



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 38 OF 2016**

**CLEMENTINA ACHIENG' DONDO**

**GODLEVA AWINO DONDO**

**(suing as personal representatives of the**

**estate of BONIFACE HILLARY OMBUNDO).....PLAINTIFFS**

**= VERSUS =**

**ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR-BUSIA.....2<sup>ND</sup> DEFENDANT**

**KEPHA MUKHWANA MUKOYA.....3<sup>RD</sup> DEFENDANT**

**NAMENYA DANIEL NABURI.....4<sup>TH</sup> DEFENDANT**

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

1. The Plaintiffs vide a Plaint on the 22<sup>nd</sup> of April, 2016 impleaded the Defendants in the suit and prays for judgement against the Defendants for:

**a) An order of court directing the County Land Registrar Busia to cancel entry number 3 on the register of L.R No. SAMIA/LUANDA-MUDOMA/500 which purported to subdivide LR No. SAMIA/LUANDA-MUDOMA/500 into L.R No. SAMIA/LUANDA-MUDOMA/2168, 2169 and 2970 and to cancel all subsequent sub divisions and/or title deeds issued and to have L.R No. SAMIA/LUANDA-MUDOMA/500 restored to the name of BONIFACE HILLARY OMBUDO;**

**b) Costs of this suit be provided for.**

2. The Plaintiffs contended that the Deceased, BONIFACE HILLARY OMBUDO, was the registered owner of L.R No. SAMIA/LUANDA-MUDOMA/500 (the Suit Property), which measured 2.2 hectares. That on or about July 14, 1999, the 2<sup>nd</sup> Defendant illegally and unprocedurally closed the title for suit property and created new numbers, which numbers are L.R Nos. SAMIA/LUANDA-MUDOMA/2168, 2169, and 2170. That the 2<sup>nd</sup> Defendant registered LR No. 2169 in the name of the 3<sup>rd</sup> Defendant, who later transferred it to the 4<sup>th</sup> Defendant.

3. The Plaintiffs further impleaded that they had filed BUSIA ELC No. 35 of 2013 which matter was consolidated with the current case on the 13<sup>th</sup> of November, 2018.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Statement of Defence on the 24<sup>th</sup> of April, 2018. They admitted that the BONIFACE HILLARY OMBUDO was the registered proprietor of the suit property as at 26/6/98 with the said land being first registered in the names of DONDO WAKUMBA and OMBUDO DONDO as at 25/2/79. They also claimed that the subdivision and subsequent transfer of the suit property from the third to the fourth defendant was done legally in accordance with the established procedure and following the presentation of the duly executed documents. That the Plaintiffs are not entitled to the orders sought in the Plaint, and that the suit should therefore be dismissed with costs.

5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their amended Statement of Defence and Counterclaim on the 17<sup>th</sup> of December, 2018 wherein they asserted that:

a) The deceased **BONIFACE HILLARY OMBUDO** on the 14<sup>th</sup> of July, 1998 successfully applied and effectively closed the title to the Suit Property and subdivided it into three portions namely: L.R No. **SAMIA/LUANANDA-MUDOMA/2168** measuring 0.6 Ha, 2169 measuring 0.8 Ha and 2170 measuring 0.8 Ha.

b) Prior to his death on March 30, 1998, the 3<sup>rd</sup> Defendant entered into a valid sale agreement with the deceased **BONIFACE HILLARY OMBUDO** for the sale of LR No. **SAMIA/LUANANDA-MUDOMA/2169** measuring 0.8 Ha for a consideration of K.Shs.54,000, which was paid in two instalments of K.Shs.40,000 and K.Shs.14,000/=. The vendor acknowledged receipt of the purchase price, which was witnessed by other people, and the transfer was completed.

c) The 3<sup>rd</sup> Defendant sold the LR No. 2169 to the 4<sup>th</sup> Defendant pursuant to a sale agreement dated February 4, 2011, and the transfer was completed on April 29, 2013, with the proper legal procedures followed and approved by the 2<sup>nd</sup> Defendants before issuing them with the Title document

6. In their Counterclaim, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants named **CYPRAS OJIAMBO OLUOCH** as an Interested Party. They averred that the 4<sup>th</sup> Defendant is the registered proprietor of LR No. **SAMIA/LUANANDA-MUDOMA/2169** and that the Plaintiffs and the Interested Party have trespassed onto the said land. They are praying for orders of:

a) **Dismissal of the Plaintiffs' suit with costs;**

b) **A permanent injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> Defendants and the Interested Party to give vacant possession of the piece of land described as LR No. SAMIA/LUANANDA-MUDOMA/2169;**

c) **General damages and mesne profits;**

d) **Costs of the suit.**

6. On October 5, 2018, the Interested Party in the Counterclaim filed his Defence to the Counterclaim, denying all claims of trespass on his part and stating that;

a) On or about the 8<sup>th</sup> of November, 2011, **LILIAN ACHIENG' JUMA, GODLEVA AWINO DONDO, CLEMENTINA ACHIENG; DONDO and FEJENIAN AYUMA DONDO** sold him a portion of the suit property measuring 3½ acres at a consideration of Kshs.260,000/= which amount was paid and receipt thereof duly acknowledged; and

b) The portion sold to him was clearly demarcated on the ground and he was allowed to take vacant possession thereof and develop the same as he deemed fit.

7. The hearing kicked off on the 3<sup>rd</sup> of March, 2020. The Plaintiffs called two witnesses. **CLEMENTINA ACHIENG' DONDO** testified as **PW1**. She testified that she was a fish monger and hailed from Sagania Village. That the deceased, Bonface Hillary Ombudo was her brother. She adopted her witness statement made on the 18<sup>th</sup> of April, 2016 in which she states that ...PW1 also produced the documents in the Plaintiffs' list filed on the 18<sup>th</sup> of April, 2016 as *Pex 1-5* respectively.

8. During cross examination by the third and fourth defendants, PW1 stated again that the deceased, Bonface Hillary Ombudo, was her brother. That his wife died before him and that he and his wife had no children. That both of their parents passed away before Bonface. She went on to say that even though she was married and lived in Nangina ward, she was constantly checking on the suit property because was her father's. She confirmed that she was aware that the land was closed for subdivision in 1999, but she had no idea who did it. **PW1** continued in cross examination that they she was not challenging the mutation form.

9. She stated further that the suit land was currently unoccupied, that L.R No. 2168 was still in the name of Bonface Ombudo, and that she did not know under whose name L.R No. 2170 was registered. PW1 went on to say that, while she was aware that Bonface had sold the land to the 3<sup>rd</sup> Defendant, she was contesting his title because the said Defendant was aware that Bonface had sisters but he had never informed them of the sale. She went on to say that she was familiar with Cypras Ojiambo Oluoch because they had a sold to him of a portion of the suit property LR No. 500. Under cross-examination by the Interested Party, **PW1** stated that the Interested Party purchased a portion of the suit land from them and that he fenced the portion. On re-examination, **PW1** stated that only one of the third and fourth defendants purchased land from Bonface and that the money was refunded in writing. That their agreement with Cyprus was for 3¼ acres of LR No. 500.

10. **GODLEVA AWINO DONDO** testifying as **PW2** stated that she lives in Sagania within Samia Sub County. That the deceased, Bonface Ombudo who was her brother was registered alongside their father as the owners of the LR. No. Samia 500. That the deceased sold the land to Jairus Mukhwana while he was still alive, but that the deceased refunded the purchase price to the latter, and that he left. **PW2** stated that after Jairus left, she began farming the suit land. That she was unaware that the suit land had been subdivided and only discovered this after Bonface's death.

11. **PW2** continued further that the mutation form was not signed by the land registrar and the registrar confirmed that the form had not been signed because the names of Bonface were different. That the Plaintiffs obtained the letters of administration to bring this suit and to help her recover the suit land back to their father's and brother's name. She concluded by stating that she was Bonface's immediate follower and she never saw him transfer the land to anyone.

12. During cross-examination by Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, **PW2** stated that PW1 was her sister and that they were both

executors of their brother's estate. Despite the fact that Jairus purchased land, he was refunded his purchase price and left the land. She had no idea who Cyrus Oluoch was, and she had never seen a fence on the land because the suit parcel was not demarcated. **PW2** went on to say that their late brother was not mentally stable. **PW1** stated that she knew the 4<sup>th</sup> Defendant when he showed her his title, and that although the suit land was indicated as Samia/Mudoma/2000 in her statement of facts, she knew nothing about the said land. **PW2** continued to state that **PW1** informed her that she had sold the land to Cyprus. She concluded by stating that she had not sold the land to Kennedy Wafula Okumu neither has he even given her any monies for the said land.

13. Upon cross-examination by the Interested Party, **PW2** reiterated that the mutation forms had not been signed by the Land Registrar. She stated that Jairus did not inform them that the 3<sup>rd</sup> Defendant had also bought the land. According to the search for L.R. No. 2169 dated January 27, 2011, the 3<sup>rd</sup> Defendant was registered in 1994. Further on re-examination, **PW2** stated that when she discovered there was a problem with the land, she reported it to the area chief, who explained why a title was issued to Daniel despite the fact that they had refunded the money to Jairus.

14. The Defence hearing commenced on the 5<sup>th</sup> of October, 2020 by calling six (6) witnesses. **KEPHA MUKHWANA** testified as **DW1** stating that he is a farmer whose place of abode was in Butere. That he bought two acres of land from Bonface Ombudo in 1998 and executed a sale agreement which was witnessed by his brother Jairo and the area village elder (Liguru). That the vendor, Bonface subdivided the suit land into three and his portion which was on the lower side of the land was numbered 2169. **DW1** continued that he lived on the land for about a year before moving back to his home. That the original title to his portion was burned in the house, requiring him to obtain a replacement title. He concluded his evidence stating that he later sold the land to the 4<sup>th</sup> Defendant and that he was never refunded any money. He also stated that his brother Jairo purchased ½ acres of the suit land but he had no idea if the Plaintiffs refunded the purchase price to Jairo.

15. **DW1** testified under cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that Bonface sold him a portion of the suit land and that signed for him all transfer documents. On further cross-exam by Counsels for the plaintiffs, **DW1** stated that the sale agreement dated 9<sup>th</sup> March, 1998 was for purchase of two acres out of L.R. No. 500. That a subdivision was done to enable him get title for his portion. He continued that he was aware that a Land Control Board consent to subdivide was obtained even though a copy had not been produced before Court. The witness went on to say that before he bought the land, it was in Bonface's father's name, but Bonface carried out succession to register it in his name.

16. **DW1**, maintained that he was aware that the land control board consent to subdivide was obtained. He also stated that his brother Jairo was refunded the purchase price for his ½ acre portion of land he bought from the Plaintiff and he returned home. **DW1** confirmed during cross-examination by the Interested Party that the suit land was registered in Dondo's name at the time of purchase and that he does not know when Dondo died. That Bonface handled his father's succession. On re-examination, **DW1** stated that his house was burned down, along with the title and all other documents pertaining to the land transactions.

17. **JAIRO MUSINA MUKOYA** testified as **DW2** stated that he is a farmer and the 3<sup>rd</sup> Defendant was his brother. He confirmed that he bought land parcel L.R. No. 2168 from the Plaintiff and paid Kshs.26,000/- which amount was later refunded by the Plaintiffs. He asserted that he never sold the 3<sup>rd</sup> Defendant's land neither did he receive any refund on his behalf. Upon cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, **DW2** testified that indeed he was a witness when the **DW1** bought the land.

18. During cross-exam by the 1<sup>st</sup> Plaintiff **DW2** stated that he purchased his land from Bonface, despite the fact that **DW1** purchased land before him. That **DW1** was arrested and imprisoned at Kakamega Prison in 1999, forcing **DW2** to live on the aforementioned land until **DW1**'s release. That **DW1**'s house was burned down, and while he couldn't recall the exact date, he was the one who reported the incident. He confirmed that the OB only refers to loss of title deed. On further cross-examination by the 2<sup>nd</sup> Plaintiff, **DW2** stated that he reported the arson to the police but he did not have any documentation detailing the items destroyed by the fire.

19. Under cross-examination by the Interested Party, **DW2** reiterated that, despite the fact that he did not have the sale agreement in Court, he purchased his land in 2001. He began caring for **DW1**'s land in June 1999 and lived in the house on it for five years. That after the house burned down, he built another house on the land he had purchased. He concluded by stating that he had received his Kshs.26,000/= refund and that by the time the land was subdivided in 1998, he had not started living on it.

20. **PATRICK ADEMBA MASABA** testified as **DW3** and adopted his witness statement from June 19<sup>th</sup>, 2018, in which he stated that **DW1** and **DW2** are brothers. That **DW1** owns LR No. 2169, which measures 0.8 Ha and is located in Sagania Village, where he was a Village Elder (Liguru). That in 1998, the late Bonface Ombudo subdivided LR No. 500 and obtained legal documents before selling the two acres to **DW1** and 12 acres to **DW2**. That **DW1** constructed a grass thatched house on the said parcel and lived there with his family until the house burned down, destroying all important land documents with it.

21. **DW3** continued in evidence that **DW2**'s purchase price was refunded to him, and he even accompanied the Plaintiff to refund the said monies, whereas **DW1** received no refund. He concluded by stating that **DW1** later transferred ownership of the land to the 4<sup>th</sup> Defendant. During cross-examination by the **DW3** stated that the suit land LR. No 500 belonged to Bonface Ombudo, but that it had previously been registered in the names of Dondo Wakumba and Ombudo Dondo, who are two separate people. That he was present during the sale of land from Bonface to **DW1**, and that he was paid Kshs.200 despite the fact that his name did not appear on the first page of the sale agreement. **DW3** averred that he saw both Dondo Wakumba and Ombudo Dondo before they died and that they were father and son. That **DW1** bought the land after Dondo Wakumba had died. **DW3** reiterated that Bonface Ombudo was the son of Dondo Wakumba and whereas Dondo died seven years before the sale, Bonface died two years after the sale. That he was present during the sale of the land between Kefa and Bonface.

22. **NAMENYA DANIEL NABIRU** testified as **DW4**. He adopted his witness statement and where he testified that he is working as a researcher and resident at Mbale within Kakamega County. That he bought the suit land from **DW1** vide a sale agreement dated 4<sup>th</sup> February, 2011 for a consideration of Kshs.200,000/= after conducting the search, which did not uncover any encumbrances. That the application for

Land Control Board consent was approved, and that the property was duly transferred to him. He was then given a title deed to the sold land. **DW4** went on to say that he had never used the land since purchasing it because the Interested Party had fenced it in and the Plaintiffs were cultivating it. He urged the court to grant orders in the counterclaim filed against the Plaintiff and the Interested Party.

23. In the course of cross-examination **DW4** stated that the entry No. 1 on *Dex-11 (the green card)* is in the name of Bonface Ombudo and entry No. 2 bears **DW1's** name. **DW4** stated that he had not taken possession of the suit land since purchasing it. He confirmed that entry No. 4 of *Dex-11* was a restriction lodged by the 1<sup>st</sup> Plaintiff that no dealing be undertaken on the property until the dispute herein is resolved. That the agreement between him and **DW1** was signed within Busia County, in the premises that now houses the County Assembly. The witness reiterated that he has never gone back to the suit property after he purchased the same because he feared for his safety. That he was aware that the Plaintiff and the Interested Party were using the suit land and that when he investigated, he discovered that it was the Interested Party who had fenced the suit parcel and was using it as well. That was based on a search he conducted in January 2011 that revealed **DW1** was the registered owner, and he relied on it because it was signed by the Land Registrar.

24. Further defense hearings were held on March 8, 2021, with WILFRED NYABERI, County Land Registrar, Busia, testifying as **DW5**. He stated that their records for Samia Luanda/Mudoma/2169 was registered in the name of Bonface Hillary Ombudo on the 14<sup>th</sup> of July, 1998. That on the 10<sup>th</sup> of December, 1998 it was transferred to Kepha Mukhwana Mukoya and a title deed issued to him who later transferred it to the 4<sup>th</sup> Defendant on the 29<sup>th</sup> of April, 2013 and title issued as shown in the copy of the green card (*Dex 11*). That according to *Pex 6* the registration opened on 14<sup>th</sup> of July, 1998 but according to *DEX 11* the registration to Bonface was done on the 14<sup>th</sup> of November, 1998 and was transferred to the 3<sup>rd</sup> Defendant on the 10<sup>th</sup> of December, 1998. He clarified that it was not true that the transfer to the 3<sup>rd</sup> Defendant was done on the 10<sup>th</sup> of February 1998 as the correct position was that the transfer was on the 10<sup>th</sup> of December, 1998.

25. Upon cross examination by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, **DW5** stated that the title to L.R No. 2169 was a subdivision of LR No. 500 which was closed for subdivision on the 14<sup>th</sup> of July, 1998. That the subdivision was effected by the registered owner Bonface Hillary Ombudo on the 26<sup>th</sup> of June, 1998. That the transfers to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were done legally and the 4<sup>th</sup> Defendant is currently the registered owner of LR No. 2169.

26. During cross-examination **DW5** stated that he had a mutation form, green card and register for parcel No. 500 which indicated that it was opened on the 23<sup>rd</sup> of May, 1979 in the name of Dondo Wakumba and Ombudo Dondo holding undivided ½ share each. That a transfer of L.R. No. 500 was made to the deceased on the 26<sup>th</sup> of June, 1998 by the previous proprietors. Further, **DW5** stated that they had not provided any documentation to prove how the land was transferred from the registered owners to Bonface. That the subdivision was carried out on the 14<sup>th</sup> of July, 1998. On re-examination, **DW5** confirmed that the mutation for parcel 500 was initiated by Bonface Hillary Ombudo, with the transfer to Bonface from Dondo Wakumba and Ombudo Dondo done on the 26<sup>th</sup> of June, 1998. He concluded by stating that the receipt number given on the mutation form confirms that it was paid for.

27. The interested party **CYPRUS OJIAMBO OLUOCH** testifying as **DW6** stated that he worked and lived in Nairobi and LR No. 500 was sold to him by the daughters of Hillary Bonface Ombudo-deceased accompanied by their husbands. That the agreed-upon consideration of KShs.260,000/= was paid in full. He denied that he was not a trespasser and urged this Court to dismiss the counterclaim brought against him.

28. During cross-examination, **DW6** stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the counterclaim (the Plaintiffs) informed him that they were the daughters of the Hillary Bonface Ombudo-deceased. That the parcel being sold was the suit property L.R. No. 500, and after conducting a search, he discovered that it was in Bonface Hillary Ombudo's name. That it was while attempting to obtain his title that the 4<sup>th</sup> Defendant entered the picture, and he decided to wait for the dispute to be resolved. That the fence he put up was destroyed, and that he later received a letter from the 4<sup>th</sup> Defendant labelling him a trespasser. He went on to say that after his fence was destroyed, he stayed away from the land and had no idea who was using it at the time. He came to the conclusion that he fenced the portion delineated to him, which was 3½ acres.

29. The 1<sup>st</sup> Plaintiff filed her submissions on the 14<sup>th</sup> of April, 2021 submitting that the Plaintiffs had written a letter requesting for various documents from the County Land Registrar but save for the mutation forms, the documents were not provided. That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' titles were under challenge and it was incumbent that they go beyond the document of the title to prove the legality of how they acquired the land. She urged this Court to find all the documents in support of the subdivision of the Suit Property into three portions null and void and to grant the prayers sought in the Plaintiff. She supported her submissions with the cases of **Munyu Maina vs. Hiram Gathiha Maina (2013) eKLR** and **Samwel Kamwere vs. Land Registrar, Kajiado (2015) eKLR**.

30. The 2<sup>nd</sup> Plaintiff filed her submissions on the 13<sup>th</sup> of July, 2021 submitting that the Defendants needed to prove that they had obtained all the necessary consents from the Land Control Board including the ones to subdivide and to transfer the land which averments they failed to prove. She urged this Court to dismiss the Counterclaim and allow the Plaintiffs' claim.

31. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions on the 28<sup>th</sup> of April, 2021. They submitted that the issues for determination are; whether the sub-division of the suit property was illegally and un-procedurally closed by the 2<sup>nd</sup> Defendant and on whether the Court should cancel entry number 3 in the land register. They contend that the Plaintiffs have failed to prove the illegality on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the fact that the receipt produced by the Land Registrar had a few numbers than that of the Interested Party is not a proof of any form of illegality.

32. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants alluded to the fact that the Plaintiffs have not alleged any fraud with respect of the sale of the suit property by the then registered owner Bonface Hillary Ombudo. That the evidence and facts of the case indicate that there was a common intention between Bonface and the 3<sup>rd</sup> Defendant to buy and sell the suit property hence creating the equitable principle of constructive trust. They relied on the case of **Willy Kimutai Kitili vs. Michael Kibet (2018) eKLR**.

33. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their submissions on the 16<sup>th</sup> of June, 2021. They raised the following issues for determination:

- a) *Whether the Land Title No. Samia/Luanda-Mudoma/500 was fraudulently closed and subdivided to Samia/Luanda-Mudoma/2168, 2169 and 2170;*
- b) *Whether the 3<sup>rd</sup> Defendant lawfully purchased and obtained a good title to Land Title No. Samia/Luanda-Mudoma/2169 to the 4<sup>th</sup> Defendant;*
- c) *Whether the 4<sup>th</sup> Defendant has valid and clean title to the Land Title No. Samia/Luanda-Mudoma/2169 which is indefeasible;*
- d) *Whether the prayers sought by the Plaintiffs should be granted; and*
- e) *Whether the prayers sought by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in their counterclaim should be granted.*

34. They continued in submission that the Plaintiffs have failed to establish and prove fraud on the part of the Defendants and that the 3<sup>rd</sup> Defendant has proved that he purchased and obtained good title. They submitted further that the 4<sup>th</sup> Defendant is entitled to mesne profits and the other prayers asked for in the Counterclaim. That the Plaintiffs had failed to prove their case on a balance of probabilities as against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and as such it should be dismissed with costs. They sought to rely on the cases of Elias Njue Ireri vs. Kubu Benson Nderi & 3 others (2019) eKLR, Vijay Morjaria vs. Nansingh Madhusingh Darbar & another (2000) eKLR and Samuel Kamere vs. Land Registrar, Kajiado (2015) eKLR.

35. The Interested Party on his part submitted that the County Land Registrar failed to produce the application for the Land Control Board Consent which approved the subdivision of the Suit Property and that the land transfer from Bonface to Kepha was illegally and fraudulently effected. That the Defendants have failed to prove that they obtained the suit title through a clean process and their counterclaim ought to be dismissed.

36. I have considered the parties' pleadings, submissions and the applicable law and the issues which in my opinion arise for determination are as follows:

- a) ***Whether or not the subdivision of Samia/Luanda-Mudoma/500 was irregularly done thus ought to be cancelled and revert to the name of Bonface Hillary Ombudo***
- b) ***Whether or not the sale/transfer to the 3<sup>rd</sup> Defendant and subsequently to the 4<sup>th</sup> Defendant was irregular, unlawful or fraudulent and if the Plaintiffs have proved the same; and***
- c) ***Whether or not the 4<sup>th</sup> Defendant is entitled to mesne profits or general damages;***
- d) ***Who should pay the costs of the suit?***

37. As an introductory analysis, the plaintiffs have brought this suit as the administratrix of the estate of their deceased brother Boniface Hillary Ombudo. Secondly, it is not disputed that before the land was registered into the deceased named, it was jointly owned by Dondo Wakumba and Ombudo Dondo. The Plaintiffs on one hand were disputing how the transfer was made from the two joint owners who were both deceased to their brother Boniface Ombudo-deceased. However, on the other hand they proceeded to deal with the title as if Boniface legally acquired it. If Plaintiffs take the view that Boniface did not acquire his title legally then there is nothing upon which their claim would stand on. This court proceeds with determination of this matter on the basis that the registration of the initial parcel number 500 is not in dispute.

38. The Land Registrar who testified as DW5 produced records in respect to parcel number 500 indicated that the title was closed on subdivision on 14<sup>th</sup> July 1998 (mutation form). The plaintiffs produced a copy of the register (Pex-6) showing instead that the title was closed on 14<sup>th</sup> July 1999. Although there is a variation in the dates on the two documents, Boniface Ombudo-deceased date of demise is given as 30<sup>th</sup> December, 2000 (Pex-8). The Plaintiffs in their evidence confirm that they were aware the deceased sold a piece of this land to the 3<sup>rd</sup> Defendant and which sale in their opinion was reversed when they refunded the sum of Kenya Shillings Twenty Six Thousand (Kshs.26,000) to Jairus (DW4). The refund was being made after the demise of the seller. The Plaintiffs claim against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is that they illegally subdivided the parcel number Samia/Luanda-Mudoma/500 and transferred a portion of it Samia/Luanda-Mudoma/2169 to themselves yet a refund had been made. DW1 however denied those allegations and stated that the Suit Property was subdivided and a portion sold to him by the deceased two years before his death.

39. Thus the Plaintiffs had a duty to demonstrate that the subdivision was undertaken illegally so as the subsequent transfer. The particulars of the illegalities were pleaded in paragraph 6 of the plaint. The Black's Law Dictionary, 10<sup>th</sup> edition defines fraud as;

**'As knowing misrepresentation or know concealment of a material fact made to induce another to act to his/her detriment.'**

40. The Court of Appeal in the case of Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR, held that fraud is a question of evidence. Fraud is an allegation that has to be proved as held in the Paul Muira & Another vs. Jane Kendi Ikinyua & 2 others (2014) eKLR where the court cited with approval the Court of Appeal case of Musonga vs. Nyati (1984) KLR 425 and in Koinange and 13 Others (1986) eKLR 23 where it was observed that;

*"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."*

41. The principles of proving fraud have been stated in HCCC No. 135 of 1998 Insurance Company of East Africa -vs- The Attorney General & 3 Others as borrowed from page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

*"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".*

42. Since the Plaintiffs are denying the validity of the mutation used to partition land parcel number 500 into three portions, the inference drawn is that they are denying the signature of the deceased on the mutation document. It was therefore incumbent on the Plaintiffs to produce evidence that indeed the mutation was not signed by the deceased. On the face of the mutation (filed by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants), it has a presentation book number given as 105/7/98 and presentation date of 14<sup>th</sup> July 1998. There is also a payment receipt number provided as 1093759. On the mutation form presented by the 3<sup>rd</sup> & 4<sup>th</sup> Defendants, besides the details of presentation book, there were assessments for other payments on its face in regard to its registration. The assessments were for payment of **registration @ Kshs 250; N/Reg @Kshs 450 and LCB @Kshs 125**. The land being subdivided was in the name of the deceased thus it was incumbent upon the owner to obtain consent to partition it. Why was payment receipted for registration of new numbers and for Land Control Board consent if there was no Land Control Board consent obtained? Secondly, if the registered owner failed to obtain the LCB consent, the Plaintiffs have not explained why the 3<sup>rd</sup> defendant would be faulted for actions done by a person whom they (plaintiffs) are administering his estate.

43. Additionally, the Land Registrar confirmed that the correct procedures were followed for the subdivision and transfer of the Suit Property. Although the Registrar admitted that he had not brought some of the documents requested by the Plaintiffs to confirm whether the transfer from the original proprietors, the Land Registrar was testifying as party to the suit (2<sup>nd</sup> Defendant) and there was no notice to produce served upon him by the Plaintiffs. In my opinion, the failure on the part of the Registrar did not take away the burden resting on the Plaintiffs to prove the illegalities alleged to have been committed by the Defendants.

44. The Plaintiffs insisted that they refunded the 3<sup>rd</sup> Defendant's purchase price. The 3<sup>rd</sup> Defendant in defending his title provided as proof a sale agreement to a portion of the suit land in which he paid consideration of Kshs.54,000/- (Dex-1). **DW1** confirmed that the land was still under succession when they started the negotiations but the vendor completed the process of succession before subdividing the suit land to give him his portion as per the sale agreement. From the evidence of **DW2**, it was only DW2's purchase price that was refunded and he vacated the portion number 2168. The agreement produced as Pex-7 is clear that Mr Jairo was being refunded for the ½ acre of land he had purchased and no mention is made that he was being refunded on behalf of the 3<sup>rd</sup> Defendant. Even assuming the refund paid to Jairo was meant for the 3<sup>rd</sup> Defendant, then the Plaintiffs had not refunded the whole amount of Kshs.54,000 paid to their deceased brother.

45. The Plaintiffs submitted the 3<sup>rd</sup> Defendant had not discharged his obligation of producing documents of transfer of the suit parcel to his name. In rebuttal, the 3<sup>rd</sup> Defendant stated that his house got burnt and inside was the title documents for this land. He produced a police abstract to support this assertion. The evidence presented by the Plaintiffs indicate that the 2<sup>nd</sup> Plaintiff is cultivating the suit parcel. PW2 said she started cultivating the land after Jairo (DW2) left but she did not state what happened to the house Jairo was living in. In fact, the Plaintiffs did not deny that a house built on the suit parcel ever got burnt. The Plaintiffs had not put any restriction on the title to land parcel number 500 to prevent Boniface from disposing the land. They did not sue Boniface in his lifetime for their stake in the land despite being aware that he had sold.

46. Boniface Ombudo- deceased sold the land between 1998 -1999 and died in the year 2000. This suit was filed in the year 2016 so that the Plaintiffs as legal representatives of his estate brought this suit after the expiry of twelve (12) years from the date of the transaction and or dated of death. The time for rescinding the contract is provided in law as six years such that the attempt to make the refund in the year 2011 was of no consequence. Further, by the time of making the refund in the year 2011, it is inferred that the Plaintiff became aware of the sale to the 3<sup>rd</sup> Defendant. The time for bringing the claim on the illegalities regarding the transactions between the deceased and the 3<sup>rd</sup> Defendant began to run. The illegalities or fraud are tortious liabilities whose suits must be brought before the expiry of three years from the date of discovery of the fraud and which in this case ended on 2014 (08/01/2011-07/01/2013). The prayer on fraud was thus commenced out of time without leave of the court. See the holding in Anastacia Wangui Muriithi vs. Jean Wamarwanyamu (2019) eKLR and Edward Githaka Kiadingu vs. Mary Naomi Mwangi & Another (2020) eKLR.

47. The 4<sup>th</sup> Defendant has demonstrated that by the time he was purchasing the suit title from the 3<sup>rd</sup> Defendant, the title was clear from all encumbrances. He has produced relevant documents of transfer executed between the 3<sup>rd</sup> Defendant and himself including the letter of Consent from the Land Control Board. The Plaintiffs have not shown the participation of the 4<sup>th</sup> Defendant in the subdivision of the original title and or the subsequent transfer of the suit portion to the 3<sup>rd</sup> Defendant. He should be protected as an innocent or *bonafide* purchaser for value.

48. Section 26 (1) of the Land Registration Act provides that,

*“the certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as the Proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of the proprietor shall not be subject to challenge except:*

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

49. Was there land measuring approximately 3½ acres available to be sold to the Interested Party? The Interested party who gave his evidence as Dw6 stated that the Plaintiffs accompanied by their husbands approached him intending to sell him the 3½ acres. That the Plaintiffs had in their possession a refund agreement of an earlier sale. The refund agreement produced in these proceedings as *Pex-7* refers to L.R. No Samia/Luanda-Mudoma/2168. The size of the land mentioned in that agreement is half acre. The Interested party was under a duty which he failed to do by elaborating to the court why he felt convinced on the face of the document shown to him that the available land for sale was 3½ acres and not ½ acre documented on the face of the refund agreement.

50. As at the time the Interested Party was entering into the transaction with the Plaintiffs on 8<sup>th</sup> November 2011, the title number 500 had been closed on subdivision. If he (the interested party) had taken due diligence, he would have known that parcel number 500 no longer existed neither did the plaintiffs have any land to sell to him since no portion of the subdivisions had been registered in their names. The Interested Party’s claim if any is against the Plaintiffs and has nothing to do with parcel number 2169 purchased by the 3<sup>rd</sup> Defendant and which was subsequently transferred to the 4<sup>th</sup> Defendant.

51. The Land Registration Act empowers this Court to order the rectification of the register under Section 80 which provides that,

**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

52. The fourth issue is **whether the 4<sup>th</sup> Defendant is entitled to mesne profits.** Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows: -

*“mesne profits” in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”*

53. Mesne profits being special damages have to be proved alleged for it to be awarded. The 4<sup>th</sup> Defendant has not provided any proof of the accrual of the mesne profits or evidence of the same. In the case of **Peter Mwangi Mbuthia & Another vs. Samow Edin Osman (2014) eKLR** the Court of Appeal stated that;

*“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”*

54. This position was also taken in the cases of **Attorney General vs. Halal Meat Products Limited (2016) eKLR**, **Rajan Shah T/A Rajan S. Shah & Partners vs. Bipin P. Shah (2016) eKLR** and **Karanja Mbugua & another vs. Marybin Holding Co. Limited (2014) eKLR**.

55. In the case of **Fredrick Korir vs. Soin United Women Group (sued through Eunice Towett, Jane Mwolomet and Lucio Chebocho) 2018 eKLR**, Hon. Justice J.M Onyango held that:

*“It is my humble opinion that the Plaintiff has not tabled evidence before this Court to enable the Court make a determination on the same.”*

56. In view of the observations and analysis made herein above I conclude that the Plaintiffs have failed to prove their case on the balance of probabilities and as such it is dismissed. Consequently, I hold that:

**a) The Plaintiffs suit is dismissed.**

**b) The 3<sup>rd</sup> & 4<sup>th</sup> Defendants’ Counterclaim succeeds and the Plaintiff and Interested parties are hereby ordered to give vacant possession of parcel of land known as Samia/Luanda-Mudoma/2169;**

**c) A permanent injunction is issued against the Plaintiffs, the Interested Party, their agents, relatives or employees from interfering with the 4<sup>th</sup> Defendant’s possession of the land Samia/Luanda-Mudoma/2169;**

**d) The Defendants are awarded costs of this suit.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**A. OMOLLO**

**JUDGE**