



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 267 OF 2013**

**MODE OF PROCEEDINGS.....FAST TRACK**

**JOHN AMUKUNE EVUSA (Suing as the personal representative of Estate of  
ELIAKIM EVUSA AGAMU – Deceased).....PLAINTIFF**

**VERSUS**

**THE CHAIRMAN, THE SCHOOL**

**COMMITTEE OF ST. VERONICA**

**SIRENDE PRIMARY SCHOOL.....1<sup>ST</sup> DEFENDANT**

**THE SECRETARY, BOARD OF**

**GOVERNORS OF ST. KIZITO**

**SECONDARY SCHOOL SIRENDE.....2<sup>ND</sup> DEFENDANT**

**THE CHAIRMAN ST. KIZITO**

**CATHOLIC CHURCH SIRENDE.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR BUNGOMA &**

**MT. ELGON DISTRICTS.....4<sup>TH</sup> DEFENDANT**

**HON. THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

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

Dishonesty and greed, it would appear, are no longer the preserve of the non – believers. This case is an illustration that those vices may, unfortunately, have now also pervaded some men of the cloth. **JOHN AMUKUNE EVUSA** (the plaintiff herein) is both a farmer and also a **PASTOR** at **SIRENDE** area. I don't know what his flock will say should they read this Judgment. But I am only an arbitrator applying the law to the facts as I understand them.

By an amended plaint filed herein on 18<sup>th</sup> March 2016 the plaintiff suing as the personal representative of the Estate of his late father **ELIAKIM EVASA AGAMU** (the deceased herein) sought Judgment against **THE CHAIRMAN, THE SCHOOL COMMITTEE ST. VERONICA SIRENDE PRIMARY SCHOOL, THE SECRETARY BOARD OF GOVERNORS ST. KIZITO SECONDARY SIRENDE, THE CHAIRMAN ST. KIZITO CATHOLIC CHURCH SIRENDE, the LAND REGISTRAR BUNGOMA & MT ELGON DISTRICTS** and the **ATTORNEY GENERAL** (the 1<sup>st</sup> to 5<sup>th</sup> defendants respectively) in the following terms:-

(a) The sub – division of the land parcel NO BUNGOMA/NAITIRI/133 into land parcels NO BUNGOMA/NAITIRI/469 and 470 and the subsequent transfer of the land parcel NO BUNGOMA/NAITIRI/469 be and are hereby declared null and void ab initio.

(b) The new land parcels NO BUNGOMA/NAITIRI/469 and 470 be and are hereby cancelled and the original land parcel

**NO BUNGOMA/NAITIRI/133 in the name of the original owner ELIAKIM EVASA AGUMU do revert.**

**(c) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants together with their workers, servants, students, members together with people living, using the original land parcel NO BUNGOMA/NAITIRI/133 be evicted therefrom forthwith unless they compensate the plaintiff by paying purchase price at the current market price per acre for 5 acres.**

**(d) Mesne profits.**

**(e) Costs and interest.**

The basis of the plaintiff's claim is that at all material times, the deceased was the registered proprietor of the land parcel **NO BUNGOMA/NAITIRI/133** (the suit land). However, on or about the 19<sup>th</sup> day of October 2010, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants colluded with the Government of Kenya and caused the suit land to be fraudulently sub – divided into two parcels being **BUNGOMA/NAITIRI/469** and **470** and the latter was transferred into the names of the Government of Kenya in trust for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Particulars of the defendants' fraud are pleaded in paragraph 8 of the plaint as follows: -

**(a) Sub – dividing the land parcel NO BUNGOMA/NAITIRI/133 into BUNGOMA/NAITIRI/469 and 470 into the name of the Government of Kenya without the requisite consent from the Land Control Board.**

**(b) Transferring the land parcel NO BUNGOMA/NAITIRI/470 into the name of the Government of Kenya without the requisite consent.**

**(c) Sub – dividing land belonging to a deceased person and transferring the same without succession.**

**(d) Illegally and unlawfully sub – dividing and transferring land registered in and belonging to a deceased person.**

That by an oral agreement between the 1<sup>st</sup> defendant and the deceased, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants occupied the suit land on the understanding that the 1<sup>st</sup> defendant would offset part of the Settlement Fund Trustee loan in lieu of the purchase price but that agreement was never honoured. Instead, and following that fraudulent sub – division of the suit land, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have continued their unlawful occupation of the parcel **NO BUNGOMA/NAITIRI/470** where they run a primary and secondary school as well as church services in permanent buildings erected thereon with impunity and to the detriment of the plaintiff thus necessitating this suit.

Together with the plaint, the plaintiff filed his statement dated 2<sup>nd</sup> April 2014 as well as list of documents dated 7<sup>th</sup> April 2014.

In his statement, he states that he is a pastor and peasant farmer living in Sirende area and that the deceased who was his father. That the deceased was allocated the suit land in the 1960's by the Settlement Fund Trustee subject to payment of the requisite loan. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants approached the deceased to allow them utilize four (4) acres with a promise to help him reduce the loan by either paying part of it or having it reduced. However, by the time the deceased passed away, the said promise had not been fulfilled. Meanwhile, the 1<sup>st</sup> and 2<sup>nd</sup> defendants brought in the 3<sup>rd</sup> defendant which constructed a permanent structure for worship. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants currently occupy over five (5) acres of the suit land yet they have not paid for it as promised. In the year 2010, the plaintiff was surprised to learn that the defendants had caused the suit land to be sub – divided into parcels **NO BUNGOMA/NAITIRI/469** and **470** and the parcel **NO BUNGOMA/NAITIRI/470** had, without due process, been registered and transferred to the Government of Kenya.

The plaintiff filed a list of the following documents: -

- 1. Copy of the title deed to the land parcel NO BUNGOMA/NAITIRI/133.**
- 2. Letter from the District Land Adjudication and Settlement Officer addressed to the Chief Accountant Settlement Fund Trustees Nairobi dated 19<sup>th</sup> November 1999.**
- 3. Letter from the District Land Adjudication and Settlement Officer addressed to the deceased dated 7<sup>th</sup> June 1999.**
- 4. Letter from the District Land Adjudication and Settlement Officer addressed to the deceased and dated 25<sup>th</sup> October 1999.**
- 5. Letter from the District Land Adjudication and Settlement Officer addressed to the deceased and dated 30<sup>th</sup> May 2007.**
- 6. Grant of Letters of Administration issued to the plaintiff on 4<sup>th</sup> March 2011 in respect of the Estate of the deceased.**
- 7. Receipts issued to the deceased for loan repayments by the Settlement Fund Trustees dated 18<sup>th</sup> November 1999, 19<sup>th</sup> December 1989 and 9<sup>th</sup> November 2006.**
- 8. Letter from the deceased and addressed to the Settlement Fund Trustees dated 17<sup>th</sup> March 1966 and copied to the Head teacher Sirende School.**

9. Certificate of Official Search for parcel NO BUNGOMA/NAITIRI/470.

10. Death Certificate for the deceased.

11. Letter from the Lands Administration Officer Bungoma dated 15<sup>th</sup> June 2010 and addressed to the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

12. Letter from the plaintiff's Counsel dated 18<sup>th</sup> June 2010 and addressed to the Lands Administration Officer Bungoma.

13. Pleadings in the Tongaren Land Dispute Tribunal Case No 6 of 2010.

14. Letter from the plaintiff's Counsel dated 11<sup>th</sup> October 2010 and addressed to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

15. Replying affidavit by the plaintiff filed in KIMILILI SRM LAND CASE No 13 of 2010.

16. Letter from the Settlement Officer dated 12<sup>th</sup> November 1969 and addressed to the deceased.

17. Notice of Intention to sue dated 7<sup>th</sup> July 2011.

18. Attorney General's letter dated 21<sup>st</sup> July 2011 addressed to the Permanent Secretary Ministry of Lands.

The 3<sup>rd</sup> defendant did not file any defence.

The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants filed a joint defence and filed Counter – Claim in which they denied that the suit land belongs to the Estate of the deceased or was registered in his names. They added that if it was, then the registration was done fraudulently since the suit land measuring 15 acres or thereabout has always been in the names of the Settlement Fund Trustees and the deceased was unable to complete the repayment of the loan and is therefore estopped from claiming it. That the sub – division of the suit land was done properly and the 1<sup>st</sup> defendant was allocated 5 acres out of the suit land by the Settlement Fund Trustees. They denied the allegations of fraud levelled against them adding that the sub – division of the suit land was done procedurally by the Settlement Fund Trustees who were the owners and not the deceased. They further denied that the 1<sup>st</sup> defendant is unlawfully occupying the suit land or that there was any oral agreement between the deceased and the 1<sup>st</sup> defendant regarding the ownership of the suit land as alleged by the plaintiff. They pleaded that the 1<sup>st</sup> defendant has been in the suit land since 1966 carrying on its business as a school peacefully without any interference and the orders of eviction or cancellation of title are not available to the plaintiff. Further, that the plaintiff's suit discloses no reasonable cause of action against the defendants and is scandalous frivolous, vexatious and an abuse of the process of this Court and should be dismissed with costs.

In their Counter – Claim, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants sought the following remedies: -

**1. Recall and cancellation of the title NO BUNGOMA/NAITIRI/133.**

**2. Upon cancellation of the title NO BUNGOMA/NAITIRI/133, 5 acres be excised therefrom and registered in the names of SIRENDE PRIMARY SCHOOL.**

**3. Re – allocation of BUNGOMA/NAITIRI/133.**

The defendant's claim is that the deceased had no valid title to the suit land and therefore cannot be protected by **Article 40** of the **Constitution**. That the deceased fraudulently and irregularly registered the suit land in his names particulars of which are pleaded in paragraph 4 of the Counter – Claim as follows:-

**(a) Registering the whole land known as BUNGOMA/NAITIRI/133 in his name despite knowing that 5 acres from the said suit land had been lawfully allocated to Sirende Primary School by the Government of Kenya.**

**(b) Knowingly registering the whole land known as BUNGOMA/NAITIRI/133 in his name despite knowing that he was only entitled to 10 acres from the said suit land.**

**(c) Knowingly registering the whole land known as BUNGOMA/NAITIRI/133 in his name despite knowing that there was a Public School already occupying 5 acres of the suit land.**

**(d) Fraudulently registering plot number 133 in NAITIRI scheme without following all the laid down procedures.**

**(e) Fraudulently registering plot number 133 in his name without consent and/or authority from the Settlement Fund Trustees.**

The defendants added that although the suit land was initially allocated to the deceased by the Government of Kenya for a charge of Kshs. 2,300/=, when the school was established on the land, the Government reduced the loan from the initial Kshs. 2,300/= to Kshs. 1,533/= to cater for the 5 acres occupied by the school and the decision was fully communicated to the deceased. The deceased therefore only paid for

10 acres out of the suit land after the loan was reduced by  $\frac{1}{3}$ . Therefore, the deceased procured registration of the suit land in his names through material non – disclosure and his Estate holds it in trust for the school which has occupied it for the last 44 years. That the creation of the land parcel **NO BUNGOMA/NAITIRI/470** was done properly. The defendants sought the dismissal of the plaintiff's suit with costs and that Judgment be entered in their favour as sought in the Counter – Claim.

The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants also filed their list of witnesses but only two of them testified. These are: -

**1. DAVID MASINDE NDURUCHI (DW 1) and,**

**2. JACOB SUKURA CHENG'OLI (DW 2).**

In his statement dated 27<sup>th</sup> June 2016, **DAVID MASINDE NDURUCHI (DW 1)** states that he is the head teacher of **SIRENDE PRIMARY SCHOOL** since January 2015 which has been in existence and in occupation of the suit land since the 1960's. That the suit land was allocated to the deceased without the knowledge that there was a school already occupying it. That upon realization of that fact, the Ministry of Lands reduced the premium which was to be paid by the deceased by  $\frac{1}{3}$  so as to cater for the school which was given 5 acres. The suit land was therefore sub – divided into two portions being parcel **NO BUNGOMA/NAITIRI /469** measuring 10 acres which was given to the deceased and parcel **NO BUNGOMA/NAITIRI/470** which was given to the school and there was no dispute.

In his statement also dated 27<sup>th</sup> June 2016, **JACOB SUKURA CHENG'OLI (DW 2)** confirms that in the 1990's, he was the P.T.A Chairman of the **SIRENDE PRIMARY SCHOOL** and was involved in having the suit land registered in the name of the school. That he travelled to the Lands Office in Nairobi on the instructions of the Settlement officer and the land was surveyed by the then District Surveyor one **MR OTIENO** in 1991 and mutation forms were prepared. The suit land was then sub – divided into two portions with parcel **NO BUNGOMA/NAITIRI/469** measuring 10 acres allocated to the deceased and parcel **NO BUNGOMA/NAITIRI/470** measuring 5 acres allocated to the school. That since 1991, there has been no dispute between the school and the family of the deceased. In 2010, the parcel **NO BUNGOMA/NAITIRI/470** was registered in the name of the Government.

The school has since the 1960's continued to occupy 5 acres out of the suit land which is parcel **NO BUNGOMA/NAITIRI/470** as demarcated by the surveyor in 1991. He was therefore shocked to learn that the whole of the suit land measuring 15 acres was secretly registered in the names of the deceased without the knowledge of the school.

The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants' list of documents comprised the following: -

**1. Un – dated letter addressed to the Ministry of Lands and Settlement by the deceased.**

**2. Letter of Allotment dated 6<sup>th</sup> September 1965.**

**3. Charge dated 6<sup>th</sup> September 1965.**

**4. Loan Agreement dated 6<sup>th</sup> September 1965.**

**5. Letter from the Ministry of Lands and Settlement addressed to the deceased and dated 12<sup>th</sup> November 1969.**

**6. Letter from the Senior Settlement Officer KITALE and addressed to the Settlement Officer KAMUKUYWA dated 28<sup>th</sup> October 1970.**

**7. Application for consent to sub – divide land parcel NO BUNGOMA/ NAITIRI/133 into two portions of 10 acres and 5 acres dated 8<sup>th</sup> June 1990.**

**8. Letter of consent to sub – divide land parcel NO BUNGOMA/NAITIRI /133 into two portions of 10 acres and 5 acres dated 13<sup>th</sup> June 1990.**

**9. Mutation forms dated 4<sup>th</sup> November 1991.**

**10. Receipts dated 27<sup>th</sup> February 1992.**

**11. Letter from the Land Adjudication and Settlement Department addressed to the District Surveyor Bungoma dated 26<sup>th</sup> January 1994.**

**12. Letter dated 2<sup>nd</sup> February 1994.**

**13. Letter dated 22<sup>nd</sup> January 1971.**

**14. Letter from the Ministry of Education dated 15<sup>th</sup> October 2008.**

The defendants also filed a supplementary list of documents dated 22<sup>nd</sup> August 2016 to which was annexed a copy of the Manual Register showing that the title to the suit land was collected by the plaintiff on behalf of the deceased on 5<sup>th</sup> September 2007.

The plaintiff filed a reply to the defence and a defence to the Counter – Claim in which he reiterated the contents of his plaint.

In his defence to the Counter – Claim, the plaintiff denied the allegations of fraud and invited the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to strict proof thereof.

The plaintiff further pleaded that the deceased paid all the loan due to the Settlement Fund Trustees totaling Kshs. 27,637/= before the title was issued to him. He denied that the loan was reduced.

The hearing commenced on 26<sup>th</sup> January 2021 and the plaintiff was the only witness in support of his case. The defence case was heard on 27<sup>th</sup> May 2021 and the defendants called **DAVID MASINDE NDURUCHI (DW 1)** and **JACOB SUKURA CHENG'OLI (DW 2)** in support of their case.

All the witnesses adopted as their evidence their respective statements and also produced the documents listed above.

Submissions were thereafter filed by **MR KASSIM** instructed by the firm of **KASSIM SIFUNA & ASSOCIATES ADVOCATES** for the plaintiff and by **MR TARUS SENIOR STATE COUNSEL** for the **ATTORNEY GENERAL** on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

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

The following are the issues that I have identified for my determination: -

- 1. Whether the sub – division of the suit land to create parcels NO BUNGOMA/NAITIRI/469 and 470 was fraudulent.**
- 2. Whether the titles NO BUNGOMA/NAITIRI/469 and 470 should be cancelled and revert to the original title NO BUNGOMA/NAITIRI/133 in the names of the deceased.**
- 3. Whether the plaintiff is entitled to the orders of eviction of the defendants or to be compensated for the value of the portion they occupy plus mesne profits.**
- 4. Whether the deceased fraudulently registered the whole title NO BUNGOMA/NAITIRI/133 in his names while aware that the 1<sup>st</sup> and 2<sup>nd</sup> defendants occupy 5 acres and he was only entitled to 10 acres.**
- 5. Whether the Government holds a valid title NO BUNGOMA/NAITIRI /470 in trust for SIRENDE PRIMARY SCHOOL.**
- 6. Who shall bear the costs.**

It is common ground that the suit land has since 3<sup>rd</sup> May 2008 been registered in the names of the deceased. A title deed was issued to him on 5<sup>th</sup> May 2008. It is also not in dispute that prior to that registration, the suit land was under the Settlement Fund Trustees. It has since been sub – divided into two portions being land parcels **NO BUNGOMA/NAITIRI/469** and **470** and the latter measuring 2.0 Hectares (about 5 acres) is registered in the name of the Government of Kenya and reserved for the 1<sup>st</sup> defendant. It is the plaintiff's case that the sub – division and registration was done fraudulently.

An allegation of fraud is a serious one. It must therefore be proved to the required standard and the burden of proof, as stated under Section 109 of the Evidence Act, is on the plaintiff. In **KINYANJUI KAMAU .V. GEORGE KAMAU 2015 eKLR** the Court of Appeal held that: -

***“It is trite law that any allegations of fraud must be pleaded and strictly proved. See **NDOLO .V. NDOLO (2008) 1 KLR (G & F) 742** wherein the Court states that “we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously high than that required in ordinary civil cases, namely proof upon a balance of probabilities.”*** Emphasis added.

In **R. G. PATEL .V. LALJI MAKANI 1957 E.A 314**, the then Court of Appeal for East Africa stated thus: -

***“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.”***

As to whether there is any evidence to support any allegations of fraud is largely a question of fact – **MUTSONGA .V. NYATI 1984 KLR 425**.

In paragraph 8(a) to 8(c) of his plaint, the plaintiff has pleaded the allegation of fraud against the defendants as sub – dividing and transferring the suit land belonging to a deceased person without the consent of the Land Control Board and before succession was done.

Further, that the defendants fraudulently transferred the portion **BUNGOMA/NAITIRI/470** into the name of the Government of Kenya without the requisite consent. However, the defendants have availed an application for consent of the Land Board dated 8<sup>th</sup> June 1990 signed by the deceased seeking consent to sub – divide the suit land into two portions of 10 acres and 5 acres. The purpose of the application as is clear from the application form, was to allocate the school its portion. The application was allowed on 14<sup>th</sup> June 1990 as is also clear from the letter of consent produced by the defendants. The defendants also produced the Mutation Form dated 4<sup>th</sup> November 1991 approving the sub – division of the suit land to create land parcels **NO BUNGOMA/NAITIRI/469** and **470**. It is also signed by the deceased and I did not hear the plaintiff allege that the deceased’s signatures either on the application for consent or the Mutation Form were forged. The Death Certificate produced by the plaintiff shows that the deceased passed away on 13<sup>th</sup> May 2009. The plaintiff was therefore being dishonest when during the plenary hearing, he said: -

***“The land parcel NO BUNGOMA/NAITIRI/133 belonged to my deceased father which the defendants fraudulently acquired and have taken over.”***

It was also incorrect for him to state in paragraphs 5 and 6 of his statement dated 2<sup>nd</sup> April 2014 that: -

***“That 1<sup>st</sup> and 2<sup>nd</sup> defendants have been encroaching onto the remainder of the suit land and now occupy over 5 acres of the suit land.***

***They have made promises to pay for the land but in vain. They have been using all means to get the suit land. In the year 2010, I was surprised to learn that the defendant caused land parcel NO BUNGOMA/NAITIRI/133 sub – divided into 469 and 470 and had 470 transferred to the Government of Kenya without due process of law of succession had not been done and the registered owner had passed away.”***

In the face of clear and un – controverted evidence that the deceased personally sought and obtained the consent to sub – divide the suit land into two portions measuring 10 acres and 5 acres and also signed the Mutation Form during his life – time, the plaintiff’s allegations of fraud on the part of the defendants have not been proved. If anything, the evidence shows that it is the plaintiff, rather than the defendants, who is being dishonest and is trying to acquire through fraudulent means what his father had already ceded to the **SIRENDE SCHOOL** during his life time as he was entitled to do.

It is also clear from the evidence that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have since the 1960’s been occupying 5 acres out of the suit land and which is now known as parcel **NO BUNGOMA/NAITIRI/470**. There is nothing to suggest that during his life time, the deceased tried to evict the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the suit land yet, unlike the plaintiff, he had a greater interest therein. The plaintiff cannot now seek orders to evict the said defendants from the land which they have occupied for over 60 years with the knowledge and consent of the deceased. The prayers for mesne profits and compensation for the value of the land occupied by the 1<sup>st</sup> and 2<sup>nd</sup> defendants are also not available for the following reasons. Firstly, this Court has already found that no fraud was committed by the defendants as alleged. Secondly, even if fraud had been proved, the claims for mesne profits and compensation by paying the purchase price being special damages claims needed to be specifically pleaded and proved. That was not done. All that the Court could glean from the letter dated 11<sup>th</sup> October 2010 addressed to the 1<sup>st</sup> and 2<sup>nd</sup> defendants by the plaintiff’s Counsel is a demand for **“Kshs. 5,000,000/= being the purchase price for 5 acres at Kshs. 1,000,000/= per acre.”** That is not sufficient to sustain a claim for special damages. And since the sub – division of the suit land to create parcels **NO BUNGOMA/NAITIRI/469** and **470** has not been shown to have been done fraudulently, the plaintiff is not entitled to the orders cancelling the titles **NO BUNGOMA/NAITIRI/469** and **470**.

The plaintiff’s suit is clearly for dismissal.

The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants pleaded in paragraph 25 of their defence that the plaintiff’s suit discloses no reasonable cause of action and is scandalous, frivolous, vexatious and an abuse of the Court process. There is merit in that claim since this suit appears to me to offend the provisions of **Section 7** of the **Limitation of Actions Act** which reads: -

***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 he claims, to that person.”***

It is common ground that the 1<sup>st</sup> defendant has been in occupation of a portion of the suit land since the 1960’s. The plaintiff’s claim filed 60 years later in 2013 is clearly statute barred.

It is also not in dispute that the suit land is registered in the names of the deceased. The plaintiff produced as part of his evidence the title deed thereto dated 5<sup>th</sup> May 2008 and which shows that the suit land measures 6.9 Hectares. The manual register which is part of the documents produced by the defendants shows that the title deed to the suit land was collected by the plaintiff on behalf of the deceased on 5<sup>th</sup> September 2007. It is not clear how a title issued in 2008 could have been collected one year earlier. Nonetheless, it is the case of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants that the deceased fraudulently and irregularly registered himself as the proprietor of the whole suit land knowing very well that 5 acres thereof had already been allocated to **SIRENDE SCHOOL** which was, and still is, in occupation.

That the deceased was the allottee of the suit land under the Settlement Fund Trustee cannot be disputed. It is also acknowledged that since the 1960’s, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been in occupation of 5 acres out of the suit land where they have gone ahead to invite the 3<sup>rd</sup> defendant. That occupation commenced long before the deceased had paid the loan owed to the Settlement Fund Trustees. This prompted the deceased to write a letter (the date is illegible) to the Ministry of Lands and Settlement as follows: -

***“Ministry of Lands and Settlement***

**P. O. Box 30450**

**NAIROBI**

**RE: PLOT NO 133 NAITIRI SCHEME**

***There is a school in my plot which has been built on illegally. May I be informed why I pay loan on this plot in full. I would like if this school is legal my land charge be reduced as the school has taken almost 4 acres.***

***Waiting to hear from you, sir.***

***Yours faithfully***

***ELIAKIM EVUSA AGAMU.”***

By a letter dated 12<sup>th</sup> November 1969, the Senior Settlement officer Nzoia addressed the deceased as follows through the Settlement Officer Kamukuywa: -

***“Mr Eliakim Evusa***

***Plot 133***

***NAITIRI SHCEME***

***RE: SCHOOL ON YOUR PLOT.***

***There is a general feeling that you have allowed a school to operate on 4 acres which is part of the plot you signed documents for.***

***Going through the records, I have found that the school is a legal one run by Bungoma County Council and sponsored by the Roman Catholic Mission.***

***Reading through a Photostat copy of your letter written direct to Nairobi without copies to Senior Settlement Officer or area Settlement Controller, I notice that you are complaining of paying loan for the full charge of your plot whereas 4 acres are occupied by the school.***

***May I know please whether it will be proper for me to recommend a reduction of the land charge of your plot so that you are billed for the only land you are now utilizing.***

***N. E. MUGITA***

***SENIOR SETTLEMENT OFFICER – NZOIA AREA.”***

The above letter was forwarded to the deceased on 13<sup>th</sup> November 1969 by the Settlement Officer Kamukuywa Complex. It is not however clear whether the deceased responded to the said letter and if so, what his response was. However, by another letter dated 28<sup>th</sup> October 1970, the Senior Settlement Officer Kitale and the Director of Settlement wrote to the Settlement Officer Kamukuywa Complex as follows: -

***“PLOT NO 133 – NAITIRI SCHEME***

***Appended below is a copy of letter Ref: LO/7/133/9 of 12.10.70 for your action.***

***“Your letter Ref NO ASC(N)/11.6.233 dated 29<sup>th</sup> May, 1970 refers.***

***Land charge on this plot after excision of 5 acres for school site has been reduced by  $\frac{1}{3}$  (a third).***

***Enclosed please find fresh documents to be accepted and signed in your presence, returning my copies for further action.”***

***Signed.***

***P J MUULA***

***for DIRECTOR OF SETTLEMENT***

**A. KIBET**

**for SENIOR SETTLEMENT OFFICER KITALE.”**

It is instructive to note that the above letter pre – dates the application for consent of the Land Control Board to sub – divide the suit land into two portions measuring 10 acres and 5 acres and dated 8<sup>th</sup> June 1990 as well as the Mutation Form dated 4<sup>th</sup> November 1991 all of which were signed by the deceased.

There is also another letter dated 22<sup>nd</sup> January 1971 from the Settlement officer Kamukuywa Complex and addressed to the Senior Settlement Officer Kitale. It reads: -

**“The Senior Settlement Officer**

**P. O. BOX 203**

**KITALE**

**PLOT NO 133 – NAITIRI SCHEME**

**Your letter NZ/7/11/3/ dated 28<sup>th</sup> October 1970**

**Attached herewith are fresh letter of Allotment and charge and ancillary form duly signed and witnessed for your onward transmission to Nairobi.**

**(name not legible)**

**SETTLEMENT OFFICER – KAMUKUYWA COMPLEX.”**

Finally, there is the letter dated 26<sup>th</sup> January 1994 and addressed to the District Surveyor, Bungoma by the Director of Land Adjudication and Settlement. It reads: -

**“RE: PLOT NO 133 – NAITIRI SETTLEMENT SCHEME.**

**The above plot engulfs a Primary School. The Primary School covers about 5 acres.**

**The purpose of this letter is to ask you to separate the two. The relevant authorized Mutation Forms are enclosed for your necessary action.**

**By a copy of this letter, the District Land Registrar is asked to register the resultant parcels in the name of Settlement Fund Trustees. The Settlement officer is also instructed to assist in finalizing this issue.**

**B. G. MUNGAI**

**C. for DIRECTOR OF LAND ADJUDICATION/SETTLEMENT.”**

That letter was written after the deceased had signed the Mutation Forms and applied for the consent of the Land Control Board to sub – divide the suit land. It was also written long after the Director of Settlement had reduced the land charge on the suit plot by one – third following excision of 5 acres therefrom for the school plot. All this evidence taken together with the fact that the deceased did not, during his life – time, institute any proceedings against the defendants for illegally occupying part of the suit land, can only lead to the irresistible conclusion that the deceased agreed to the proposal to transfer a portion measuring 5 acres for use by the School.

In his defence to the Counter – Claim, the plaintiff has pleaded that the deceased paid the outstanding loan and accrued interest to the Settlement Fund Trustees amounting to Kshs. 27,637/= upon which the discharge was issued and the title for the entire suit land was processed in his name. It is the defendants’ case however that the deceased only paid for 10 acres of the suit land after his loan was reduced by one – third. Although the plaintiff produced receipts dated 19<sup>th</sup> December 1989, 18<sup>th</sup> November 1999 and 9<sup>th</sup> November 2006 as evidence that the deceased repaid the whole loan, it is important to note that all those payments were made after 28<sup>th</sup> October 1970 when the Director of Survey and the Senior Settlement Officer had already communicated to the deceased the decision to reduce his loan by one – third. The onus was on the plaintiff to demonstrate that the Kshs. 27,637/- which the deceased paid was for the whole suit land (which actually measures 6.9 Hectares i.e. 17 acres and not 15 acres as suggested by the parties) and not for only 10 acres after the deceased had voluntarily made an application to transfer 5 acres to the 1<sup>st</sup> defendant. If the deceased had not accepted the proposal to transfer 5 acres out of the suit land to the 1<sup>st</sup> defendant in lieu of a reduction of the loan, nothing would have been easier than for him to say so in clear terms. This Court takes note of the fact that indeed the suggestion to reduce his loan obligation to the Settlement Fund Trustees was first raised by the deceased himself in his un – dated letter addressed to the Ministry of Lands and Settlement. It is obvious to this Court that the District surveyor and Land Registrar Bungoma did not promptly act on the letter dated 26<sup>th</sup> January 1994 from the Director of Land Adjudication and Settlement forwarding to them the Mutation Form and directing them to register the 5 acres in the names of the Settlement Fund Trustees to hold in trust

for the 1<sup>st</sup> defendant. The deceased, taking advantage of that lapse, and in collusion with some officers in the Lands Registry at Bungoma, was able to fraudulently have the whole suit land registered in his names including the 5 acres that properly belonged to the 1<sup>st</sup> defendant. That fraud was continued when the plaintiff, on behalf of the deceased, collected the title deed to the suit land and now wants to perfect it by seeking the orders herein.

Counsel for the plaintiff has submitted, and rightly so, that the deceased never signed any transfer forms transferring the land parcel **NO BUNGOMA/ NAITIRI/470** to the Government of Kenya or any other person. That cannot be disputed. However, from the totality of the evidence herein, the conclusion that the deceased voluntarily relinquished part of the suit land to the school is inevitable.

In my view, the conduct of the deceased by applying for consent to sub – divide the suit land and signing the Mutation Form following his own request for a reduction in the loan sum due, amounted to a waiver of his right to the 5 acres and the plaintiff is now estopped from claiming the whole suit land. Giving a history of Estoppel, Lord **DENNING** said the following in **MCLIKENNY .V. CHIEF CONSTABLE OF WEST MIDLANDS 1980 ALL E.R 227**: -

*“..... we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying ‘estoppel is only a rule of evidence. If you go into another room, you will find a different notice; estoppel can give rise to a cause of action.’ Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others.”* Emphasis mine.

The above was adopted by the Court of Appeal in the case of **748 AIR SERVICES LTD .V. THEURI MUNYI 2017 eKLR**. In the circumstances of this case, it is clear to me that the deceased waived his right to a portion of the suit land voluntarily by his own conduct. Therefore, the plaintiff as his representative cannot now purport to claim the same land. In **BANNING .V. WRIGHT 1972 2 ALL. E.R 987** also cited by the Court in the case of **7484 AIR SERVICES** (supra), the House of Lords stated thus with regard to waiver: -

*“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead abandonment by way of confession and avoidance if the right is thereafter asserted .....*

*Waivers are not always in writing. Sometimes a person’s actions can be interpreted as a waver – waiver by conduct.”*

In **SITA STEEL ROLLING MILLS LTD .V. JUBILEE INSURANCE COMPANY LTD 2007 eKLR** it was stated thus: -

*“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”*

In his submissions, Counsel for the plaintiff avers that the defendants have acted illegally by intermeddling with the deceased’s Estate contrary to **Section 45** of the **Law of Succession Act**. Counsel further submitted as follows: -

*“Since the deceased person never sub – divided nor filled or signed any forms transferring/passing good title to any of the defendants herein, the act of registering such transfer by the 4<sup>th</sup> defendant was illegal and fraudulent. To-date, the plaintiff is still in possession of the original title deed. He produced copy as exhibit 18 which proves that sub – division was for all purposes illegal.”*

It is of course correct that the title to the suit land is registered in the names of the deceased. But that title is under challenge and the plaintiff was obliged to demonstrate that the title is protected by **Article 40** of the **Constitution** as well as **Sections 24** and **25** of the **Land Registration Act**. In any event, **Article 40** of the **Constitution** only protects a title which was not acquired unlawfully while **Section 26** of the **Land Registration** makes it clear that a title deed is only *“prima facie evidence”* of ownership. As was held in the case of **MUNGU MAINA .V. HIRAM GATHIHA MAINA C.A CIVIL APPEAL No 239 of 2009 [2013 eKLR]**: -

*“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is in challenge and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”*

Whereas it is a matter of fact that the suit land has since 5<sup>th</sup> May 2008 been registered in the name of the deceased, it is also now a matter of fact proved by cogent evidence that long before that registration, the deceased had applied to sub – divide it to set aside a portion measuring 5 acres for the use by the 1<sup>st</sup> defendant.

This was pursuant to his own request for a reduction of his loan with the Settlement Funds Trustees which was allowed on that understanding. It would be un – just and inequitable for the plaintiff to now claim the whole suit land and seek orders to evict the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants when his own father never even attempted to do so. That is a clear manifestation of un – mitigated greed and dishonesty which a Court of equity will not countenance. The registration of the land parcel **NO BUNGOMA/NAITIRI/470** in the name of the Government of Kenya to hold in trust for **SIRENDE PRIMARY SCHOOL** was done procedurally and in fact that registration ought to have been done

much earlier than on 19<sup>th</sup> October 2010 were it not for the lapses or complicity on the part of the Land Registrar and Surveyor Bungoma.

In their Counter – Claim, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants seek the cancellation of the title **NO BUNGOMA/NAITIRI/133** and reinstatement to plot **No 133** for re – allocation. That would be un – just as plot **No 133** is no longer available for re – allocation by the Settlement Fund Trustees. This Court will be making appropriate orders shortly.

Ultimately therefore and having considered all the evidence herein, this Court enters Judgment for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants as follows: -

**1. The plaintiff’s suit is dismissed.**

**2. The Counter – Claim by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants is allowed in the following terms: -**

**(a) The title to the land parcel NO BUNGOMA/NAITIRI/133 issued in the name of ELIAKIM EVUSA AGAMU on 5<sup>th</sup> May 2008 is hereby cancelled.**

**(b) The registration of the title NO BUNGOMA/NAITIRI/470 in the name of the Government of Kenya in trust for the SIRENDE PRIMARY SCHOOL is hereby affirmed.**

**(c) The title NO BUNGOMA/NAITIRI/469 shall remain in the name of the deceased.**

**(d) The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are awarded the costs of the dismissed suit and their Counter – Claim.**

**BOAZ N. OLAO.**

**J U D G E**

**7TH OCTOBER 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 7<sup>th</sup> day of October 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**7<sup>th</sup> October 2021.**