



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 46 OF 2018

LEAH EGEHIZA MASIDZA (Suing as the widow

and personal representative of the late

CLEMENT FESTUS MASIDZA – DECEASED).....PLAINTIFF

VERSUS

ALICE NANJALA WAFULA.....1ST DEFENDANT

BEATRICE NANJALA KHAOYA.....2ND DEFENDANT

PATRICK NANDASABA KAMULANDA.....3RD DEFENDANT

LAND REGISTRAR – BUNGOMA COUNTY.....4TH DEFENDANT

HON ATTORNEY GENERAL5TH DEFENDANT

J U D G M E N T

Greed and unjust enrichment are the twin forces which, in my view have propelled **LEAH EGEHIZA MASIDZA** (the plaintiff herein) to file this suit. She strikes me as a person who, having earlier given away her daughter's hand in marriage and accepted bride price decides to renege, perhaps after meeting another better suitor, and offers him the same bride.

The scriptures warn us about greed. In **LUKE 12:15**, it is written: -

“Watch out! Be on your guard against all kinds of greed, a man's life does not consist in the abundance of his possessions.”

In **PROVERBS 28:25** it says: -

“A greedy person stirs up a fight but whoever trusts the Lord prospers.”

The plaintiff herein is the Administrator of the Estate of the late **CLEMENT FESTUS MASIDZA** (hereinafter **MASIDZA**) who, prior to his demise on 22nd December 1998, was the proprietor of the land parcel **NO EAST BUKUSU/ SOUTH KANDUYI/8026** measuring 0.25 Ha (the suit land). **ALICE NANJALA WAFULA** (the 1st defendant is the Administratrix to the Estate of the late **PROTUS WAFULA MASINDE** (hereinafter **MASINDE**).

It is the plaintiff's case that on 20th April 2004, **MASINDE** colluded with the **LAND REGISTRAR BUNGOMA** and **THE ATTORNEY GENERAL** (the 4th and 5th defendants) to disinherit the plaintiff and other co – heirs of **MASIDZA** by transferring the suit land from the name of **MASIDZA** into the name of **MASINDE**. Thereafter, and in an effort to conceal their illegal acts, the 1st, 4th and 5th defendants sub – divided the suit land into three parcels which were then registered into the names of the 1st, 2nd and 3rd defendants as follows: -

1: EAST BUKUSU/SOUTH KANDUYI/12919 – ALICE NANJALA WAFULA – 1st defendant.

2: EAST BUKUSU/SOUTH KANDUYI/12920 – BEATRICE NANJALA KHAOYA – 2nd defendant.

3: EAST BUKUSU/SOUTH KANDUYI 12921 – PATRICK NANDASABA KAMULANDA – 3rd defendant.

The particulars of fraud on the part of the defendants are pleaded in paragraph 10 of the plaint as hereunder: -

- (i) Forging the deceased MASIDZA's signature for relevant transfer forms in respect of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.**
- (ii) Causing transfer of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026 from the name of MASIDZA to the name of MASINDE without regard to the law of succession.**
- (iii) Causing sub – division of the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/8026 in an effort to conceal their illegal and unlawful acts.**
- (iv) Conspiring to disinherit the heirs of the late MASIDZA who include the plaintiff.**
- (v) Failure on the part of the 4th and 5th defendants to exercise their mandate as per the law and the constitution.**
- (vi) Deliberately flouting the law for personal/individual gain.**
- (vii) Collusion between the 4th and 5th defendants and MASINDE to defeat justice.**

Arising out of the above, the plaintiff sought Judgment against the defendants jointly and severally in the following terms: -

- (a) That titles for the land parcels NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921 be cancelled and revert to parcel NO EAST BUKUSU/SOUTH KANDUYI/8026 and a further order that the transfer made on 20th April 2004 transferring title NO EAST BUKUSU/SOUTH KANDUYI/8026 from the name of MASIDZA to the name of MASINDE be cancelled and the same to revert to the name of MASIDZA.**
- (b) Costs**
- (c) Interest**
- (d) Any other relief**

Together with the plaint, the plaintiff filed her witness statement and also a list of documents both dated 8th August 2018.

In her statement which she adopted as her evidence during the plenary hearing, the plaintiff confirms that she is the widow and personal representative of **MASIDZA** who prior to his demise on 22nd December 1998 was the registered proprietor of the suit land. That on 20th April 2004 **MASINDE** colluded with the 4th and 5th defendants to transfer the suit land to himself in contravention of the Law of Succession as no Succession had ever been carried out in respect to the suit land. Thereafter, the said **MASINDE**, the 4th and 5th defendants colluded to sub – divide the suit land into parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919**, 12920 and 12921 which were transferred into the names of **MASINDE**, the 2nd and 3rd defendants respectively. The land parcel **NO EAST BUKUSU/SOUTH KANDUYI/12919** was subsequently transferred to the name of the 1st defendant. That the said sub – divisions and transfers were done fraudulently and was only discovered on 26th June 2018 hence this suit.

The plaintiff filed the following as her list of documentary evidence: -

- 1. Plaintiff's Identity Card.**
- 2. Certificate of Confirmation of Grant issued in BUNGOMA HIGH COURT SUCCESSION CASUE No 32 of 2002 in respect of the Estate of MASIDZA.**
- 3. Green Card for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.**
- 4. Letter dated 28th June 2018 from the plaintiff's Counsel to the COUNTY SURVEYOR BUNGOMA.**
- 5. Letter dated 28th June 2018 from the plaintiff's Counsel to the COUNTY SURVEYOR BUNGOMA (the list wrongfully states that it is addressed to the LAND REGISTRAR BUNGOMA).**
- 6. Certificate of Official Search for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/8026.**
- 7. Certificate of Death of MASIDZA.**
- 8. Certificate of official Search for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/12919 in the name of 1st**

defendant.

9. Certificate of official Search for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/12920 in the name of 2nd defendant.

10. Certificate of official Search for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/12921 in the name of 3rd defendant.

11. Certificate of official Search for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/12919 in the name of MASINDE dated 26th January 2018.

12. Certificate of official Search for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/12919 in the name of MASINDE dated 3rd January 2018.

13. Letter 21st June 2018 from the COUNTY SURVEYOR BUNGOMA to the AREA CHIEF – KHALABA LOCATION.

The 1st defendant filed her defence on 6th September 2018 in which she described the suit as bad in law, incompetent, inept, ambiguous and which does not sufficiently disclose proper particulars of the claim or cause of action against her.

She added that in early 2004, the plaintiff offered to sell the suit property to **MASINDE** to enable her pay school fees for her children. Being satisfied that the plaintiff was the legal representative of the Estate of her late husband **MASIDZA** and due to his love for education, **MASINDE** entered into a formal written agreement with the plaintiff on 16th April 2004 for the purchase of a portion measuring 0.25 Ha out of the suit property at a consideration of Kshs. 400,000/=. That the plaintiff signed the transfer form and supplied **MASINDE** with all the necessary documents to facilitate the transfer of the suit land into his name. That it is therefore not true that the 1st defendant colluded with any of the other defendants to disinherit the plaintiff of the suit land. That it is the plaintiff herself who sold and facilitated the transfer of the suit land into the name of **MASINDE**. The 1st defendant further denied that the sub – division of the suit land to give rise to parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921** was done with any ill motive as the same was legally bought by **MASINDE** and there was no forgery of **MASIDZA**'s signature because it was the plaintiff who signed the transfer forms in favour of **MASINDE**. The 1st defendant therefore denied all the allegations of fraud levelled against her adding that it was discovered that in the year 2007, **MASINDE** had already sold a portion measuring 0.05 Ha comprised in the suit land to the 3rd defendant. The 1st defendant pleaded further that having purchased the suit land from the plaintiff who was the legal representative of **MASIDZA** the registered proprietor thereof, and the plaintiff having signed the transfer forms, the 1st defendant became the legal owner of the suit property. The 1st defendant therefore Counter – Claimed for orders that: -

(a) A declaration that the 1st defendant's late husband MASINDE legally bought the suit land from the plaintiff.

(b) The plaintiff legally signed all necessary transfer forms in favour of the 1st defendant's late husband MASINDE.

(c) A refund of the market value of a plot measuring 0.05 Ha initially sold to the 3rd defendant.

Together with her defence, the 1st defendant filed her statement and list of documentary evidence dated 15th April 2019.

In the said statement, the 1st defendant confirmed that she is the legal Administrator of the Estate of her late husband **MASINDE** and that in 2004, the plaintiff offered to sell the suit land to the said **MASINDE** to enable her pay school fees for her children. That **MASINDE** being satisfied that the plaintiff was the legal representative of the Estate of **MASIDZA** agreed to purchase the suit land at a consideration of Kshs. 400,000/= as per the agreement dated 16th April 2004 whereupon the plaintiff signed the necessary transfer forms and the suit land was transferred into the name of **MASINDE**. Sometime in the year 2007, it was discovered that **MASINDE** had already sold a portion measuring 0.05 Ha comprised in the suit land to the 3rd defendant yet the plaintiff had wrongfully sold the whole of the suit land to **MASINDE**. The 1st defendant therefore claims for that portion because **MASINDE** agreed to transfer that portion to the 3rd defendant on the understanding that the plaintiff would compensate him for the loss by either refunding the purchase price or by giving him an equivalent plot from the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/3027**.

That **MASINDE** sub – divided the suit land into three portions being **EAST BUKUSU/SOUTH KANDUYI/1291, 12920 and 12921**. The 1st defendant therefore denied having colluded with any of the other defendants to disinherit the plaintiff since it is the plaintiff herself who sold and facilitated the transfer of the suit land to **MASINDE**. That the parties have co – existed in harmony until late 2017 when the plaintiff's sons started claiming ownership of the 1st defendant's land parcel **NO EAST BUKUSU/SOUTH KANDUYI/12919**. That there was no forgery of **MASIDZA**'s signature but rather, the plaintiff herself signed the transfer forms as the legal representative of **MASIDZA**.

The 1st defendant filed a list of the following documents in support of her case: -

1. Confirmed Grant dated 14th December 2014 issued to her in respect to the Estate of MASINDE.

2. Sale agreement dated 16th April 2004 between the plaintiff as vendor and MASINDE as purchaser for the land parcel NO EAST BUKUSU/ SOUTH KANDUYI/8026 for a consideration of Kshs. 400,000/=.

3. Grant of letters of Administration issued to the plaintiff on 14th November 2002 in respect to the Estate of MASIDZA.

4. Mutation form registered on 19th June 2008 in respect to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.

5. Letter from the 1st defendant dated 11th June 2018 addressed to the COUNTY SURVEYOR BUNGOMA requesting a demarcation of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/12919.

The plaintiff filed a reply to the 1st defendant's defence and a defence to the Counter – Claim in which she denied that in 2004 she offered to sell the suit property to **MASINDE** to enable her pay school fees for her children or that she entered into a written agreement on 16th April 2004 to sell the suit property to **MASINDE** at a consideration of Kshs. 400,000/= and put the 1st defendant to strict proof thereof. The plaintiff reiterated the contents of her plaint and denied having signed any transfer forms and put the 1st defendant to strict proof thereof.

In her defence to the 1st defendant's Counter – Claim, the plaintiff denied having entered into any written agreement with **MASINDE** on 16th April 2004 or on any other date for the purchase of the suit land at a consideration of Kshs. 400,000/= adding that the transfer and sub – division of the suit property was tainted with fraud and forgery between the defendants. She denied that the 1st defendant had taken possession or that the plaintiff started claiming ownership in 2017. The plaintiff similarly denied having signed the transfer form or that in 2007 it was discovered that **MASIDZA** had already sold a plot measuring 0.05 Ha comprised in the suit land. She further denied that **MASINDE** had agreed to transfer the suit land to the 3rd defendant on the understanding that the plaintiff would compensate him for the loss either by refunding the purchase price or by giving him an equivalent plot from the land parcel **NO EAST BUKUSU/ SOUTH KANDUYI/8027**. The plaintiff denied that the 1st defendant purchased the suit land from her adding that the suit land has never been succeeded.

Without prejudice to the foregoing, the plaintiff pleaded that she would raise a Preliminary Objection on the following points of law: -

(a) That the 1st defendant lacks the capacity to institute the Counter – Claim.

(b) That the Counter – claim offends the provisions of the law of Limitation of Actions Act.

(c) That the Counter – Claim offends the provisions of Order 7 of the Civil Procedure Rules.

The 2nd and 3rd defendants filed a joint statement of defence dated 13th September 2018 in which they pleaded that the suit land was once registered in the name of **MASIDZA** but was disposed off by way of a sale by the plaintiff as the Administrator of the Estate of **MASIDZA**. That the sub – division and sale of the suit land to create land parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921** was open and with the full knowledge of the plaintiff who never raised any issue. That the land parcels **NO EAST BUKUSU/SOUTH KANDUYI /12920 and 12921** were registered in the name of the 2nd and 3rd defendants respectively on 19th June 2008 as purchasers for value without any notice of the alleged fraud. That in purchasing the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/12920** from **MASINDE**, the 2nd defendant followed all requirements of the law after ascertaining that **MASINDE** was the registered and absolute owner thereof and without notice of any encumbrances save for the financial accommodation extended to the said **MASINDE** by the Agricultural Finance Corporation (**AFC**). That sometime on 20th August 1994, the 3rd defendant purchased a portion of land measuring 0.05 Ha from **MASIDZA** who died before transferring the same to him but the transfer was subsequently done by **MASINDE** on the instructions from the plaintiff and no fraud was involved.

The 2nd and 3rd defendants denied all the allegation of fraud levelled against them and in particular that they forged the signature of **MASIDZA** and transferred the suit land to **MASINDE** and caused the sub – division thereof. They further denied that the plaintiff is entitled to any of the orders sought and added that the plaintiff's suit is an afterthought as she has always been aware that the 2nd and 3rd defendants who are her neighbours have developed their respective portions of land by building permanent houses valued at more than Kshs. 30 million and have never raised any objection. That the plaintiff's suit is incompetent, bad in law and an abuse of the due process of the Court and should be dismissed with costs.

The 2nd and 3rd defendants filed their statements and list of documents dated 3rd September 2018.

In her statement, the 2nd defendant states that in January 2008, she was informed by one **PATRICK LUMUMBA** that the 1st defendant was selling land behind Generation Hotel and Restaurant. That she met the 1st defendant and her husband **MASINDE** and was shown a copy of the title deed to the suit land registered in the name of **MASINDE**. She carried out a search at the Lands Office and confirmed that indeed **MASINDE** was the registered proprietor of the suit land which had been used to secure financial accommodation of Kshs. 360,000/= from the **AFC**. That vide an agreement dated 16th January 2008, **MASINDE** sold to her a portion measuring 0.13 Ha to be carved out of the suit land at a consideration of Kshs. 800,000/=. That the 2nd defendant would pay a deposit of Kshs. 300,000/= on the signing of the agreement and pay the sum outstanding to **AFC** on or before 5th February 2008 and the balance after signing the transfer and consent. The 2nd defendant took vacant possession of the land upon signing the agreement. There was a delay and the balance was paid on 19th February 2008 and the Branch Manager **AFC** did a letter addressed to the **KANDUYI LAND CONTROL BOARD** saying that they had no objection to the transfer. When the 2nd defendant took the surveyor to the land, it was discovered that the portion which he had been shown was 0.10 Ha and not 0.13 Ha as per the agreement. It also transpired that a portion of land measuring 0.05 Ha belonged to **PATRICK NANDASABA** the 3rd defendant and it was agreed that the said portion be surveyed and registered in the names of the 3rd defendant. On 11th March 2008, the consent of the Land Control Board was obtained authorizing the transfer of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/12920** from **MASINDE** to the 2nd defendant and on 28th march 2008, the 2nd defendant paid the balance price of Kshs. 151,320/=. She subsequently obtained her title on 19th June 2008 and started putting materials on the land in preparation for the construction

of her house. That during the transportation of materials to the land, the lorry damaged the plaintiff's gate and the parties mutually agreed to move the gate as it was on the road and a fresh gate was constructed and is still there. That the 2nd defendant informed the plaintiff that the land she had purchased had been charged to a financial institution and the plaintiff confirmed that she was the one who had also sold land to **MASINDE** and the 3rd defendant. That after constructing her Bungalow in 2009, she has lived on her portion peacefully with all her neighbours who include the plaintiff and her family until she received summons in this case. She denied having participated in any fraud or forging the signature of **MASIDZA** for the transfer of the suit land to **MASINDE**. She added that she carried out due diligence and was not even present when **MASINDE** purchased the suit land from the plaintiff and urged the Court to dismiss the suit with costs.

In his statement also dated 3rd September 2018, the 3rd defendant states that on 20th August 1994 he purchased a portion of land measuring 94 feet by 87 feet by 56 feet to be curved from the suit land from **MASIDZA** at a consideration of Kshs. 65,000/= which was paid in two instalments of Kshs. 32,000 on 20th August 1994 and Kshs. 33,000/= on 16th November 1994. He took possession of the said portion on which he constructed a two bed – roomed house in 1995 which he occupies to – date and the family of **MASIDZA** has raised no issues. That at the time of the transaction, the suit land had been charged to a financial institution which made it difficult to get the consent of the Land Control Board. However, **MASIDZA** promised him that he would apply for the consent once the loan is cleared. Unfortunately, **MASIDZA** passed away in 1998 before the said consent had been obtained. The 3rd defendant even participated in the burial arrangements of **MASIDZA** whose family promised to transfer his portion to him. In February 2008, the plaintiff informed him that the suit land had initially been transferred to **MASINDE** who was in the process of sub – dividing it after which he would get a title deed to his portion. Mutations were done and the suit land was sub – divided into parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921**. His title was processed for parcel **NO EAST BUKUSU/SOUTH KANDUYI/ 12921** measuring 0.05 Ha and was issued to him on 20th June 2008. That he has occupied his portion openly to the knowledge of everybody including the family of **MASIDZA** and it is therefore false for the plaintiff to allege that she only became aware about his presence on the said land on 26th June 2018. It is therefore imperative that this suit be dismissed with costs as it is an abuse of the due process of the Court.

In support of her case, the 2nd defendant filed a list of the following documents: -

1. Certificate of Official Search for land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026 dated 11th January 2008 in the name of **MASINDE**.
2. Land sale agreement dated 16th January 2008 between **MASINDE** as vendor and the 2nd defendant as purchaser for a portion measuring 0.13 Ha out of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.
3. Title deed for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026 in the name of **MASINDE**.
4. Land sale agreement dated 16th April 2004 between the plaintiff as the vendor and **MASINDE** as the purchase for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026 at a consideration of Kshs. 400,000/=.
5. Application and consent for sub – division of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.
6. Addendum to the sale agreement date 28th March 2008.
7. Notification of Discharge of Title NO EAST BUKUSU/SOUTH KANDUYI/8026 from AFC.
8. Letter dated 19th February 2008 from AFC to Chairman KANDUYI LAND CONTROL BOARD.
9. Receipts dated 19th February 2008 from AFC.
10. Application for consent and transfer of parcel NO EAST BUKUSU/ SOUTH KANDUYI/12920.
11. Mutations for land parcel NO EAST BUKUSU/SOUTH KANDUYI /8026 dated 20th February 2008.
12. Grant of Letters of Administration dated 14th November 2002 issued to the plaintiff in respect to the Estate of **MASIDZA** in BUNGOMA H.C SUCCESSION CAUSE No 30 of 2002.
13. Application for Confirmation of Grant issued to plaintiff.
14. Certificate of Confirmation of Grant issued to plaintiff dated 25th may 2010.
15. Photograph of house.

On his part, the 3rd defendant filed a list of the following documents: -

1. Land sale agreement dated 16th November 1994 between **MASIDZA** and the 3rd defendant for a portion measuring 94 feet x 87 feet x 56 feet x 42 feet out of parcel NO EAST BUKUSU/SOUTH KANDUYI/32125.
2. Title deed for land parcel NO EAST BUKUSU/SOUTH KANDUYI/ 12921 issued to the 3rd defendant on 20th June 2008.

3. Photograph of house.

The plaintiff filed a reply to the defence of the 2nd and 3rd defendants in which she denied having sold the suit land to **MASINDE** as Administratrix of the Estate of **MASIDZA**. She further denied that the sub – division of the suit land to create parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921** was done openly and with her knowledge. She reiterated the contents of her plaint and maintained that no succession has ever been done with respect to the suit land and thus any sub – division thereof is a nullity ab initio. The plaintiff further denied that the 3rd defendant purchased a portion of land measuring 0.05 Ha from **MASIDZA** on 20th August 1994 but died before transferring the same to him. She further denied that the 2nd and 3rd defendants have extensively developed their respective portions of land by building permanent houses valued at more than Kshs. 30 million with the full knowledge of the plaintiff.

The 4th and 5th defendants also filed a joint statement of defence dated 12th October 2018 in which they denied having colluded with **MASINDE** to disinherit the plaintiff and other beneficiaries of the Estate of **MASIDZA** of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8026**. They pleaded further that the transfer of the suit land and it's sub – division were done procedurally and within the law and the plaintiff's suit be dismissed with costs.

In reply to that defence, the plaintiff joined issues with the 4th and 5th defendants and reiterated the contents of her plaint. She urged that the defence by the 4th and 5th defendants be struck out and Judgment be entered as prayed in her plaint.

The trial commenced on 26th February 2020. The plaintiff, 1st, 2nd and 3rd defendants were the only witnesses who testified in respect of their respective cases. They adopted as their evidence the statements whose contents I have already summarized above. They also produced as their documentary evidence their respective list of documents which I have also already referred to in this Judgment.

The 3rd and 4th defendants did not file any witness statements or call any witnesses during the plenary hearing.

Submissions were thereafter filed both by **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the plaintiff, **MS WAKOLI** instructed by the firm of **LUBANGA & ASSOCIATES** for the 1st defendant, **MR MAKOKHA** instructed by the firm of **MAKOKHA, WATTANGA & LUYALI ASSOCIATES** for the 2nd and 3rd defendants and by **MR TARUS SENIOR STATE COUNSEL** for the **ATTORNEY GENERAL**.

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

The gist of the plaintiff's case is that she is the Administratrix of the Estate of **MASIDZA** who prior to his demise on 22nd December 1988, was the proprietor of the suit land. That on 20th April 2004, **MASINDE** whose Estate is administered by the 1st defendant colluded with the other defendants to disinherit the plaintiff and other heirs of **MASIDZA** by transferring the suit land to **MASINDE** and thereafter sub – dividing it into parcels **NO EAST BUKUSU/SOUTH KANDUYI/12919, 12920 and 12921** which were subsequently registered in the names of the 1st, 2nd and 3rd defendants respectively. It is her case that the said transfer and sub – divisions were done fraudulently particulars whereof have been itemized in paragraph 10 of her plaint. The defendants have denied the allegations of fraud levelled against them and pleaded that infact the plaintiff, as the Administratrix of the Estate of **MASIDZA** transferred the suit land to **MASINDE** vide a sale agreement dated 16th January 2008.

It is not in dispute that the suit land was first registered in the name of **MASIDZA** as the first owner on 30th June 1997. It is also not in dispute that the said **MASIDZA** died on 22nd December 1998. The Green Card to the suit land also confirms that it was transferred to **MASINDE** on 20th April 2004. It is common ground therefore that by the time **MASIDZA** passed away on 22nd December 1998, he was still the registered proprietor of the suit land. It is also clear from the documents produced by the parties herein that the plaintiff and the 1st defendant are the respective legal representatives of the Estates of **MASIDZA** and **MASINDE**. What this Court has to determine is whether the transfer of the suit land to **MASINDE**, it's sub – division and subsequent transfer of the resultant portions to the 1st, 2nd and 3rd defendants was done fraudulently with the intention of disinheriting the beneficiaries of the Estate of **MASIDZA**. This is because, fraud is the fulcrum of the plaintiff's case.

Fraud is a serious allegation which the law requires to be specifically pleaded and proved to the standard provided in law. The onus is on the party alleging fraud to prove such an allegation and the standard of proof is higher than that which obtains in ordinary civil cases. In **R. G. PATEL .V. LALJI MAKANJI 1957 E.A 314**, the Court held 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.”

Citing the case of **R. G. PATEL .V. LALJI MAKANJI** (supra) on the same issue, the Court of Appeal said as follows in the case of **ELDORET EXPRESS LTD .V. TAWAI LIMITED & NATIONAL LAND COMMISSION (INTERESTED PARTY) 2019 eKLR**: -

“The degree of proof must be such as to create a moral certainty though it need not reach the criminal standard of proof beyond reasonable doubt. This has to be so because allegations of fraud in a civil suit carry with them an element of criminality and are referred to as being quasi – criminal in nature. As Esther put it more than a century ago in LEVRE .V. GOLLD [1895] 1 & B 491 at page 498: -

“a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind.”

Thus it is not enough that a party should cry “fraud” they must back it up with clear particulars and prove it with satisfactory and solid evidence.”

In her evidence in support of the claim that the defendants fraudulently transferred the suit land to **MASINDE** and thereafter sub – divided it, the plaintiff stated as follows in paragraph 6, 7 and 8 of her statement: -

6: “That on the 20.4.2004, one PROTUS WAFULA MASINDE, now deceased in collusion, with the 4th and 5th defendants did cause land parcel EAST BUKUSU /SOUTH KANDUYI/8026 to be transferred from the name of CLEMENT FESTUS MASIDZA (deceased) to that of PROTUS WAFULA MASINDE all in contravention of the law of succession as no succession has ever been carried out in respect of land parcel number EAST BUKUSU/SOUTH KANDUYI /8026.”

7: “That thereafter on the 19.6.2008, PROTUS WAFULA MASINDE, the 4th and 5th defendants further caused land parcel number EAST BUKUSU/SOUTH KANDUYI/8026 to be sub – divided into three parcels namely: -

(a) EAST BUKUSU/SOUTH KANDUYI/12919 and registered into the name of PROTUS WAFULA MASINDE.

(b) EAST BUKUSU/SOUTH KANDUYI/12920 into the names of the 2nd defendant and

(c) EAST BUKUSU/SOUTH KANDUYI 12921 into the names of the 3rd defendant.”

8: “That on the 4.7.2018 EAST BUKUSU/SOUTH KANDUYI 12919 was transferred into the names of the 1st defendant.”

Although the plaintiff has pleaded several particulars of fraud against the defendants in paragraph 10 of her plaint including that the defendants forged the signature of **MASIDZA** in transferring the suit land to **MASINDE**, no iota of evidence was led to prove the allegation of forgery. And as will become clear shortly, there could have been no such evidence of forgery to place before the Court. It is clear that the substratum of the plaintiff’s allegation of fraud is because at the time of the transfer of the suit land to **MASINDE** in 2004, the suit land was still registered in the name of **MASIDZA** and no confirmation of Grant in respect of his Estate had been issued. Indeed, it was not until 25th May 2010 that the plaintiff obtained a confirmed Grant in respect of the Estate of **MASIDZA** and it did not include the suit land.

Section 45 (1) of the **Law of Succession Act** forbids any person from inter – meddling with the property of a deceased person. It states: -

“Except so far as expressly authorized by this Act, or by any written law or by a grant of representation under this Act, no person shall for any purpose take possession or dispose off or otherwise meddle with any free property of a deceased person.”

Section 82 (b) (ii) of the same Act states: -

“No immovable property shall be sold before confirmation of the grant.”

Picking up from the above provisions, **MR BW’ONCHIRI** Counsel to the plaintiff has submitted as follows at pages 6 and 7 of his submissions: -

“The plaintiff has produced a confirmed grant herein that clearly shows that land parcel number EAST BUKUSU/ SOUTH KANDUYI/8026 was not succeeded. It is thus clear as stated by the plaintiff in paragraph 8 of the plaint that land parcel number EAST BUKUSU/SOUTH KANDUYI/8026 was transferred to PROTUS WAFULA MASIDZA without adherence to the law of Succession hence rendering the transfer illegal, unlawful and void for all purposes.

Your Lordship the 1st defendant who is the widow of PROTUS WAFULA MASINDE failed to table any grant before Court showing if there was succession carried out by her late husband or any other person that enabled him acquire title over EAST BUKUSU/SOUTH KANDUYI/8026 from the late CLEMENT FESTUS MASIDZA.

The plaintiff has established her case by production of a grant issued in BUNGOMA HIGH COURT SECESSION CAUSE No 30 of 2002 that EAST BUKUSU/SOUTH KANDUYI/8026 was part of the property of her deceased husband that was succeeded upon.

Your Lordship it follows that the transfer of EAST BUKUSU/SOUTH KANDUYI/8026 from CLEMENT FESTUS MASIDZA to PROTUS WAFULA MASINDE was illegal and tainted with fraud on the face of the law.”

Contrary to those submissions, the grant issued to the plaintiff in respect to **MASIDZA**’s Estate, and which is document No 2 and dated 25th May 2010, shows clearly that the only property which she declared to be the property of the deceased was parcel **NO EAST BUKUSU/SOUTH KANDUYI/8027**. The suit property is not listed in that grant. Nonetheless, as I have already stated above, **Sections 45(1) and 82 (b) (ii)** of the **Law of Succession Act** make it clear that by entering into an agreement with **MASIDZA** on 16th January 2004 for the disposition of the suit land, the plaintiff was essentially an inter – meddler.

Having said so, however, and although none of the defendants pleaded limitation, (Counsel for the 1st defendant only made a fleeting

reference to that issue in her submissions), it is obvious to me that the plaintiff's suit is infact hopelessly time barred. The plaintiff's claim as is clear from paragraphs 8, 9 and 10 of her plaint is for the restitution of the suit land to the name of **MASIDZA** for the reason that by an agreement dated 20th April 2004, the defendants fraudulently transferred it to the name of **MASINDE** and subsequently sub – divided and had the resultant sub – divisions registered in the names of the 1st, 2nd and 3rd defendant. Limitation is an issue of law which goes to the jurisdiction of the Court. It can therefore be raised by the Court on it's own motion (suo moto) – **HAFSWA OMAR ABDALLA TAIB & OTHERS .V. SWALEH ABDALLA TAIB 2015 eKLR.**

Being a claim to land, this suit could not be filed after the end of 12 years from the date when the cause of action accrued. **Section 7** of the **Limitation of Actions Act** provides that: -

7 “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 the claims, to that person.”

From the plaintiff's own evidence, the fraud was first perpetrated on 20th April 2004 when **MASINDE** colluded with the 4th and 5th defendants to transfer the suit land from the name of **MASIDZA** to his name. That means that this suit ought to have been filed at the latest on 20th April 2016. It was filed on 10th August 2018 some 28 months late.

In order to circumvent the clear provisions of **Section 7** of the **Limitation of Actions Act**, the plaintiff stated in paragraph 10 of her statement as follows: -

“That I discovered of this ill acts on 26.6.2018 when the County Surveyor served me with a letter dated 21/6/2018 hence this claim.”

If the averment in that paragraph were correct, then this suit would be saved by the provision of **Section 26** of the **Limitation of Actions Act** which states that where an action is based on fraud of the defendant, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could, with reasonable diligence, have discovered it. However, the plaintiff cannot benefit from that provision and the claim that she discovered the fraud on 26th June 2018 can only be described as a mischievous attempt to try and save this suit which, in my view, is clearly statute barred.

Both the 1st, 2nd and 3rd defendants pleaded in their respective defences that it was the plaintiff who by a formal agreement dated 16th April 2004 sold the suit land to **MASINDE**. When she was cross – examined by **MS WAKOLI** during the plenary hearing, this is what she said: -

“I knew PROTUS WAFULA MASINDE. I sold him land. I sold him the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026.

I signed the sale agreement dated 16th April 2004 that I was selling him the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026. I was not forced to sign the said agreement which is part of the 1st defendant's documents.”

Similarly, when she was cross – examined by **MR MAKOKHA**, she said: -

“It is true that I sold to PROTUS WAFULA MASINDE the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8026. The land was 0.25 Ha but I didn't read the agreement well. It is true that I signed the agreement on 16th April 2004.”

When she was re – examined by her Counsel **MR BW'ONCHIRI**, she said: -

“I did not do succession for parcel NO 8026. I did not sell the whole of the parcel No 8026 to the 3rd defendant. I only sold him 0.1 Ha I didn't sell the whole land.”

The relevant parts of the sale agreements dated 16th April 2004 and which the plaintiff admits to have signed reads: -

“SALE AGREEMENT

THIS AGREEMENT is made on this 16th day of April 2004 between LEAH EGHIZA MAZIDZA ID NO 1180354 of P. O. Box 1218 BUNGOMA (hereinafter referred to as the Vendor) on the other part and PROTUS WAFULA MASINDE ID NO 8430019 of P.O. Box 2339 BUNGOMA (hereinafter referred to as the Purchaser) on the other part.

WHEREAS:

1. The vendor is the beneficial owner of all the portion of land clearly demarcated by boundaries on L. R. NO E. BUKUSU /S. KANDUYI/8026.

2. The vendor is desirous of disposing off a plot measuring 0.25 Ha to the purchaser at Kshs. 400,000 (four hundred thousand shillings). The vendor on this 16th day received Kshs. 200,000 and the remaining balance of Kshs. 200,000 is to be paid on or before the end month of every quarter.”

A copy of the Certificate of Search and the title deed in respect to the suit land shows that it's approximate area is 0.25 Ha which means that the plaintiff sold the whole of the suit land to the **MASINDE** and not, as suggested when she was re – examined by her own Counsel, a portion only measuring 0.1 Ha to the 3rd defendant. Clearly therefore the fraud was in fact committed by herself on 16th April 2004 when she signed the sale agreement transferring the suit land to **MASINDE**. It cannot be true that she discovered the fraud on 26th June 2018 as stated in her statement.

This suit is, in my view, statute barred and offends the provisions of **Section 7 of the Limitation of Actions Act**. It is for striking out.

However, should I be wrong on the issue of limitation, I will now proceed to consider the plaintiff's claim on its merits.

As I have already stated above, by the time the plaintiff executed the sale agreement with **MASINDE** on 16th April 2004 transferring the suit land, she was meddling with the Estate of a deceased person contrary to the law. It is however doubtful, in my view, whether the suit land actually formed part of the Estate of **MASIDZA**. **Section 3 of the Law of Succession Act** defines Estate as follows: -

“estate means the free property of a deceased person.”

The same provision defines free property in the following terms: -

“free property in relation to a deceased person means the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not been terminated by his death.”

During the plenary hearing, the 3rd defendant told the Court that prior to his demise in 1998, **MASIDZA** had sold to him a portion of land out of the suit land on 20th August 1994 which he is still in his possession. This is what he said: -

“I bought the land in dispute from CLEMENT MASIDZA on 20th August 1994. I took possession on 16th November 1994 after paying the last instalment. I am still in possession to – date and nobody has evicted me from it. I did not obtain it fraudulently.”

When she was cross – examined by **MR MAKOKHA**, the plaintiff said she had no problem with the 2nd and 3rd defendants. She added that she had only placed cautions on the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/12919** which is registered in the name of the 1st defendant and not parcels **NO EAST BUKUSU/SOUTH KANDUYI/ 12920** and **12921** which are registered in the names of the 2nd and 3rd defendants. This is what she said: -

“There were three (3) sub – divisions but I only put a caution on one portion NO 12919 not 12920 and 12921. I only put a caution on parcel No 12919 not the others. When I put the caution, PROTUS MASINDE was still alive. I have no problem with the 3rd or the 2nd defendants land parcels. I am aware that the 2nd and 3rd defendants have developed their portions of land that they bought.”

And upon being re – examined by **MR BW'ONCHIRI**, she said: -

“The 3rd defendant bought his portion from my late husband who died before the 3rd defendant had obtained title.”

The import of all the above is that the plaintiff was aware that there were purchasers who had interests in the suit land all along. That explains why she did not include it among the free property of **MASIDZA** when she obtained the grant in respect of his Estate on 25th May 2010. She was well aware that the suit land was property which **MASIDZA** was not legally competent to freely dispose during his life time because of the interest therein by the 3rd defendant and which therefore did not form part of **MASIDZA**'s Estate. She was also acutely aware that in view of the sale agreement which she had voluntarily executed on 16th April 2004 with **MASINDE** in relation to the suit land, any inclusion of the said property in the application for Confirmation of Grant would have elicited huge protests from the 1st, 2nd and 3rd defendants because it did not form part of **MASIDZA**'s free property. And as I stated at the commencement of this Judgment, the plaintiff's greed has certainly stirred up a fight – back by the 1st, 2nd and 3rd defendants and rightly so.

It is also trite that he who comes to equity must do so with clean hands and must also do equity. Equity will not allow a person to benefit from his own transgressions or illegalities. In the circumstance of this case, it is obvious that what the plaintiff is seeking is the restitution of the suit land into the name of **MASIDZA**. There is no doubt that the principle of restitution is applicable in this country – see **KENYA COMMERCIAL BANK LTD & ANOTHER V. SAMUEL KAMAU MACHARIA & OTHERS 2006 eKLR**. However, a restitutionary claim will not be up – held if, as is clear in this case, the plaintiff conferred a benefit on **MASINDE** while acting in her own self-interest and in the absence of compelling factors. Further, the suit land is no longer available in its original condition and it would be inequitable given the circumstances herein to make restitution at all or in full.

MR BW'ONCHIRI, submitting on the issue of intermeddling, has said the following at page 7 of his submissions: -

“Your Lordship the agreement dated 16.4.2004 allegedly purporting to transact on EAST BUKUSU/SOUTH KANDUYI/8026 is illegal having been entered into by parties who did not have capacity. To date no succession has been carried out over the suit title hence no person had capacity to transact over the same. What the agreement shows is an act that is prohibited by Section 45 of the Law of Succession Act Chapter 160 Laws of Kenya.”

The circumstances obtaining in this case are not similar to what obtained in the case of **BRENDA NELIMA KIMUNGUI & OTHERS .V. STEPHEN LUMBASI KUYI & ANOTHER 2021 eKLR**, a case in which, incidentally, **MR BW'ONCHIRI** acted for the 1st defendant. In the **BRENDA NELIMA KIMUNGUI** case (supra), not only did the beneficiaries of the Estate of the deceased plead and prove fraud but they also established a constructive trust in their favour. In this case now before me, it is instructive to note that the other beneficiaries of the Estate of **MASIDZA** have not been enjoined in this case but more fundamentally, and as I have already stated above, the fraud pleaded as against the defendants was in fact perpetrated by the plaintiff herself. That is indicative of the fact that the transfer of the suit land to **MASINDE** was solely for the plaintiff's own selfish interests and as is now clear, this suit was motivated by greed. It was certainly not instituted in the interest of justice.

As I have already stated above, it is doubtful if the suit land was in fact part of the Estate of **MASIDZA**. The plaintiff herself harboured those doubts and that is why she omitted it from the list of properties constituting the Estate of **MASIDZA**. Essentially therefore, the plaintiff is an officious intermeddler who is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

“Someone who confers a benefit on another without being requested or having a legal duty to do so, and who therefore has no legal grounds to demand restitution for the benefit conferred.”

The plaintiff cannot now be heard to claim, as she has done, that the titles for the land parcels **NO EAST BUKUSU/SOUTH KANDUYI12919, 12920 and 12921** be cancelled to revert to the title **NO EAST BUKUSU/SOUTH KANDUYI/8026** and be registered in the names of **MASIDZA**. Having failed to prove, as required in law, that the transfer of the suit land to **MASINDE** was procured fraudulently, the plaintiff has no basis upon which she can now fault its sub – division and transfer of the resultant parcels to the 1st, 2nd and 3rd defendants.

Counsel for the plaintiff has also submitted, citing the case of **LINUS NGANGA KIONGO & OTHERS .V. TOWN COUNCIL OF KIKUYU 2012 eKLR**, that since the 4th and 5th defendants chose to close their case without calling any witness, then the plaintiff's evidence is un – controverted. It is true that the 4th and 5th defendants only filed a defence but did not call any witnesses to adduce evidence challenging the plaintiff's testimony. However, the position in law as is clear from **Sections 107 and 109** of the **Evidence Act** is that the burden of proof lies on the party that alleges the existence of particular facts. And that proof is on a balance of probability. It is therefore immaterial that the defendant does not adduce any evidence because that does not lessen the plaintiff's burden to prove his case to the required standard. Where for example a suit is barred by the statute of limitation or allegations of fraud have not been proved as is the position in this case, it matters not how many witnesses the plaintiff calls in support of his case or that the defendant does not adduce any evidence. Of course un – controverted evidence bears a lot of weight but it must be evidence that can prove what the party has alleged and which he wants the Court to believe.

Further, it is not always fatal that a party does not call witnesses in support of his case particularly in a case such as this where other parties have testified and challenged the plaintiff's testimony. Therefore, a party need not adduce evidence if his case can be proved by the testimony of other witnesses. The Court of Appeal considered this issue in the case of **JULIAE ULRKE .V. TIWI BEACH HOTEL LTD 1998 eKLR** and said: -

“if a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 Rule 2 (1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself or by the arguments of his Counsel”

The Court was dealing with a case where a plaintiff does not testify in support of his case. However, that proposition applies with equal force in a case where a defendant does not testify or call witnesses. In the case now before me, it is not fatal that the 4th and 5th defendants did not testify. As is now clear, there is sufficient evidence from the 1st, 2nd and 3rd defendants rebutting the plaintiff's allegations of fraud.

From my evaluation of the evidence herein, I am not persuaded that the plaintiff has proved her case against the defendants as required in law. Not only has she failed in proving the allegations of fraud levelled against the defendants but further and more significantly, her suit offends the provisions of **Section 7** of the **Limitation of Actions Act**. This suit is therefore for dismissal.

The 1st defendant raised a Counter – Claim seeking Judgment against the plaintiff in the following terms: -

- (a) A declaration that the 1st defendant's late husband legally bought the suit land from the plaintiff.**
- (b) The plaintiff legally signed all necessary transfer forms in favour of the 1st defendant's late husband.**
- (c) A refund of the market value of a plot measuring 0.05 Ha initially sold to the 3rd defendant.**

With regard to prayers (a) and (b), I have already made a finding that the plaintiff has not proved any of the allegations of fraud levelled against the defendants. It will be superfluous to grant those prayers. A dismissal of the plaintiff's suit will serve the same purpose. With regard to prayer (c), it is in the nature of a special damage claim which has neither been pleaded nor specifically proved. The Counter – Claim is for dismissal. However, since the plaintiff precipitated this Counter – Claim due to her deceit, she is not entitled to costs thereof.

The up – shot of the above is that this Court makes the following disposal orders: -

1. The plaintiff's suit is dismissed with costs to the defendants.

2. The 1st defendant's Counter – Claim is dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

20th September 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF SEPTEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

This Judgment was due on 6th July 2021 but I was away attending a Conference in Mombasa. The delay is regretted but was due to official engagements.

Boaz N. Olao.

J U D G E

20th September 2021.