcel of land **NO BUNGOMA/KIMININI/165** registered in the name of her daughter **ELIZABETH DOMINICO OSICHE APWORA** and thereby exceeded their mandate.

That the defendants live in **KOYONZO KAKAMEGA COUNTY** where they have other properties and therefore, if they have any claim, they should file it in respect to properties registered in the names of **PIUS MALALA WAKHU** and not the suit land which is private property registered in the plaintiff's names.

The defendants filed a joint defence dated 2<sup>nd</sup> May 2012 in which they admitted that the plaintiff is the registered proprietor of the suit land. They however added that the plaintiff was registered as the proprietor of the said land on 26<sup>th</sup> July 1996 by misrepresenting that he is **WAKHU OTOKOMA** when he knew he was not the one. They denied having trespassed onto the suit land between January and March 2013 or at all adding that they have used it all their lives as it was purchased by their late husband and father **PIUS MALALA WAKHU** and that by the time the suit land was registered in the names of **WAKHU OTOKOMA** in 1965, the plaintiff was not even born. That even though the plaintiff is registered as the proprietor of the suit land, he holds it in trust for the defendants and the other beneficiaries of the Estate of **PIUS MALALA WAKHU**. The defendants pleaded further that this suit is incompetent, bad in law and otherwise an abuse of the process of the Court and should be dismissed with costs.

The defendants listed as their witnesses some of the defendants herein as well as other witnesses. However, only the 1<sup>st</sup> defendant **JOYCE AYIEKO MALALA (DW 1)** and the 3<sup>rd</sup> defendant **VINCENT MUYEYI (DW 2)** testified among the seven (7) defendants. The other witnesses were **JULIANA ADHIAMBO MALALA (DW 3)** and **ALFRED WASIKE SIMIYU (DW 4)**.

The defendants also filed as their list of documentary evidence the following documents annexed to the 1<sup>st</sup> defendant's replying affidavit dated 3<sup>rd</sup> April 2013: -

1. **The Nominal Roll dated 4<sup>th</sup> January 1967 from the Ministry of Lands and Settlement.**
2. **The Decree issued in KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE No 9 of 2011.**

As her evidence, the 1<sup>st</sup> defendant recorded a statement dated 29<sup>th</sup> June 2015 in which she stated that she got married to **PIUS MALALA WAKHU** in 1971 as the 4<sup>th</sup> wife. That **CECILIA MUYEYI MALALA** was married in 1960, **JULIANA ADHIAMBO MALALA** in 1969 and **BRIGID NEKESA** in 1966. That during his life time, **PIUS MALALA WAKHU** acquired and distributed the following parcels of land: -

1. **BUNGOMA/KIMININI/164 to WAKHU OTOKOMA (his father).**
2. **BUNGOMA/KIMININI/156 to CECILIA MUYEYI MALALA his first wife and mother to the plaintiff.**
3. **BUNGOMA/KIMININI/165 to DOMINICO OSICHE APWORA.**

That the plaintiff was born in 1969 and could not therefore have been allocated the suit land in 1965. That all the family of **PIUS MALALA WAKHU** peacefully live on the suit land and have extensively developed their portions and on 26<sup>th</sup> July 1996, the plaintiff fraudulently registered himself as the proprietor thereof by way of correction of name for the sole purpose of defeating the inheritance of the other beneficiaries.

In his statement dated 3<sup>rd</sup> April 2013, the 3<sup>rd</sup> defendants **VINCENT MUYEYI MALALA (DW 2)** confirms that the plaintiff is his step – brother and that prior to his death, their father **PIUS MALALA WAKHU** allocated him 3 acres out of the suit land. That although the plaintiff is registered as the proprietor of the suit land, he holds it in trust for him and the other defendants. It is therefore in the interest of justice that the plaintiff's suit be dismissed.

In her statement dated 6<sup>th</sup> April 2013, **JULIANA ADHIAMBO MALALA (DW 3)** states that she is the 3<sup>rd</sup> wife of **PIUS MALALA WAKHU** having married him in 1969 and that she lives in parcel **NO BUNGOMA/KIMININI /165**. She adds that their husband also owned the following parcels of land, **BUNGOMA/KIMININI/156** and the suit land which he allocated to her four (4) wives as follows: -

1. **1<sup>st</sup> wife CECILIA MUYEYI – BUNGOMA/KIMININI/156.**
2. **2<sup>nd</sup> wife BRIGID NEKESA and 3<sup>rd</sup> wife JULIANA ADHIAMBO MALALA – BUNGOMA/KIMININI/165.**
3. **4<sup>th</sup> wife JOYCE MALALA – BUNGOMA – KIMININI/164.**

She states that all the above parcels of land belong to their late husband who paid for them and therefore this suit is malicious and an abuse of the Court process.

**ALFRED SIMIYU WASIKE (DW 4)** a village elder at **MBIRIRA VILLAGE KIMILILI LOCATION** recorded a statement dated 20<sup>th</sup> May 2019 in which he states that the late **PIUS MALALA** then working as a Police Officer was his neighbour and was allocated land parcels **NO BUNGOMA/KIMININI/156, 164 and 165** all measuring 27 acres or thereabout. That since **PIUS MALALA** was a civil servant, he could not register land in his name then. So he registered his land in the name of his wife **CECILIA MALALA**, his father **WAKHU OTOKOMA** and his brother – in – law **DOMINIC OSICHE**. That it was extremely rare for a woman to be allocated Government land those days and so **CECILIA MALALA** who was a house – wife could not be allocated land. Therefore, the land belonged to **PIUS MALALA WAKHU** and not his wives or children.

Although the 1<sup>st</sup> defendant and other witnesses filed further statements herein on 22<sup>nd</sup> January 2020, they were expunged from the record vide a ruling dated 20<sup>th</sup> February 2020 following objections raised by the plaintiff's Counsel **MR MUSEVE**.

Further, the record shows that when the parties appeared before **MUKUNYA J** on 13<sup>th</sup> October 2015, it was agreed that this file and **BUNGOMA ELC CASE No 49 of 2014** be consolidated with this file being the lead file. However, it would appear that Counsel may have forgotten about that order because when they appeared before me for hearing on 18<sup>th</sup> October 2018, **MR MUSEVE** for the plaintiff did mention that the two files were being handled together. When I enquired if the two files had been consolidated, **MR MUSEVE** said they had not. It was therefore agreed that **BUNGOMA ELC CASE No 49 of 2014** be stayed. The record shows that when the orders of 13<sup>th</sup> October 2015 were made, both **MR MUSEVE** for the plaintiff and **MR MAKOKHA** for the defendants were not in Court. The plaintiff was then being represented by **MR ELUNGATA** while **MR MURUNGA** held brief for **MR MAKOKHA** for the defendants. Therefore, both **MR MUSEVE** and **MR MAKOKHA** were not aware about the orders made by **MUKUNYA J** on 13<sup>th</sup> October 2015. I have only become aware of those orders in the course of drafting this Judgment and it is important that I set the record straight.

The trial commenced on 18<sup>th</sup> October 2018 and ended on 1<sup>st</sup> March 2021. During the plenary hearings, the witnesses adopted as their evidence the statements whose contents I have already summarized above. They also produced as their documents evidence the list of documents filed herein.

Submissions were thereafter filed both by **MR MUSEVE** instructed by the firm of **J. A. GUSERWA & COMPANY ADVOCATES** for the plaintiff and by **MR MAKOKHA** instructed by the firm of **MAKOKHA WATTANGA & LUYALI ASSOCIATES, ADVOCATES** for the defendants.

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

In my view, the issues that call for my determination in this dispute are: -

- 1. Whether the suit land is the sole property of the plaintiff and the defendants should be evicted therefrom.**
- 2. Whether the plaintiff holds the suit land in trust for the benefit of himself and the defendants.**
- 3. If a trust has been established, what orders should this Court make.**

Before I consider the above, it is clear from the documents filed herein that the suit land was among parcels of land apportioned by the **TONGAREN LAND DISPUTES TRIBUNAL** in **CASE No 5 of 2011** whose decision was adopted by the **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT** in **LAND CASE No 9 of 2011**. A decree was thereafter drawn distributing various parcels of land among the parties herein including the suit land. Counsel for the defendants has submitted that this Court should abide by that decision through which **PIUS MALALA WAKHU** distributed the suit land among other properties to the parties herein. On the other hand, Counsel for the plaintiff has submitted that the **TONGAREN LAND DISPUTES TRIBUNAL** exceeded its jurisdiction by making orders touching on the suit land which was not an issue before it.

It is clear from the proceedings of the **TONGAREN LAND DISPUTES TRIBUNAL** in **case No 5 of 2011** that the dispute was between **CECILIA MUYEYI MALALA (PW 2)** and her husband **PIUS MALALA WAKHU** and it was in relation to the sub – division of the land parcel **NO BUNGOMA/ KIMININI/156** only. However, in its award dated 25<sup>th</sup> May 2011, the **TRIBUNAL** proceeded to make orders distributing other parcels of land including the suit land. I therefore agree with the submissions by Counsel for the plaintiff that the decision of the said **TRIBUNAL** and the subsequent decree were issued in excess of jurisdiction for the following reasons. Firstly, the suit land was not a subject of that dispute which only involved the land parcel **NO BUNGOMA/ KIMININI/156**. Secondly, the **TRIBUNAL** went ahead and sub – divided the suit land which is registered land. It is trite law that in exercising its jurisdiction under the now repealed Land Dispute Tribunal Act, the **TRIBUNAL** could not determine a dispute concerning title to registered land – **JONATHAN AMUTAVA .V. THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL C.A CIVIL APPEAL No 256 of 2002**. Thirdly, by the time the **TRIBUNAL** was determining the dispute between **CECILIA MUYEYI MALALA (PW 2)** and her husband **PIUS MALALA WAKHU**, the suit land was registered in the names of **CHARLES WAKHU OTOKOMA** since 26<sup>th</sup> July 1996 as per the title deed produced herein. This said **CHARLES WAKHU OTOKOMA** was not a party to those proceedings. None of the parties in those proceedings had approached the **TRIBUNAL** as a legal representative of the said **CHARLES WAKHU OTOKOMA**. Finally, the claim before the **TRIBUNAL** even if it had properly touched on the suit land was in fact statute barred since the said land had been registered in the names of **CHARLES WAKHU OTOKOMA** in 1996 and the claim was being filed in 2011 long after the 12-year limitation provided for under **Section 7** of the **Limitation of Actions Act** which reads: -

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

Whereas it is appreciated that the Land Disputes Tribunals were presided over by lay persons and no doubt had good intentions, they were nonetheless obliged to abide by the law on limitation. This is because, **Section 13(3)** of the repealed law provided that: -

*“For avoidance of doubt, it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the Limitation of Actions or to any proceedings which had been heard or determined by any Court.”*

Clearly therefore, the **TRIBUNAL** had no jurisdiction to make any determinations involving the suit land. In **DESAI .V. WARSAMA 1967 E A 351**, it was held that where a Court confers upon itself jurisdiction which it does not have, its proceedings and determinations are a nullity. In the case of **DAVID KIPLETING CHEMEI .V. KANAMOI CHEPTOO KIMOITUK & ANOTHER 2021 eKLR**, a Tribunal exceeded its jurisdiction in determining a dispute before it. The award was however adopted as a Judgment of the Magistrate's Court. When the matter went to the Environment and Land Court, a Preliminary objection was raised that the matter was res – judicata and also a back – door appeal against the Tribunal's award. The Court up – held that Preliminary Objection holding that the procedure under the repealed law provided for an appeal to the Provincial Appeals Committee or through Judicial Review. On appeal however, the Court of Appeal stated thus in allowing the appeal: -

*“When a body acts without jurisdiction, its decision is a nullity and is not enforceable. It matters not that the Appellant did not expressly raise the issue of jurisdiction.”*

It follows therefore that the decision of the **TONGAREN LAND DISPUTES TRIBUNAL** and the subsequent decree issue by the **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT** in **LAND CASE No 9 of 2011** were nullities and cannot be relied upon by the defendants to support their case especially as relates to the suit land which is the subject before this Court.

As to whether the suit land is the property of the plaintiff or he holds it in trust for himself and his family, the plaintiff's case is that he is the registered proprietor of the suit land and is therefore entitled to orders to evict the defendants therefrom. It is not however in dispute that the suit land was first allocated to **WAKHU OTOKOMA** on 22<sup>nd</sup> October 1965 who accepted it on 22<sup>nd</sup> November 1965 as per the letter from the Settlement Fund Trustees produced herein. When he was cross – examined by **MR MAKOKHA**, the plaintiff admitted that he was born

on 10<sup>th</sup> March 1969. It cannot therefore be correct for the plaintiff to allege, as he did in his evidence in chief, that: -

***“The defendants have no claim on the land. I acquired it through my own resources. The title deed was issued to me on 26<sup>th</sup> July 1996.”***

The plaintiff could not have acquired the suit property before he was born. It also transpired during the trial that **WAKHU OTOKOMA** the plaintiff's grandfather and **CECILIA MUYEYI MALALA**'s father – in – law in whose names the suit land was allocated in 1965 had in fact died way back in 1949. It is therefore not clear which is this **WAKHU OTOKOMA** who on 22<sup>nd</sup> November 1965 appended his signature to the Settlement Fund Trustees letter accepting the allocation of the plot No 164 in his names. What is clear to this Court however is that even though **CECILIA MUYEYI MALALA (PW 2)** made the payments due to the Settlement Fund Trustees in respect to the suit land, she could not have been doing so on behalf of the plaintiff who was not yet born at the time of the allocation nor **WAKHU OTOKOMA** who was long deceased. The inevitable conclusion is that the use of the name **WAKHU OTOKOMA** could only have been intended to acquire the suit land for the use of the family. **PIUS MALALA WAKHU** the father to the plaintiff and the 2<sup>nd</sup> to 7<sup>th</sup> defendants as well as the husband to **CECILIA MUYEYI MALALA (PW 2)** and the 2<sup>nd</sup> defendant had no authority to purport to distribute land registered in another person's name.

In attempting to support the plaintiff's claim to the suit land, his Counsel made the following submission at paragraph 36: -

***“We submit that PW 2 who balloted for the suit property and purchased the same testified under oath that since she was the owner of the suit property and had registered the same in the names of her deceased father – in – law, she opted to correct the position by allowing the rectification of the title to the suit property within the meaning of Section 142 (1) (a) and (b) of the repealed Registered Land Act, Cap 300 which was in order and consented to the plaintiff's names being registered.”***

It is of course true that **Section 142(1)** of the repealed **Registered Land Act** which was the law then in force allowed for the rectification by the Registrar of any instrument. It stated that: -

***“The Registrar may rectify the register or any instrument presented for registration in the following cases –***

***(a) in formal matters and in the case of errors or omissions not materially affecting the interest of any proprietor;***

***(b) in any case and at any time with the consent of all persons interested;***

***(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.”*** Emphasis added.

The rectification contemplated under **Section 142** of the repealed **Registered Land Act** and which is replicated in **Section 79** of the new **Land Registration Act** is only meant to be invoked in rectifying errors or omissions that do not affect the interest of any proprietor or where a dimension or area is found to be incorrect and in any case, with the consent of all interested persons. That provision was never intended to change the ownership of land from one person to another. In this case, it is clear that **CHARLES WAKHU OTOKOMA** (the plaintiff) and his late grandfather **WAKHU OTOKOMA** are two different persons. That title deed to the suit land shows that the plaintiff was the second registered owner thereof on 26<sup>th</sup> July 1996. The Green Card was not availed during the trial. However, on being cross – examined, **CECILIA MUYEYI MALAA (PW 2)** said: -

***“Panel NO BUNGOMA/KIMININI/164 was registered in the names of WAKHU OTOKOMA who was deceased.”***

Earlier on when she was led by the plaintiff's Counsel **MR MUSEVE**, she said: -

***“When I was balloting, WAKHU OTOKOMA was already deceased but in his memory, the suit land was registered in his names when he was already deceased. The title was obtained in 1965. The title now reads CHARLES WAKHU OTOKOMA. It was issued on 26<sup>th</sup> July 1996.”***

In the face of such clear evidence that **WAKHU OTOKOMA** was the first registered proprietor of the suit land, albeit as a deceased person, and that he and the plaintiff are two different persons, it was not legally possible to transfer the suit land from the name of **WAKHU OTOKOMA** to that of **CHARLES WAKHU OTOKOMA** through change of names. What was done was a complete change of proprietorship which could not be cured by **Section 142** of the repealed **Registered Land Act** as suggested by Counsel for the plaintiff. It must be remembered that the registration of land in the name of a particular proprietor is a matter of fact to be gleaned from the title document itself. Therefore, the only lawful way that the suit land could have been transferred from **WAKHU OTOKOMA** to the plaintiff ought to have been through any of the processes of transmission provided for in law. There was no evidence of any transfer from the name of **WAKHU OTOKOMA** to the plaintiff and therefore for all intents and purposes, the suit land was the property of **WAKHU OTOKOMA** and not the plaintiff nor **PIUS MALALA WAKHU** or **CECILIA MUYEYI MALALA (PW 2)**.

As stated above, the registration of land in the name of a proprietor is a matter of fact to be gleaned from the document of title itself. It is not in doubt that the suit land is registered in the names of the plaintiff who holds the title thereto. However, as is now clear, the plaintiff was not yet born in 1965 when the suit land was acquired and it was registered in the name of his grandfather **WAKHU OTOKOMA**. When he was cross – examined by **MR MAKOKHA**, the plaintiff said: -

***“It is not true that WAKHU OTOKOMA was a brother to my mother. WAKHU OTOKOMA is myself. WAKHU OTOKOMA***

*was also my grandfather. So I share his name. He died in 1949. My elder sister MARY WAKHU was born in 1966. The WAKHU OTOKOMA that you are referring to is myself. My father was called PIUS MALALA WAKHU. He died on 11<sup>th</sup> February 2012. The name WAKHU OTOKOMA is a generational name.”*

As is now abundantly clear from the proceeding paragraphs of this Judgment, the suit land could not have been the sole property of the plaintiff because it was acquired before he was born. It was registered in the name of his grandfather **WAKHU OTOKOMA** the patriarch of the family. The intention of registering the suit land in the name of **WAKHU OTOKOMA** could only have been for it to be held in trust for the family. Otherwise, it may very well have been registered in the names of any other living member of the family. Being family land, this Court must make a finding, guided by the Supreme Court’s decision in **ISACK M’LINTARI & ANOTHER 2018 eKLR**, that the plaintiff holds the title thereto in trust for the family. The defendants pleaded in paragraph eight (8) of their defence that although the plaintiff is registered as the proprietor of the suit land, *“he holds the said in trust for the defendants and other beneficiaries of the late PIUS MALALA WAKHU.”* From the evidence herein, there is no doubt that the plaintiff is a mere trustee holding the suit land in trust for the **WAKHU OTOKOMA** family. It cannot be his sole property. This Court is also guided by the principles of intergenerational and intragenerational equity espoused in **Section 18** of the **Environment and Land Court Act**. The plaintiff is therefore not entitled to the orders to evict the defendants from the suit land. To do so would be an act of un – mitigated injustice.

However, having found that the plaintiff holds the suit land in trust for the **WAKHU OTOKOMA** family which includes himself, the defendants and also his mother **CECILIA MUYEYI MALALA (PW 2)**, this Court must now determine that trust by making appropriate orders. For the reasons already stated above, it is now clear that the award of the **TONGAREN LAND DISPUTES TRIBUNAL** and which was adopted by the **KIMILILI SENIOR PRINCIPAL MAGISTRATE’S COURT** was arrived at in excess of jurisdiction and is therefore a nullity. This Court must also take note of the fact that it was **CECILIA MUYEYI MALALA (P W 2)** who did the balloting for the suit land before it was registered in the names of **WAKHU OTOKOMA** her father – in – law. She stated in her evidence that she was working and even paid the initial Kshs. 500/= to the Settlement Fund Trustees as well as the other sums due in respect to the suit land. She provided copies of the relevant receipts issued in the name of **WAKHU OTOKOMA**. Her co – wives **JOYCE AYIEKO MALALA** (the 1<sup>st</sup> defendant) and **JULIANA ADHIAMBO MALALA (DW 3)** admitted that they were not even married to **PIUS MALALA WAKHU** at the time the suit land was allocated to **WAKHU OTOKOMA**. When she was cross – examined by **MR MUSEVE**, the 1<sup>st</sup> defendant said: -

*“The land in dispute is BUNGOMA/KIMININI/164. It was bought in 1965. When it was bought, I had not been married to MALALA. I was married in 1971.”*

On her part **JULIANA ADHIAMBO MALALA (DW 3)** stated that she was married to **PIUS MALALA WAKHU** in 1969 and does not even live on the suit land but lives on the land parcel **NO BUNGOMA/KIMININI/165**. **VINCENT MUYEYI MALALA** the 3<sup>rd</sup> defendant stated that he was allocated 3 acres out of the suit land on which he lives. **CECILIA MUYEYI MALALA (PW 2)** on the other hand testified that she was married to **PIUS WAKHU MALALA** in 1960 and paid for the suit land as she was doing business. When she was cross – examined by **MR MUSEVE**, **JULIANA ADHIAMBO MALALA (DW 3)** confirmed that indeed **CECILIA MUYEYI MALALA** was doing business. In his submissions, the plaintiff’s Counsel stated as follows in paragraph 25: -

*“We further submit that PW 2 CECILIA MUYEYI MALALA paid for the purchase of the suit property as she was engaged as a business lady which fact was corroborated by the sworn testimony of JULIANA MALALA where she confirmed that PW 2 was a business woman at all material times.”*

In determining this trust, the Court takes note of the fact that notwithstanding the pivotal role that **CECILIA MUYEYI MALALA** played in the acquisition of the suit land, she was not given a share out of the award by the **TONGAREN LAND DISPUTES TRIBUNAL**. With respect to the suit land, this is the order that the **TRIBUNAL** made: -

*“BUNGOMA/KIMININI/164*

1. **JOYCE MALALA - 4<sup>th</sup> wife - 2 acres**
2. **CHARLES WAKHU - 3 acres**
3. **MICHAEL ASOMBO - 3 acres**
4. **VINCENT MUYEYI - 3 acres**
5. **PROTUS MAKAVANA - 3 acres**
6. **DANIEL OKELLO - 3 acres**
7. **MOSES OTOKOMA - 3 acres**
8. **MARTIN NABWIRE - 3 acres**
9. **PIUS MALALA - 4 acres.”**

**PIUS MALALA** is of course now deceased having passed away in 2012 although the award shows he was given 4 acres. I appreciate that **CECILIA MUYEYI MALALA** is not a party to this suit but neither is **PIUS MALALA** who was awarded 4 acres. It is my view that the

plaintiff is entitled to an extra portion of the suit land to hold in trust for his mother **CECILIA MUYEYI MALALA**. She too is among the **“beneficiaries”** whom the defendants concede the plaintiff holds the suit land in trust for. She played an important role in the acquisition of the suit land and her contribution can best be appreciated by increasing the acreage of the plaintiff’s entitlement in the suit land. This Court will consider that role in determining the trust in respect to the suit land. The plaintiff is not however entitled to the whole suit land as he claims.

Ultimately therefore and having considered all the evidence herein, this Court makes the following orders in disposal of this suit:

1. **The plaintiff’s suit is dismissed.**
2. **The plaintiff holds the title to the land parcel NO BUNGOMA/ KIMININI/164 in trust for himself, his mother CECILIA MUYEYI MALALA and the other family members being the defendants herein.**
3. **That trust is determined and the land parcel NO BUNGOMA/ KIMININI/164 shall be apportioned as follows: -**
  - (a) **JOYCE MALALA - 2 acres**
  - (b) **CHARLES WAKHU OTOKOMA - 7 acres**
  - (c) **MICHAEL ASOMBO - 3 acres**
  - (d) **VINCENT MUYEYI - 3 acres**
  - (e) **PROTUS MAKAVANA - 3 acres**
  - (f) **DANIEL OKELLO - 3 acres**
  - (g) **MOSES OTOKOMA - 3 acres**
  - (h) **MARTIN NABWIRE - 3 acres**
4. **The Land Registrar and Land Surveyor to cancel the title NO BUNGOMA/KIMININI/164 and issue new titles to the beneficiaries as indicated in (3) above.**
5. **The plaintiff shall execute all the relevant documents to facilitate the sub – division of the title to land parcel NO BUNGOMA/KIMININI/164 in terms of the order in (3) above within 30 days from to-day.**
6. **In default of (5) above, the Deputy Registrar shall execute the said documents.**
7. **As the parties are family, each shall meet their own costs.**

**BOAZ N. OLAO.**

**J U D G E**

**30<sup>th</sup> September 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 30<sup>th</sup> day of September 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

**BOAZ N. OLAO.**

**J U D G E**

**30<sup>th</sup> September 2021.**

This Judgment was first due on 8<sup>th</sup> July 2021 but I was away in Mombasa on official duties. It was later rescheduled for 21<sup>st</sup> July 2021 and 29<sup>th</sup> September but I was unwell.

The delay is regretted.

**BOAZ N. OLAO.**

**J U D G E**

**30<sup>th</sup> September 2021.**