



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 303 OF 2013**

**(FORMERLY CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 621 OF 2009)**

**JOSEPHAT DOE OKIRIA.....PLAINTIFF**

**VERSUS**

**LUDOVICIUS ORIAMA OKITOYI.....1<sup>ST</sup> DEFENDANT**

**FAUSTINO OPURU OJULOTO.....2<sup>ND</sup> DEFENDANT**

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

**JOSEPHAT DOE OKIRIA** (the plaintiff herein) moved to this Court by a plaint dated 6<sup>th</sup> August 2009 and filed on the same day, originally in the Subordinate Court, in which he sought against **LUDOVICIUS ORIAMA OKITOYI** (1<sup>st</sup> defendant herein) Judgment in the following terms: -

**(a) A declaration that the defendant, his agents, servants and/or workers acts on land parcel NO SOUTH/TESO/OSURETTE/2427 are unlawful and illegal, an order of injunction restraining the defendant, whether by himself, his servants, agents or workers whatsoever from entering, erecting houses or using the above parcel in any manner. The plaintiff also claimed for damages.**

**(b) Costs**

**(c) Interest on (a) and (b)**

**(d) Further or other relief.**

The basis of the plaintiff's claim is that he is the sole registered owner of all that parcel of land known as **SOUTH TESO/OSURETTE/2427** (hereinafter the suit land) with an approximate area of 0.08 Ha as per the registry map sheet No. 5 whose title he obtained on 17<sup>th</sup> March 2009 being a commercial parcel of land in **MALABA TOWNSHIP**.

However, in April 2009, the defendant without any lawful permission from the plaintiff put materials on the suit land and is in the process of erecting a permanent structure and also fencing it.

Despite demands from the plaintiff, the Provincial Administration and other law enforcement agencies, the defendant has refused to remove the materials thus hindering the plaintiff from utilizing the suit land.

The plaint dated 6<sup>th</sup> August 2009 was never amended by the plaintiff to enjoin **FAUSTINO OPURU OJULOTO** (the 2<sup>nd</sup> defendant). However, by his own application dated 14<sup>th</sup> April 2010 and filed under Certificate of Urgency, **FAUSTINO OPURU OJULOTO** filed a chamber summons seeking to be enjoined in these proceedings as a 2<sup>nd</sup> defendant and on 20<sup>th</sup> April 2010, **HON. R. NYAKUNDI – CHIEF MAGISTRATE** (as he then was) granted that application. However, the plaint herein remains the one dated 6<sup>th</sup> August 2009 and that is clear even from the submissions by counsel.

Following the orders granted on 20<sup>th</sup> April 2009, the defendants filed a joint further amended statement of defence and Counter – Claim dated 14<sup>th</sup> December 2015 in which they pleaded, inter alia that the 2<sup>nd</sup> defendant has been and is still the registered proprietor of the land parcel **NO SOUTH TESO/OSURETTE/2301** (a sub – division of the original land parcel **NO SOUTH TESO/OSURETTE/ 1682**) which measures approximately 0.36 Ha and whose boundaries are well demarcated on the ground. They denied having heaped any building materials on the suit land as alleged or that the 1<sup>st</sup> defendant was in the process of constructing a house on, or fencing the suit land. In the

alternative, the defendants pleaded that in the year 2007, the 2<sup>nd</sup> defendant sold an un-surveyed portion measuring 50 ft by 100 ft of his parcel **NO SOUTH TESO/OSURETTE/2301** to the 1<sup>st</sup> defendant who took immediate possession, collected building materials, erected a fence and constructed a building which as at the time the pleadings were filed, was at lintel level. They however denied each and every averment in the plaint.

By way of Counter – Claim, the defendants pleaded that in or about the year 2009 the plaintiff, without the consent of the defendants, encroached onto and appropriated to himself part of land parcel **NO SOUTH TESO/OSURETTE/2301** and fraudulently procured proprietorship of the land parcels **NO SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428** which parcels were procured through the fraudulent partitioning of parcel **NO SOUTH TESO/OSURETTE /1512**.

Other particulars of fraud pleaded by the defendants include: -

- Ø **Procuring an illegal survey, desecrating the boundaries and sanctity of parcel NO SOUTH TESO/OSURETTE/2301.**
- Ø **Procuring falsification of land Registry maps and registers to cover up fraud.**
- Ø **Abusing the process of the Court by making false claims aimed at legitimizing fraud.**
- Ø **Encroaching and converting part of the land parcel NO SOUTH TESO/OSURETTE/2301 to create land parcels NO SOUTH TESO/OSURETTE 2427 and 2428 and illegally influencing the issue of fake title deeds thereof to himself.**

The defendants therefore pray for the dismissal of the plaintiff's suit and for Judgment in their favour as follows: -

- 1. A declaration that the registration of plaintiff as proprietor of land parcels NO SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428 is fraudulent and the same be cancelled and the title NO SOUTH TESO/OSURETTE/1512 be restored.**
- 2. A mandatory injunction directed at the plaintiff, his servants, agents and assigns to correct the fraud and restore parcel NO SOUTH TESO/OSURETTE/2301 to it's status before the fraud.**
- 3. A prohibitory injunction to restrain and prohibit the plaintiff, his servants, agents and assigns from entering upon or making claims over land parcel NO SOUTH TESO/OSURETTE/2301.**
- 4. General and exemplary to the defendants against the plaintiff for fraud.**
- 5. Costs of the Counter – Claim and interest at Court rates.**
- 6. Any other or further relief this Honourable Court may deem fit to grant.**

Together with their pleadings, the parties filed their statements and those of their respective witnesses as well as the lists of their documentary evidence.

When the trial commenced on 20<sup>th</sup> September 2018, the plaintiff adopted as his evidence the statement dated 30<sup>th</sup> August 2011 as well as the list of documents filed.

In the said statement, he states that he is the registered proprietor of the suit land but in April 2009, the 1<sup>st</sup> defendant placed building materials thereon and commenced the construction of a permanent structure. That despite demands to remove the said materials, the 1<sup>st</sup> defendant has refused to do so thus hindering the plaintiff from fully utilizing the suit land hence this suit. He added during his oral testimony that he did not know the 1<sup>st</sup> defendant but it was the 2<sup>nd</sup> defendant who sold to the 1<sup>st</sup> defendant the portion of the land on which the building materials were being kept. He denied having obtained registration of the suit land fraudulently but added that the land parcel **NO SOUTH TESO/OSURETTE/2301** belongs to the 2<sup>nd</sup> defendant. He therefore prayed for the dismissal of the defendants' Counter – Claim with costs.

The plaintiff called as his witness **TOM CHEPKWESI (PW 2)** currently the Land Registrar **NAROK** but who previously worked at **BUSIA**. The witness recalled that on 30<sup>th</sup> October 2015 he visited the land parcels **NO SOUTH TESO/OSURETTE/2427, 2426, 2428, 2301 and 2301** in the company of the **COUNTY SURVEYOR MR JULIUS MULUSA**, the parties herein and **MR IKAPEL** counsel for the defendants. The purpose of the visit was to establish the boundaries of the said parcels of land. He established that whereas land parcel **NO SOUTH TESO/OSURETTE/2427** had a clear boundary, there was encroachment by parcels **NO SOUTH TESO/OSURETTE/2426 and 2428**. He also noted that someone had put up a building on the land parcel **NO SOUTH TESO/ OSURETTE/2427**. His report dated 4<sup>th</sup> December 2015 and that of the Surveyor dated 8<sup>th</sup> December 2015 were with the consent of the parties admitted as part of the evidence having been filed on 24<sup>th</sup> May 2016.

In his defence and Counter – Claim, the 1<sup>st</sup> defendant also adopted as his evidence his statement dated 3<sup>rd</sup> May 2011 and his lists of documents.

In the said statement, he narrated how in the year 2006 while looking for a plot in **MALABA TOWNSHIP**, he met the 2<sup>nd</sup> defendant who offered to sell him a plot from his land parcel **NO SOUTH TESO/OSURETTE/1682** measuring 60 ft by 100 ft. They signed a sale

agreement on 31<sup>st</sup> March 2007 and the 1<sup>st</sup> defendant made a down payment of Kshs. 20,000/= and the balance of Kshs. 60,000/= was to be paid as and when the 2<sup>nd</sup> defendant needed money to pay school fees for his children. There was no specific time frame for the completion of the purchase price but pending the approval of the Land Control Board, the 2<sup>nd</sup> defendant allowed him to commence the development of the said portion which he commenced in April 2007 and all this time, the plaintiff who was his neighbour watched him and even used to assist him in planting seedlings. He paid the last instalment of the purchase price in 2008 and as he was making arrangements to apply for the Land Control Board Consent to obtain his titles, the plaintiff astonished him with Court Summons alleging that the 1<sup>st</sup> defendant had constructed his home on the plaintiff's land parcel **NO SOUTH TESO/ OSURETTE/2427**. In August 2009, the plaintiff obtained an injunction to stop the 1<sup>st</sup> defendant from proceeding with the construction which therefore stalled.

The 2<sup>nd</sup> defendant also adopted as his evidence the witness statement dated 3<sup>rd</sup> May 2011 in which he confirms having sold a portion of his land parcel **NO SOUTH TESO/OSURETTE/1682** to the 1<sup>st</sup> defendant (in his statement he states that he sold it to the 2<sup>nd</sup> defendant but that must be a typing error). He adds that in 1991, he bought from one **SITUMA OGALO** the land parcel **NO SOUTH TESO/OSURETTE/904** and his neighbours were as follows: -

1. **WENCESLAUS EMASE – SOUTH TESO/OSURETTE/905 to the East.**
2. **CHRISTOPHER ADEKE (deceased) – SOUTH TESO/OSURETTE/ 1512 to the North.**
3. **ERNEYO ECHAKARA (deceased) – SOUTH TESO/OSURETTE/1513 to the West.**
4. **To the South, the land borders the MALABA – BUSIA road.**

He added that before his death in or about 1985, **CHRISTOPHER ADEKE** had sold a portion of his land **SOUTH TESO/OSURETTE/1512** measuring  $\frac{3}{4}$  acre along the border with **SOUTH TESO/OSURETTE/904** to one **BASSAN** but had not processed the title and after **MR CHRISTOPHER ADEKE**'s death, his family had a problem with **BASSAN** who abandoned the deal.

In 1993, the 2<sup>nd</sup> defendant sub – divided his land parcel **NO SOUTH TESO/OSURETTE/904** into **SOUTH TESO/OSURETTE/1682, 1683, 1684** and **1685** and sold parcels **NO 1683** and **1685** to other persons and retained **NO 1682 (0.42 Ha)** and **1684 (0.05 Ha)**. All this time, there was no complaint from any of his neighbours including the plaintiff.

In the mid 1990's the plaintiff started using the portion that had been abandoned by **BASSAN** while living with the late **CHRISTOPHER ADEKE**'s daughter called **BABY**.

The plaintiff later built a house on the land and up – rooted the sisal plants forming the boundary claiming that they were inhabited with snakes.

In 2006, the 1<sup>st</sup> defendant informed him that he was interested in buying a plot on which to construct a residential building and so he sold him a portion measuring 60 feet by 100 feet out of the parcel **NO SOUTH TESO/OSURETTE /1682** which was bordering the land occupied by the plaintiff. The 1<sup>st</sup> defendant started construction in April 2007. In the same year the 2<sup>nd</sup> defendant sub – divided his land parcel **NO SOUTH TESO/OSURETTE/1682** into **SOUTH TESO/OSURETTE/2301** and **2302**. He sold **SOUTH TESO/OSURETTE/2302** and retained **SOUTH TESO/OSURETTE/2301**.

In 2009, the 1<sup>st</sup> defendant informed him that the plaintiff was accusing him of constructing his house on his (plaintiff's) land. When the 2<sup>nd</sup> defendant went to check, he found that the area which the plaintiff was claiming was in fact part of the land parcel **NO SOUTH TESO/OSURETTE/2301** belonging to the 2<sup>nd</sup> defendant and it was the plaintiff who had removed the boundary wire. It was then that the 2<sup>nd</sup> defendant discovered that the plaintiff had fraudulently transferred the land parcel **NO SOUTH TESO/OSURETTE/2301** and registered it in his names as land parcel **NO SOUTH TESO/OSURETTE/2427**. He adds that it was for this reason that he was constrained to join these proceedings to protect his rights. He therefore sought orders as per the Counter – Claim.

The defendants called the following witnesses in support of their case: -

- ü **DISMUS OKABURU (DW 3)**
- ü **JULIUS MULUSA (DW 4)**
- ü **COSMAS OPURU OJILO (DW 5) and**
- ü **ALFRED PAPA OGARI (DW 6).**

**DISMUS OKABURU (DW 3)** adopted as his evidence the witness statement dated 5<sup>th</sup> December 2016. In that statement, he alleges, inter alia, that the land parcel **NO SOUTH TESO/OSURETTE/1512** was jointly owned by his late father **CHRISTOPHER ADEKE**, his brother **DISMUS OLUMASI** and himself each owning 1/3 share. That his father sold a portion measuring 49 x 122 paces first to one **BASSAN** and later to the plaintiff. Later, he heard that there was a dispute between the plaintiff and **MR OPURU** over that portion. It is his statement that the plaintiff is interfering with the portion belonging to **MR OPURU**.

In the cause of the trial, it transpired that this same witness had also recorded a statement dated 30<sup>th</sup> August 2011 this time as a witness for

the plaintiff. In that statement, he stated that on 3<sup>rd</sup> July 1993 he had sold a ½ acre to the plaintiff which was later registered as land parcel **NO SOUTH TESO/OSURETTE/2420**.

Clearly, such a witness cannot be relied upon to give credible evidence and indeed I indicated in the record, pursuant to the provisions of **Order 18 Rule 7 of the Civil Procedure Rules**, that he was an **“Evasive and un – reliable witness.”** His testimony can only be discarded.

**JULIUS MULUSA (DW 4)** was a Surveyor based in **BUNGOMA COUNTY** in 2014 when he was directed to visit the land in dispute and file a report. He did so and prepared the report dated 8<sup>th</sup> December 2015 and found that the parcels in contention being land parcels **NO SOUTH TESO/OSURETEE/ 2427** and **2428** being claimed by the plaintiff and 1<sup>st</sup> defendant each claiming that the Eucalyptus trees were the boundaries between them. Both parcels were sub – divisions of the parcel **NO SOUTH TESO/ OSURETTE/904** and existed on the ground and so in his view, they were not false sub – divisions and the plaintiff’s portion measured 46 by 96 by 108 metres. He also saw the agreement dated 7<sup>th</sup> May 1993.

**COSMAS OPURU OJILO (DW 5)** is a neighbor to the parties herein and also adopted as his evidence the witness statement dated 5<sup>th</sup> December 2016.

In that statement, he narrates how, during his stint as the area village elder, he witnessed **CHRISTOPHER ADEKE** selling a portion of his land measuring 49 x 122 paces to one **BASSAN**. That plot was later sold to the plaintiff after **CHRISTOPHER ADEKE** had died. It was sold by **DISMAS OKABURU** and his mother **BIBIANA ISWAN ADEKE** being son and wife respectively of the late **CHRISTOPHER ADEKE**.

When a dispute arose between the plaintiff and **MR OPURU**, the witness visited the site and found that it was the plaintiff who had interfered with the boundary and encroached onto **MR OPURU**’s land.

Finally, **ALFRED PAPAI OGARI (DW 6)** also adopted as his evidence his witness statement dated 3<sup>rd</sup> May 2011 in which he states that he knows the parties well although the plaintiff only came to live in the area in the 1990’s and married the daughter of the late **CHRISTOPHER ADEKE** called **BABY** and built his house on the land of the late **CHRISTOPHER ADEKE** which shared a border with the land of **MR OPURU**. In 2009, the witness was informed that there was a dispute between the plaintiff and 1<sup>st</sup> defendant and that the plaintiff was encroaching onto the 1<sup>st</sup> defendant’s land which had been sold to him by the 2<sup>nd</sup> defendant. The witness summoned the parties to a meeting to resolve the dispute but the plaintiff refused to attend claiming that he had already referred the dispute to the Court.

Submissions were thereafter filed both by **MR OTSIULA** instructed by the firm of **J. B. OTSIULA & CO ASSOCIATES ADVOCATES** for the plaintiff and by **MR IKAPEL** instructed by the firm of **IKAPEL & COMPANY ADVOCATES** for the defendants.

I have considered the evidence by both parties including the documents filed and the submissions by counsel.

I must first start with the role of **FAUSTINO OPURU OJILOTO** the 2<sup>nd</sup> defendant in this case. He was enjoined in these proceedings, as I have already indicated above, through orders issued on 20<sup>th</sup> April 2010 by **HON. R. NYAKUNDI – CHIEF MAGISTRATE** (as he then was) following an application by the 2<sup>nd</sup> defendant to be enjoined as a defendant in his case. That application was apparently not opposed by the plaintiff. It is trite law that **Order 1 Rule 10 (2) of the Civil Procedure Rules** allows the Court to enjoin any person whether as a plaintiff, a defendant or any person whose presence may be necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. With regard to the joinder of two or more defendants, **Order 1 Rule 7 of the Civil Procedure Rules** provides that: -

***“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between the parties.”***

**Order 1 Rule 10 (4) of the Civil Procedure Rules** also provides that where a defendant is added or substituted, ***“the plaintiff shall, unless the Court otherwise directs, be amended.”***

In this case, following the orders to enjoin the 2<sup>nd</sup> defendant in these proceedings, the original plaint was never amended. That is not surprising because the 2<sup>nd</sup> defendant made the application to be enjoined herein. It was not at the request of the plaintiff who obviously had no reason to do so as he had no claim against the 2<sup>nd</sup> defendant. In **CIVICON LIMITED .V. KIVUWATT LIMITED & 2 OTHERS 2015 eKLR**, the Court of Appeal cited with approval the following passage from **O’HARE & HILLS CIVIL LITIGATION 7<sup>TH</sup> EDITION 1996** at page 101

***“... One cannot be added as a plaintiff unless one gives one’s consent in writing. In contrast, any one can be joined as a defendant even against his wishes. However, no person can be a defendant unless the plaintiff claims some relief, even if only a declaration, against him.***

***The general rule of practice is that the plaintiff is “dominus litis.” This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue.*** Emphasis added.

The 2<sup>nd</sup> defendant, if he so wished, may have joined these proceedings as one whose presence was necessary to enable the Court effectually and completely adjudicate upon this dispute. He may even have chosen to be a witness for the 1<sup>st</sup> defendant. And although the plaintiff did

not oppose the 2<sup>nd</sup> defendant's application to be enjoined in these proceedings as a defendant, the rule is that a party retains the right to choose his adversary against whom he seeks specified reliefs. He cannot be compelled to sue a party against his wish. The orders issued on 20<sup>th</sup> April 2011 had the effect of forcing the plaintiff to proceed against the 2<sup>nd</sup> defendant yet he did not seek any relief against him. Indeed, the plaintiff opted not to amend his plaint and he was not obliged to do so. The 2<sup>nd</sup> defendant then went ahead to file a defence and Counter – Claim against a suit in which he was not really a party. That was un – procedural and although counsel did not address that issue, it is important that I do so.

The up – shot of the above is that the name of **FAUSTINO OPURU OJULOTO** who is named herein as the 2<sup>nd</sup> defendant is expunged from the record for having been improperly enjoined in these proceedings. And since he did so on his own motion, he is not entitled to any costs.

I shall now consider the respective cases of **JOSEPHAT DOE OKIRIA** (hereinafter the plaintiff) and **LUDOVICUS ORIAMA OKITOI** (hereinafter the defendant) who are the only parties in this dispute.

While the plaintiff's claim is that the defendant has trespassed onto the land parcel **NO SOUTH TESO/OSURETTE/2427** by constructing a building thereon and should therefore be permanently enjoined, the defendant's case is that the plaintiff has in fact fraudulently registered himself as the proprietor of the land parcels **NO SOUTH TESO/OSURETTE/2420, 2426, 2427 and 2428** whose titles should be cancelled and restored to the original parcel **NO SOUTH TESO/OSURETTE/2301** and he be enjoined from entering thereon and also pay general and exemplary damages to the defendant.

The plaintiff's evidence is that he bought the land parcel **NO SOUTH TESO/OSURETTE/2427** on 7<sup>th</sup> May 1993. A copy of that agreement was produced and it shows that the sellers were **BIBIANA ISWAN ADEKE, DISMAS OKABURU ADEKE and CHRISTOPHER ADEKE**. It also shows that the said parcel measured 49 by 122 paces and was hived from the parcel **NO SOUTH TESO/OSURETTE/1175**. The Green Card for parcel **NO SOUTH TESO/OSURETTE/2420** shows that it was registered in the names of the plaintiff on 10<sup>th</sup> February 2009 and on 17<sup>th</sup> May 2009, he sub – divided it to create parcels **NO SOUTH TESO/OSURETTE/2426, 2427 and 2428**.

In my view, the only issue that calls for my determination in this case is whether the plaintiff obtained a good title to parcel **NO SOUTH TESO/ OSURETTE/2420** and thereafter the subsequent sub – divisions being **SOUTH TESO/OSURETTE/2426, 2427 and 2428**. If he did, he is entitled to the orders sought in the plaint. If he didn't, then those titles must be cancelled and the defendant's Counter – Claim allowed.

As the registered proprietor of the land parcels **NO SOUTH TESO/ OSURETTE/2426, 2427 and 2428**, the plaintiff is entitled to the protection afforded to him by the provisions of **Sections 24, 25 and 26 of the Land Registration** which vest in him the absolute ownership of those parcels of land together with all the rights and privileges belonging or appurtenant thereto. That protection can however be challenged if obtained through fraud. Similar provisions obtain in **Sections, 27, 28, and 143 of the repealed Registered Land Act** under which the titles were issued.

According to the agreement dated 7<sup>th</sup> May 1993, the parcel of land that the plaintiff purchased was hived from parcel **NO SOUTH TESO/OSURETTE/1175**. This is what he said when cross – examined by **MR IKAPEL**.

***“I bought it on 7<sup>th</sup> May 1993. I have the sale agreement which is part of my documents. When I bought the suit land, it was still part of the original land NO SOUTH TESO/OSURETTE/1512 but the number of the land is not reflected. It was reflected as SOUTH TESO/OSURETTE/1175 which was registered in the names of CHRISTOPHER ADEKE, RAPHAEL OKWARE and DISMUS OLUMASI.”***

I have looked at the Green Cards for land parcels **NO SOUTH TESO/ OSURETTE/1175 and 1152** which are part of the plaintiff's documents. They show that the land parcel **NO SOUTH TESO/OSURETTE/1175** was registered in the name of **CHRISTOPHER ADEKE, RAPHAEL OKWARE and DISMUS OLUMASI** on 14<sup>th</sup> January 1977. That title was closed on 13<sup>th</sup> November 1990 when that parcel was partitioned to create parcels **NO SOUTH TESO/ OSURETTE/1512 and 1513**. Parcel **NO SOUTH TESO/OSURETTE/1512** was in turn created on 12<sup>th</sup> November 1990 and registered in the names of **CHRISTOPHER ADEKE, RAPHAEL OKWARE and DISMAS OLUMASI**. It was subsequently closed on 4<sup>th</sup> April 2009 to create parcels **NO SOUTH TESO/ OSURETTE/2419, 2420 and 2421**. It is therefore clear that by the time the plaintiff purchased on 7<sup>th</sup> May 1993 the land parcel that was subsequently registered in his names as parcel **NO SOUTH TESO/OSURETTE/2420**, the land parcel **NO SOUTH TESO/OSURETTE/1512** from which it was hived was registered in the names of **CHRISTOPHER ADEKE, RAPHAEL OKWARE and DISMAS OLUMASI**. **CHRISTOPHER ADEKE** had died 3 years earlier on 10<sup>th</sup> May 1990 as per the Death Certificate which is part of the defendant's documents. The said **CHRISTOPHER ADEKE** was therefore deceased by the time the agreement dated 7<sup>th</sup> May 1993 was executed although his name appears on the same. The agreement also bears the thumb – print of one **BIBIANA ISWAN ADEKE** who, according to the statement of **COSMAS OPURU OJILO (DW 5)**, was the wife of **CHRISTOPHER ADEKE**. There is no evidence that by the time **BIBIANA ISWAN ADEKE** signed the sale agreement dated 7<sup>th</sup> May 1993, she had obtained a grant of Letters of Administration in respect to the Estate of the late **CHRISTOPHER ADEKE**. She had no capacity to transact any business in relation to the land parcel **NO SOUTH TESO/OSURETTE/1512**. Therefore, what **BIBIANA ISWAN ADEKE** and the plaintiff did amounted to intermeddling with the Estate of a deceased person contrary to the provisions of **Section 45 of the Law of Succession Act**. That was a fraudulent disposition. The plaintiff conceded as much during cross – examination by **MR IKAPEL** on 20<sup>th</sup> September 2018 when he said: -

***“The agreement has the names of the seller as BIBIANA ADEKE, DISMUS ADEKE and CHRISTOPHER ADEKE. As at that time, the registered owners of parcel NO SOUTH TESO/OSURETTE/1175 were CHRISTOPHER ADEKE, RAPHAEL OKWARE and DISMUS ALUMASI. So it is true that the persons who sold me the land were not the registered owners. It is***

*true that the succession had not been done. The title for SOUTH TESO/OSURETTE/1175 was closed on 13<sup>th</sup> November 1990 as per the register. So by 1993, the land known as SOUTH TESO/OSURETTE/1175 had long been sub –divided to give rise to SOUTH TESO/OSURETTE/1512 and 1513.”*

In his submissions, counsel for the plaintiff **MR OTSIULA** has made the following remarks as to how parcel **NO SOUTH TESO/OSURETTE/2420** was created: -

*“Your Lordship, it is upon the sub – division of land parcel number SOUTH TESO/OSURETTE/1512 by DW 3 that created SOUTH TESO/OSURETTE /2420 transferred and registered in the plaintiff’s name by DW 3. The plaintiff has duly annexed a mutation form for SOUTH TESO/OSURETTE /1512 as document number 10 on the plaintiff’s further list of document while a copy of the green card for SOUTH TESO/OSURETTE/2420 is annexed on the plaintiff’s further list of documents as document NO 18.”*

The mutation form that counsel for the plaintiff is referring to has the following three (3) dates: -

1. 4<sup>th</sup> February 2009 when the form was received for registration.
2. 21<sup>st</sup> January 2009 when the registration fee was received; and
3. 4<sup>th</sup> December 2008 when the proprietors gave instructions to the Surveyor.

The mutation form bears the names of the proprietors of the land parcel **NO SOUTH TESO/OSURETTE/1512** as **CHRISTOPHER ADEKE, RAPHAEL OKWARE** and **DISMAS OLUMASI**. As is now already clear, **CHRISTOPHER ADEKE** had died on 10<sup>th</sup> May 1990 while **RAPHAEL OKWARE** had died on 12<sup>th</sup> March 1997. They could not therefore have given instructions to the Surveyor in 2008 and 2009 to sub – divide the land parcel **NO SOUTH TESO/OSURETTE/1512** to give rise to parcels **NO SOUTH TESO/OSURETTE/2419, 2420** and **2421** as indicated in the said mutation form. That form, is so far as it states therein that the registered proprietors of land parcel **NO SOUTH TESO/OSURETTE/1512** had approved its sub – division to create parcels **NO SOUTH TESO/OSURETTE/2419, 2420** and **2421** was clearly a fraudulent document. Fraud is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as to include: -

*“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”*

Fraud is also defined in the same **DICTIONARY** as: -

*“A reckless misrepresentation made without justified belief in it’s truth to induce another person to act.”*

In **KERR ON LAW OF FRAUD & MISTAKE 7<sup>TH</sup> EDITION** page 644, it is stated as follows: -

*“Fraud is infinite in variety, and rather than define it, the Courts have reserved unto themselves the liberty to deal with it under whatever form it may present itself. Fraud in the contemplation of a Civil Court may be used to include properly all acts, omissions and concealment which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another or by which an undue or un-conscious advantage is taken of another .....*

*Fraud in all cases implies a willful act on the part of any one whereby another is sought to be deprived, by illegal or inequitable means of what he is entitle to.”*

By purporting that the mutation form in respect to the land parcel **NO SOUTH TESO/OSURETTE/1512** had been prepared by the registered proprietors yet two of them were already deceased, that mutation form which authorized the Surveyor to sub – divide the land parcel **NO SOUTH TESO/OSURETTE/1512** to give rise to land parcels **NO SOUTH TESO/OSURETTE/2419, 2420** and **2421** amounted to a *“knowing misrepresentation”* or *“knowing concealment of a material fact”* or *“a breach of legal or equitable duty”* which resulted in an undue advantage to the plaintiff in this case.

It is of course true that by an agreement dated 31<sup>st</sup> March 2007, **FAUSTINO OJULOTO OPURU** sold a plot measuring 100 x 60 feet to the plaintiff out of the land parcel **NO SOUTH TESO/OSURETTE/1682** at a consideration of Kshs. 80,000/=. That agreement is part of the defendant’s documents. However, the titles which the defendant seek to impeach are titles in respect to the land parcels **NO SOUTH TESO/OSURETTE/2420, 2426, 2427** and **2428** which were not hived from the land parcel **NO SOUTH TESO/OSURETTE/1682**.

According to the Green Card for land parcel **NO SOUTH TESO/ OSURETTE/2420** which is part of the defendant’s documents, land parcels **NO SOUTH TESO/OSURETTE/2426, 2427** and **2428** were hived from the land parcel **NO SOUTH TESO/OSURETTE/2420** whose title was closed on 17<sup>th</sup> March 2009. And since the land parcel **NO SOUTH TESO/OSURETTE/2420** was itself created fraudulently from land parcel **NO SOUTH TESO/OSURETTE /1512**, it follows that the creation of titles in respect of the land parcels **NO SOUTH TESO/OSURETTE/2426, 2427** and **2428** was equally fraudulent and illegal and cannot be allowed to remain in the register because a nullity always begets a nullity and something cannot stand on nothing – **BENJAMIN LEONARD MACFOY.V. UNITED AFRICA CO LTD 1961 3 ALL.E.R 1179**. It must be clear by now that the plaintiff’s suit is for dismissal because he cannot obtain orders to injunct the defendant, his agents or those acting under him from the land parcel **NO SOUTH TESO/OSURETTE/2427** when he obtained the title thereto through a fraudulent process. He is no longer entitled to the protection of the law under **Sections 24, 25, and 26 of the Land**

**Registration Act.** Indeed, even **Article 40 of the Constitution** which protects the right to property is clear under **Sub - Article (6)** that: -

**(6): “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”**

The plaintiff’s claim is therefore for dismissal.

With regard to the defendant’s Counter – Claim, this Court has already made a finding that the creation of land parcel **NO SOUTH TESO/OSURETTE/2420** was procured through a fraudulent process. The land parcels **NO SOUTH TESO/OSURETTE/2426, 2427 and 2428** which were resultant sub – divisions of the land parcel **NO SOUTH TESO/OSURETTE/2420** must therefore be cancelled because they arose from an illegal and fraudulent process to which the plaintiff was clearly a party. On the authority of **MACFOY .V. UNITED AFRICA CO LTD** (supra), the plaintiff not having obtained a valid title to the land parcel **NO SOUTH TESO/OSURETTE/2420**, he could not purport to sub – divide or deal with it in any other manner because whatever else he did would be illegal. The defendant is therefore entitled to the orders sought in his Counter – Claim cancelling the registration of the land parcels **NO SOUTH TESO/OSURETTE/ 2420, 2426, 2427 and 2428** in the plaintiff’s names as well as the injunctive reliefs sought.

With regard to the claim for general damages, the defendant has just made a blanket claim without for example specifying whether that claim is for trespass, loss of user etc. And as regards exemplary damages, **LORD DEVLIN** in **ROOKES .V. BARNARD 1964 AC 1129** stated that they are available in the following categories: -

- 1. In cases of oppressive, arbitrary or unconstitutional actions by the servants of the Government.**
- 2. In cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.**
- 3. Where exemplary damages are expressly authorized by statute.**

An award for exemplary damages must be used with restraint. In the circumstances of this case, those who transferred the land in dispute to the plaintiff did so voluntarily only that in law, they had no right to do so. Perhaps if the parties had sought proper legal advice, they would not have ended up in the situation in which they now find themselves. It would be harsh to punish the plaintiff with an award of exemplary damages against him notwithstanding his role in the fraudulent process.

The defendant has also sought orders of mandatory and prohibitory injunctions to restrain the plaintiff, his agents, servants and assigns from entering or making any claim on the land parcel **NO SOUTH TESO/OSURETTE/2301** and to restore it to its previous status before the fraud. Those remedies are not available to the defendant for the main reason that according to the Green Card to that parcel of land and which was produced by the plaintiff, it was registered in the names of **FAUSTINO OPURU OJULOTO** on 24<sup>th</sup> April 2007. The said **FAUSTINO OPURU OJULOTO** is not a party to this suit having been struck out by this Court since he was improperly enjoined. If **FAUSTINO OPURU OJULOTO** has any grievances against the plaintiff with regard to that parcel of land, he is at liberty to file a suit against him.

Ultimately therefore and having considered all the evidence by both parties herein, there shall be Judgment for the defendant against the plaintiff in the following terms: -

- 1. The plaintiff’s suit is dismissed.**
- 2. The defendant’s Counter – Claim is allowed as follows: -**
  - (a) A declaration is issued that the registration of the plaintiff as proprietor of the land parcels NO SOUTH TESO/USURETTE/2420, 2426, 2427 and 2428 was fraudulent and the same is hereby cancelled and the Land Registrar is directed to restore the land parcel NO SOUTH TESO/OSURETTE/1512 to the previous owners as at 12<sup>th</sup> November 1990.**
  - (b) The defendant is granted costs of the dismissed suit and the Counter – Claim.**
- 3. The defendant’s claim for general and exemplary damages is dismissed.**
- 4. The name of FAUSTINO OPURU OJULOTO (previously the 2<sup>nd</sup> defendant) is expunged from the record and no orders are made in relation to the land parcel NO SOUTH TESO/OSURETTE/2301 and specifically on the prayers seeking mandatory and prohibitory orders of injunction.**

**It is so ordered.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

Judgment dated, delivered and signed at Bungoma this 27<sup>th</sup> day of May 2020.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

This Judgment was due on 11<sup>th</sup> June 2020. However, in view of the measures restricting Court operations following the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23<sup>rd</sup> April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**