



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 172 OF 2014**

**MODE OF PROCEEDING MULTI TRACK BILDAD SIMIYU KHAKINA ...1<sup>ST</sup> PLAINTIFF**

**MOSES KHAKINA WAKHUNGU..... 2<sup>ND</sup> PLAINTIFF**

**DAVID NYONGES WAMBILIANGA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DR. HENRY KERRE WAKHUNGU..... 1<sup>ST</sup> DEFENDANT**

**DR. PHOEBE KHASIALA WAKHUNGU.....2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

This litigation, unfortunately, involves siblings and other relatives and is yet another illustration of the emotive nature of land disputes.

The 2<sup>nd</sup> plaintiff is father to the 1<sup>st</sup> plaintiff and a brother to the 1<sup>st</sup> defendant and brother – in – law to the 2<sup>nd</sup> defendant. **MARGARET NAMUKHOLA CRUTCHER** who testified as a defence witness is a sister to the 2<sup>nd</sup> plaintiff who, as will become clearer in the cause of this Judgment, was a key player in the events leading to this litigation.

As is the practice in cases involving members of one family, the Court attempted an amicable settlement to this dispute and in fact on 2<sup>nd</sup> November 2016, both **MR AREBA** counsel for the plaintiffs and **MR KHAKULA** counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants assured the Court that the parties were likely to settle this dispute. However, that did not happen and this Court must now discharge its Constitutional mandate in determining a dispute that could very easily have been settled out of Court.

By a re- amended plaint dated 12<sup>th</sup> April 2018 and filed herein on 13<sup>th</sup> April 2018, the plaintiffs sought Judgment against the defendants jointly and severally in the following terms: -

- 1. An order that the sub – division of land parcel NO EAST BUKUSU/NORTH KANDUYI/2395 into EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870, and 5871 and their registration in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants was fraudulent and unlawful and therefore the 1<sup>st</sup> and 2<sup>nd</sup> defendants' titles be cancelled for the attendant fraud.**
- 2. An order that the defaced original boundary between land parcels NO EAST BUKUSU/NORTH KANDUYI/2394 and EAST BUKUSU/NORTH KANDUYI/2395 be determined by the Land Registrar and be replaced.**
- 3. An order that the two land parcels NO EAST BUKUSU/NORTH KANDUYI/2394 and 2395 measuring 1.10 Ha be shared on a pro – rata basis.**
- 4. Costs of this suit.**

On 21<sup>st</sup> June 2018, the plaintiffs abandoned prayer No. 2.

The basis of the plaintiffs' case is that at all material time, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are the jointly registered owners of the land parcel NO

**EAST BUKUSU /NORTH KANDUYI/2394** while the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the joint owners of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395**. That on 2<sup>nd</sup> August 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants encroached onto the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** and increased the size of their land parcel **NO EAST BUKUSU/NORTH KANDUYI /2395** on the ground and super – imposed it on land parcel **NO EAST BUKUSU/ NORTH KANDUYI/2394** and thereafter sub – divided their land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** to create land parcels **NO EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871** which they then registered in their names fraudulently. The particulars of fraud are pleaded in paragraph 5(c) of the re – amended plaint as follows: -

- a. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants colluded to sub – divide titles **NO EAST BUKUSU/NORTH KANDUYI/2395** after encroaching onto the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** without the knowledge of the plaintiffs.
- b. Defacing the original boundary between parcels **NO EAST BUKUSU/NORTH KANDUYI/2395** and **2394** and amalgamating the two parcels.
- c. The 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently encroached onto the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff's land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394**.
- d. The 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently increased the size of **EAST BUKUSU/NORTH KANDUYI/2395** on the ground and super imposed it on **EAST BUKUSU/NORTH KANDUYI/2394**.

That the surveyor's report dated 1<sup>st</sup> January 2016 revealed that the actual size of the land parcels **NO EAST BUKUSU/NORTH KANDUYI/2394** and **2395** on the ground is 1.10 Ha and not 1.52 Ha as reflected in the respective title deeds owned by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. That the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were the first purchasers and their title measures 0.72 Ha whereas the 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased their parcels subsequently and it measures 0.80 Ha and therefore both the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are entitled to a portion on the ground on a pro – rata basis.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants by their defence dated 23<sup>rd</sup> April 2018 and filed on the same day (there is no record of any defence dated 3<sup>rd</sup> November 2019 as stated in the submissions by **MR KHAKULA**) denying in toto all the allegations of encroachment, conspiracy and fraud levelled against them. They also denied having increased the size of their land parcel **NO EAST BUKUSU/NORTH KHANDUYI/2395** prior to sub – dividing it into parcels **NO EAST BUKUSU/ NORTH KANDUYI/5868, 5869, 5870 and 5871**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded that they purchased their land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** measuring 2 acres from **PATRICK LUMUMBA WALUBENGO** who had purchased it from **PAUL MASINDE NATO** whose share of land parcel **NO EAST BUKUSU/NORTH KANDUYI/1663** originated from the title **NO EAST BUKUSU/NORTH KANDUYI/1989** belonging to his father **ROMANO MASINDE NATO**. That the transaction between **PAUL MASINDE NATO** and **PATRICK LUMUMBA WALUBENGO** was handled by the 2<sup>nd</sup> plaintiff on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and it was the 2<sup>nd</sup> plaintiff who created titles **NO EAST BUKUSU/NORTH KANDUYI/2394** and **2395** out of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/1989** and if there was any fraud committed, then it was the 2<sup>nd</sup> plaintiff who must have committed it. Particulars of the 2<sup>nd</sup> plaintiff's fraud were pleaded in paragraph 7 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's defence as follows: -

- 1: **Creating two titles out of land parcel NO EAST BUKUSU/NORTH KANDUYI/1989 instead of transferring the whole of it to PATRICK LUMUMBA WALUBENGO.**
- 2: **Creating title NO EAST BUKUSU/NORTH KANDUYI/2394 and registering it in the names of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff when infact they had not purchased such land.**
- 3: **Registering parcel NO EAST BUKUSU/NORTH KANDUYI/2395 in the name of PATRICK LUMUMBA WALUBENGO when he should have registered the whole of title NO EAST BUKUSU/NORTH KANDUYI/1989, which he had purchased on his behalf.**

The 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded further that they bought land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** from **PATRICK LUMUMBA WALUBENGO** knowing that it was 2 acres which he had purchased from **PAUL MASINDE NATO** and the sub – division of the same into parcels **NO EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5071** was done legally and in good faith and should not be cancelled. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded that this suit is essentially a boundary dispute and offends the provisions of **Section 18 of the Land Registration Act** and a Preliminary Objection would be taken to have it struck out.

No such Preliminary Objection was raised prior to or even during the trial. Such Preliminary Objection would not in any event be merited for two reasons.

Firstly, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs had on 21<sup>st</sup> June 2018 abandoned the prayer relating to determination of the boundary between parcels **NO EAST BUKUSU /NORTH KANDUYI/2394** and **2395**.

Secondly and most importantly, it is clear from the pleadings herein that this suit involves the fraudulent creation of titles and has nothing to do with boundary disputes.

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

The 2<sup>nd</sup> plaintiff **MOSES KHAKINA (PW 1)** was the only witness to testify on behalf of the plaintiffs. He adopted as his evidence his witness statement filed on 17<sup>th</sup> April 2018 and also his list of documents filed on 18<sup>th</sup> September 2014.

In that statement, the 2<sup>nd</sup> plaintiff states that sometime in May 1992, one **KENNEDY BARASA** (deceased) informed him that **PAUL MASINDE NATO** was selling land measuring 4 acres which had been given to him by his father. So they agreed that the 2<sup>nd</sup> plaintiff would purchase 2 acres at a cost of Kshs. 27,000/= per acre. 2<sup>nd</sup> plaintiff also informed his sister **MARGARET WAKHUNGU** and her husband **LUMUMBA WALUBENGO WEKESA** that there were 2 acres of land available and they agreed to buy. The first agreement was dated 10<sup>th</sup> June 1992 and on 16<sup>th</sup> July 1992 two other agreements were signed at the offices of **J. S. KHAKULA & CO. ADVOCATES** between the 2<sup>nd</sup> plaintiff and **PAUL NATO** and another agreement was signed to include ½ acre that the 2<sup>nd</sup> plaintiff had bought during the first agreement but which had not been done at an Advocate's office.

A survey of the entire land was later done by one **ERICK** a Surveyor from the **BUNGOMA COUNTY COUNCIL** who noted that the land was 1.52 Ha and not 1.6 Ha. Since his sister and brother – in – law were not present, the 2<sup>nd</sup> plaintiff agreed to have the parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** allocated to himself and the parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** allocated to his sister and brother – in – law and the titles were registered for both parcels and issued on 2<sup>nd</sup> August 1994.

In 2010, her sister sold her parcel to their brother **HENRY KERRE WAKHUNGU** who then transferred both land parcels **NO EAST BUKUSU/ NORTH KANDUYI/2394** and **2395** into his names before sub – dividing them into parcels **NO EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870** and **5871** despite the 2<sup>nd</sup> plaintiff protesting that his land parcel **NO EAST BUKUSU /NORTH SANGALO/2394** was within the two parcels. He complained to the Land Registrar Bungoma who advised him to place a restriction and thereafter he sought legal redress as attempts to resolve the dispute were fruitless. He added that despite the restriction, **HENRY KERRE WAKHUNGU** has proceeded to plant Eucalyptus trees and construct permanent structures on part of the land. He asked that the land be shared on a pro – rata basis.

The 1<sup>st</sup> defendant (**DR HENRY KERRE WAKHUNGU**) was the only defendant who testified and he called as his witnesses his sister **MARGARET NAMUKHULA CRUTCHER (DW 2)**, **PAUL MASINDE ROMANO NATO (DW 3)** and **JANE ROSE NASIMIYU WAKHUNGU (DW 4)** all of whom adopted as their evidence their respective witness statements filed herein.

In his statement dated 10<sup>th</sup> December 2018 and filed herein on 22<sup>nd</sup> February 2019, the 1<sup>st</sup> defendant confirms that he and the 2<sup>nd</sup> defendant who is his wife reside in the United States of America while the 1<sup>st</sup> plaintiff is a son of the 2<sup>nd</sup> plaintiff who is his younger brother.

He adds that he and the 2<sup>nd</sup> defendant are the proprietor of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** which they purchased from his sister **MARGARET NAMUKHULA CRUTCHER (DW 2)** who had purchased it together with her husband **PATRICE LUMUMBA WALUBENGO** from one **PAUL MASINDE NATO (DW 3)** after inspecting it. That the land is situated next to **KIBABII UNIVERSITY** and when they purchased it, it was fenced and measured 2 acres as per the title. They took possession of it, planted trees and later engaged a Surveyor who sub – divided it to create parcels **NO EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870** and **5871** so as to take advantage of the high demand for hostel facilities by students. He added that they had never heard that the plaintiffs also owned land next to their land and the allegation that they created fraudulent titles by increasing their land and super – imposing it on the plaintiffs' land is strange and it is false as all their activities were restricted to the land which they purchased from his sister **MARGARET CRUTCHER (DW 2)**. He denied having defaced any boundary or having been aware about the existence of land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** adding that if indeed the plaintiffs owned any land next to their land, he should have gone to the Land Registrar to establish the two parcels of land instead of coming to Court.

**MARGARET NAMUKHULA CRUTCHER (DW 2)** also lives and works in the United States of America and is the sister to the 2<sup>nd</sup> plaintiff and 1<sup>st</sup> defendant.

She states that while working in **NAIROBI** in 1992, her cousin **JANEROSE NASIMIYU WAKHUNGU** who then lived at **KIBABII** with her husband **PAUL MASINDE NATO** informed her, through the 2<sup>nd</sup> plaintiff who was then residing in **BUNGOMA**, that they wished to sell their land at **KIBABII**. So she and her then husband one **PATRICK LUMUMBA WALUBENGO** went to see the land and agreed to buy it. It did not have a separate title but was part of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/1663** which belonged to her cousin's father – in – law though it was clearly marked on the ground and was said to be 2 acres. They agreed on a purchase price of Kshs. 54,000/= and took possession and after sub – division, their portion was titled **NO EAST BUKUSU/NORTH KANDUYI/1989**. This transaction was handled on their behalf by the 2<sup>nd</sup> plaintiff.

The witness and her husband later migrated to the United States of America but later separated and she kept possession of the land which she assigned the 2<sup>nd</sup> plaintiff to have the title changed into her names. She then sold it to the 1<sup>st</sup> defendant but was later surprised to hear that 2<sup>nd</sup> plaintiff had sued the 1<sup>st</sup> defendant claiming that the land be shared.

**PAUL MASINDE ROMANO NATO (DW 3)** similarly adopted as is evidence his witness statement dated 10<sup>th</sup> December 2018 in which he states that in 1992, he sold his 2 acres being his share of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/1663** which belonged to his late father **ROMANO MASINDE NATO** to his sister – in – law **MARGARET CRUTCHER (DW 2)** and her then husband **PATRICK LUMUMBA WALUBENGO**. After sub – division, that parcel became **NO EAST BUKUSU/NORTH KANDUYI/1989** for which **MARGARET CRUTCHER (DW 2)** and **PATRICK LUMUMBA WALUBENGO** paid in full following a transaction handled by the 2<sup>nd</sup> plaintiff. He stated however that he never sold any land to the 2<sup>nd</sup> plaintiff or his son the 1<sup>st</sup> plaintiff. Later, he was informed that **MARGARET CRUTCHER (DW 2)** and **PATRICK LUMUMBA WALUBENGO** had sold the said land to **DR HENRY WAKHUNGU** (1<sup>st</sup> defendant) and his wife **DR PHOEBE KHASIALA WAKHUNGU** the 2<sup>nd</sup> defendant.

Finally, **JANE ROSE NASIMIYU WAKHUNGU (DW 4)** adopted as her evidence her statement dated 10<sup>th</sup> December 2018 in which she confirms that she is the wife to **PAUL MASINDE ROMANO NATO (DW 3)** and that they sold 2 acres being their portion out of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/1663** to **MARGARET CRUTCHER** and her then husband. That portion became land parcel **NO EAST BUKUSU/NORTH KANDUYI/1989** after sub – division and **MARGARET CRUTCHER** and her husband fenced it. This transaction was being handled by the 2<sup>nd</sup> plaintiff. Later, **MARGARET CRUTCHER** and her husband migrated to the United States of America and sold the land to the 1<sup>st</sup> defendant. She however denied having sold any land to the 2<sup>nd</sup> plaintiff.

Submissions were thereafter filed both by **MR OLONYI** instructed by the firm of **AREBA ATANCHA & CO. ADVOCATES** for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and **MR KHAKULA** instructed by the firm of **J. S. KHAKULA & CO. ADVOCATES** for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

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

It is common ground that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are the registered proprietors of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** while the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the registered proprietors of the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** which has since been sub – divided to give rise to land parcels **NO EAST BUKUSU/ NORTH KANDUYI/5868, 5869, 5870 and 5871** which the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs seek to have the titles cancelled for having been obtained fraudulently. It is also the case of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have encroached onto the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** thereby increasing the size of their land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395**.

On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' case is that in fact the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not purchase any land from **PATRICE LUMUMBA WALUBENGO** and fraudulently created title **NO EAST BUKUSU/NORTH KANDUYI/2394** which they then registered in their names. Therefore, each of the parties are claiming that the title of their adversaries is fraudulent.

In my view, there are two issues for my determination in this case. These are: -

**1: Which of the titles herein, if any, was obtained fraudulently?**

**2: If both parties obtained their respective titles legally, what is their entitlement on the ground?**

The importance of issue No. 2 above arises because in his report dated 1<sup>st</sup> November 2016 and filed herein pursuant to this Court's order dated 7<sup>th</sup> October 2016, **BRYAN W. KUBWA** writing on behalf of the **COUNTY SURVEYOR BUNGOMA** makes the following findings which I shall reproduce in full because in my view, they hold the key to un – locking this dispute.

The report reads: -

**“We visited land parcel numbers E. BUKUSU/N. KANDUYI/2394 and 2395 on 31.10.2016 to implement the above named Court order dated 7.10.2016 and we made the following observations: -**

- **That the actual ground acreage of 1.10 Ha doesn't tally with the registered acreage of 1.52 Ha hence to confirm the extent of land parcels E. BUKUSU/N. KANDUYI/2394 which has a total acreage of 0.72 Ha and 2395 which has a total acreage of 0.80 Ha its impossible.**
- **The 1<sup>st</sup> and 2<sup>nd</sup> defendants are occupying the whole parcel of land measuring 1.10 Ha which comprise of both land parcels E. BUKUSU/N. KANDUYI/2394 and 2395, and they have sub – divided to create land parcel numbers E. BUKUSU/N. KANDUYI/5868, 5869, 5870 and 5871.**

**Recommendation: -**

**Since the actual ground acreage is less than the registered acreage, we therefore request the honourable Court to give directions on how the plaintiff and the defendants should share the actual acreage amicably**” Emphasis added.

I shall give those directions shortly.

With regard to issue No. 1, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs made allegations of fraud with regard to the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> defendants obtained their title in respect to land parcels **NO EAST BUKUSU/NORTH KANDUYI/2395** and the resultant sub – divisions being **EAST BUKUSU/NORTH KANDUYI 5868, 5869, 5870 and 5871**.

Allegations of fraud are very serious and must be proved to the required standard which is more than on a mere balance of probabilities. It is higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. In **ARTHI HIGHWAY DEVELOPERS LTD.V. WEST END BUTCHERY LTD C.A CIVIL APPEAL NO 242 OF 2013**, the Court said: -

**“It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud which any Court ought to take notice.”**

It is not in dispute that **MARGARET CRUTCHER (DW 2)** and her former husband purchased 2 acres of land from **PAUL MASINDE NATO**. This has been confirmed both by **MARGARET CRUTCHER (DW 2)**, **PAUL MASINDE NATO (DW 3)**, his wife **JANE ROSE (DW 4)** and even by the 2<sup>nd</sup> plaintiff himself who states in his statement filed herein on 17<sup>th</sup> April 2018 as follows: -

**“I also informed my sister MARGARET N. WAKHUNGU and her husband LUMUMBA WALUBENGO WEKESA of the availability of two acres which they showed interest and agreed to buy.”**

It is these 2 acres that **MARGARET CRUTCHER** later sold to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who sub – divided it to create parcels on **EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871**. Although the title deed for parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** was not availed for this Court’s inspection, it is clear from the report of the **COUNTY SURVEYOR BUNGOMA** referred to above that it is 0.80 Ha in acreage. 1 Ha is equivalent to 2.47 acres and if it is rounded up to 1 Ha = 2.5 acres, then the 2 acres that the 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased equals to 0.80 Ha. It must be remembered that ordinarily, the area of a parcel of land is usually described in the title document as **“approximate”**. Using the formula of 1 Ha being equivalent to 2.5 acres, then the size of parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** which, as per the Surveyor’s report measure 0.80 Ha, the size in acres is 2 acres worked out as follows: -

1 Ha = 2.5 acres

0.80 Ha = (2.5 x 0.8) = 2 acres

There is also evidence that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did also purchase land from **PAUL ROMANO MASINDE NATO**. In the agreement dated 13<sup>th</sup> June 1992 which is the same agreement through which **PATRICE LUMUMBA WALUBENGO** and **MARGARET CRUTCHER (DW 3)** purchased 2 acres, it is indicated that the 2<sup>nd</sup> plaintiff also purchased ½ acre. That agreement was not translated into the English language which is the language of this Court as per **Section 23(1) of the Environment and Land Court Act** following the amendment of 2012. However, as I stated recently in **SIMON KHAEMBA MWANJA .V. JAMIN WASIKE KHAEMBA BUNGOMA ELC CASE NO 289 OF 2013**, in a situation such as this where the document produced is in **KISWAHILI** language which the Court can understand, and bearing in mind that the **Constitution in Article 7(2)** provides that the official languages of the Republic of Kenya are **KISWAHILI** and **ENGLISH**, and also guided by this Court’s inherent powers and the provisions of **Article 159 (2) (d) of the Constitution**, that agreement can be admitted in evidence. That agreement reads as follows in so far as is relevant to this case: -

**“PATRICE LUMUMBA WALUBENGO WEKESA I.D 3806958/1, MOSES KHAKINA WAKHUNGU ID 2091584/65 WAMENUNUA SHAMBA EKARI MBILI NA NUSU NA BWANA PATRICE LUMUMBA WALUBENGO EKARI MBILI (2 ACRES) KWA BEI YA 54,000 NA BWANA MOSES KHAKINA WAKHUNGU AMENUNUA NUSU EKA (½ ACRE KWA BEI YA 13,500/= LEO TAREHE**

**13 – 6 – 92 BWANA PATRICE LUMUMBA WALUBENGO AMELIPA (Ksh 10,000) TEN THOUSAND HAND (sic) CASH.”**

In summary, the import of that agreement which was signed by **PAUL MASINDE** in the presence of several witnesses is that even as the 2<sup>nd</sup> plaintiff was handling the purchase of 2 acres on behalf of his sister **MARGARET CRUTCHER (DW 3)**, he also purchased ½ acre for himself and the 1<sup>st</sup> plaintiff. Then there is another agreement dated 16<sup>th</sup> July 1992 between **PAUL MASINDE NATO** and the 2<sup>nd</sup> plaintiff by which **PAUL MASINDE NATO** again sold 1 acre to the 2<sup>nd</sup> plaintiff at a consideration of Kshs. 27,000/= of which Kshs. 8,000/= was paid at the time of signing the agreement and the balance of Kshs. 19,000/= was paid on 14<sup>th</sup> February 1993 as per the acknowledgment document also produced by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. In the circumstances, **PAUL MASINDE NATO** cannot now claim, as he had done in paragraph 8 of his statement dated 10<sup>th</sup> December 2018, that: -

**“I did not however sell any land to MOSES KHAKINA WAKHUNGU nor to his son BILDAD SIMIYU KHAKINA.”**

His wife **JANEROSE NASIMIYU WAKHUNGU (DW 4)** her similarly stated as follows in her statement also dated 10<sup>th</sup> December 2018 at paragraph 8: -

**“The transaction between us and MARGARET and her husband was channeled through the 2<sup>nd</sup> plaintiff. We did not sell any land to the 2<sup>nd</sup> plaintiff or BILDAD the 1<sup>st</sup> plaintiff.”**

What these two witnesses are trying to do is contradict the terms of a written agreement signed between **PAUL MASINDE NATO** and the 2<sup>nd</sup> plaintiff through oral evidence. The law is that no oral evidence is admissible to contradict or vary a written contract – **FIDELITY COMMERCIAL BANK LTD .V. KENYA GRANGE VEHICLE INDUSTRIES LTD 2017 eKLR**.

In **HALSBURY’S LAWS OF ENGLAND 4<sup>TH</sup> EDITION VOL 9(1)** at paragraph 662, it is stated that: -

**“Where the intention of parties has infact been reduced in writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention or to contradict, vary or add to the terms of the document, including implied terms.”**

It is therefore not open to **PAUL MASINDE NATO** to try and contradict the contents of the agreement dated 13<sup>th</sup> June 1992 by which he sold to the 2<sup>nd</sup> plaintiff ½ an acre and a further agreement dated 16<sup>th</sup> July 1992 by which he also sold the 2<sup>nd</sup> plaintiff a further 1 acre. In the

circumstances, it cannot be correct for the 1<sup>st</sup> and 2<sup>nd</sup> defendants to plead, as they have done in paragraph 7 of their defence, that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not purchase any land known as **EAST BUKUSU/ NORTH KANDUYI/2394**, yet **PAUL MASINDE NATO (DW 3)** confirmed in cross – examination that he signed the mutation form to create that parcel.

Having said so, however, it cannot be correct that the land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394** measures 0.72 Ha as reflected on the copy of the title deed produced herein. It can only be 0.60 Ha applying the same calculations as earlier i.e.

2.5 acres = 1 Ha

1.5 acre = 1.5 ÷ 2.5

= 0.6 Ha

Going by those figures, it means that the combined acreage of the land parcels **NO EAST BUKUSU/NORTH KANDUYI/2394** and **2395**, as per the agreements is 1.40 Ha. However, according to the report of the **COUNTY SURVEYOR BUNGOMA 2016** (and who is really the expert), the actual acreage on the ground is 1.10 Ha and the registered acreage is 1.52 Ha. The report also states that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are occupying the whole parcel of land measuring 1.10 Ha and which comprises both parcels **NO EAST BUKUSU/NORTH KANDUYI 2394** and **2395** including the resultant sub – divisions being **EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871**. That would mean therefore that while the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have the title to land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394**, there is nothing on the ground to show for it.

As stated earlier in this Judgment, the title for land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** was not availed for this Court's perusal. I have however gained sight of the official Certificate of Search in respect to the resultant sub – divisions of that parcel being **EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871** and they show the approximate acreage of those sub – divisions as follows: -

1. 5868 - 0.31 Ha

2. 5869 - 0.31 Ha

3. 5870 - 0.20 Ha

4. 5871 - 0.20 Ha

**Total 1.02 Ha**

Since the 1<sup>st</sup> and 2<sup>nd</sup> defendants were only entitled to 2 acres which is 0.80 Ha, it is obvious that in creating land parcels **NO EAST BUKUSU/NORTH KANDUYI/ 5868, 5869, 5870 and 5871**, they encroached onto 0.22 Ha being part of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs land parcel **NO EAST BUKUSU/NORTH KANDUYI/2394**. This Court must therefore intervene, as recommended by the **COUNTY SURVEYOR BUNGOMA**, and “*give directions on how the plaintiffs and the defendants should share the actual acreage amicably.*”

I therefore answer the two issues that I set out earlier in this Judgment as follows: -

**1: The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not obtain the registration of land parcel NO EAST BUKUSU/NORTH KANDUYI/2395 fraudulently.**

**2: Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not obtain the registration of the land parcel NO EAST BUKUSU/NORTH KANDUYI/2394 fraudulently.**

**3: The acreage of land parcel NO EAST BUKUSU/NORTH KANDUYI/2395 is 0.80 Ha reflecting the 2 acres that the 1<sup>st</sup> and 2<sup>nd</sup> defendants purchased.**

**4: The acreage of land parcel NO EAST BUKUSU/NORTH KANDUYI/2394 should be 0.60 Ha reflecting the 1.5 acres that they purchased and not 0.72 Ha as per the title deed which they hold. That title deed must therefore be rectified.**

**5: Similarly, while the acreage of the land parcel NO EAST BUKUSU/NORTH KANDUYI/2395 is 0.8 Ha as per the COUNTY SURVEYOR's report, that parcel was sub – divided to give rise to land parcels NO EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871 whose total acreage is 1.02 Ha which is 0.22 Ha in excess of the land parcel NO EAST BUKUSU/NORTH KANDUYI/2395 from which the said sub – divisions were created. Those titles must similarly be rectified.**

**6: Most importantly, the actual ground acreage of the land parcels NO EAST BUKUSU/NORTH KANDUYI/2394 and 2395 is 1.10 Ha and not the 1.52 Ha as reflected on the registration documents.**

**Section 80 of the Land Registration Act** empowers this Court to order the rectification by amendment of any registration obtained or omitted by fraud or mistake. In the circumstances of this case, I am persuaded that what happened was largely through a mistake.

This Court's Judgment shall therefore be as follows bearing in mind that the ground acreage of the land parcels **NO EAST BUKUSU/NORTH KANDUYI/2394** and **EAST BUKUSU/NORTH KANDUYI/5868, 5869, 5870 and 5871** (arising from land parcel **NO EAST BUKUSU/NORTH KANDUYI/2395** is only 1.10 Ha and also taking into account what each of the parties paid as purchase price: -

- 1. The register to land parcels NO EAST BUKUSU/NORTH KANDUYI 5868, 5869, 5870 and 5870 is rectified to reflect the total acreage as 0.70 Ha.**
- 2. The register to land parcel NO EAST BUKUSU/NORTH KANDUYI/2394 is rectified to reflect the total acreage as 0.40 Ha.**
- 3. The Land Registrar and County Surveyor Bungoma are directed to rectify the registers and amend the registration of the parcels as above and the same to be reflected on the ground.**
- 4. All the parties, where necessary, shall execute any relevant documents to facilitate that process and in default, the Deputy Registrar shall be at liberty to do so on behalf of any of the parties upon application.**
- 5. As the parties are a family, each shall meet their own costs.**

**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 due to 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.**