



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO 55 OF 2017

FREEMAN WAFULA WATAMBEKO1ST PLAINTIFF

LEONARD OWENS WATAMBEKO.....2ND PLAINTIFF

PETER MAMBIRI WATAMBEKO3RD PLAINTIFF

NICK LUGANO WATAMBEKO4TH PLAINTIFF

VERSUS

ENOS JUMA WABOMBA DEFENDANT

J U D G M E N T

This is one of those perennial family disputes over land which, in my view, are best handled through the Alternative Disputes Resolutions Mechanisms. Although the primary role of the Courts is to resolve conflicts within society, they are not always the best forum for determining disputes particularly those involving family. That is why **Article 159 2(c) of the Constitution** provides that: -

“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”

Litigation no doubt leaves a sour taste in the mouth of the parties and where families are involved, this can lead to further frictions within the family. Under **Article 45(1) of the Constitution**, it is provided as follows: -

“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.”

That is why the Alternative Justice System initiative must be promoted where chiefs and elders can certainly play a very pivotal role in dispute resolution.

Land parcel **NO EAST BUKUSU/WEST SANG’ALO/774** was first registered in the names of **MUTOKA WABOYA (WABOYA)** on 2nd August 1969. Among **WABOYA**’s six (6) sons were **WILLIAM MUTOKA WABOMBA (WABOMBA)** who is the deceased father to the defendant and **JOHN WATAMBEKO MUTOKA (MUTOKA)** who is also deceased and father to the plaintiffs. The parties herein are therefore cousins. On 15th May 2000, the land parcel **NO EAST BUKUSU/WEST SANG’ALO/774** was transferred to **MUTOKA** through a change of names. On 3rd May 2010, **MUTOKA** sub – divided that title to give rise to parcels **NO EAST BUKUSU/WEST SANG’ALO/3839, 3840 and 3841**. Parcels **NO EAST BUKUSU/3839, 3840** together with parcel **NO EAST BUKUSU/SOUTH KANDUYI/3832** and two other properties being parcel **NO KWALE/GANDINI/301** and plot **NO 11 NZOIA MARKET** (herein the suit properties) were registered in the joint names of the plaintiffs following a Confirmation of Grant in respect to the Estate of **MUTOKA** in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 199 OF 2011** on 19th June 2014.

By a plaint dated 10th April 2017 and filed herein on 15th April 2017, the plaintiffs sought Judgment against the defendant in the following terms: -

- 1. A declaration that they are the absolute registered proprietors and have the right to exclusive possession and use of the suit properties and the defendant has no legal or equitable interest in the same.**
- 2. A permanent injunction to restrain the defendant acting by himself and/or through his family members or employees from entering, taking possession of, utilizing and or otherwise dealing with the suit properties.**

3. Costs of the suit.

The basis of the plaintiffs' claim is that the suit properties previously belonged to their late father **MUTOKA** and was transmitted to them following the succession proceedings in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 199 OF 2011** to which there was no objection or protest. As the registered proprietors of the suit properties, the plaintiffs have the right to use the same to the exclusion of all others including the defendant. However, on 12th April 2017, the defendant without any colour of right, legal excuse or justifiable cause invaded the parcel **NO EAST BUKUSU/WEST SANG'ALO/3839** with the intention of ploughing it hence this suit.

Together with the plaint, the 1st plaintiff (**FREEMAN WAFULA WATAMBEKO**) filed two witness statement one dated 10th April 2017 and a second one dated 25th August 2017 together with two lists of documents dated the same dates. He also filed a witness statement by **ROSE NAMUVUYA BARASA (PW 2)** and other witnesses whom he however did not call during the trial.

In the two statements, the 1st plaintiff who testified on behalf of the other plaintiffs who are his siblings has reiterated that as the registered proprietors of the suit properties which they acquired following a succession process that was not contested, they are entitled to the suit properties which previously belonged to their late father **MUTOKA**. That the defendant has no interest, legal or equitable in the suit properties yet on 12th April 2017, he invaded the land with the intention of taking possession of the same. The plaintiffs filed the following documents in support of their claim: -

1. Copies of title deeds for land parcels **NO EAST BUKUSU/SOUTH KANDUYI/3832, 3839 and 3840**.
2. Confirmation of Grant dated 19th June 2014 issued to the plaintiffs in respect of the Estate of **MUTOKA**.
3. Copy of title deed for land parcel **NO EAST BUKUSU/WEST SANG'ALO/774**.
4. Transfer of land in respect to land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** from **WABOYA** to **MUTOKA**.
5. Letter dated 29th April 1998 and addressed to the Land Control Board Bungoma by **WABOYA** for the transfer of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/774** to **MUTOKA**.
6. Statements of Accounts from Nzoia Sugar Company in the names of **MUTOKA** and the plaintiffs showing cane delivery.
7. Funeral programme for **MUTOKA**.

In her statement dated 25th April 2017, **ROSE NAMUVUYA BARASA (PW 2)** states that she is the 2nd daughter of **WABOYA** who was the grandfather to the plaintiff and the sister to **MUTOKA** the plaintiffs' father. That while **MUTOKA** was working in Mombasa, he sent money to his father who bought land at **DOROF** and also Trans – Nzoia where his father lived with their step mother. When **MUTOKA** was shown land at Trans – Nzoia by his father to build, there were wrangles with his step mother and so **MUTOKA** moved to Bungoma and settled on parcel **NO EAST BUKUSU/WEST SANG'ALO/774** which therefore belongs to him and his children who are the plaintiffs herein. That the defendant has no interest in that land and if he wants land, he should have claimed for his share at Trans – Nzoia where his father **WABOMBA** was buried.

By an amended defence and Counter – Claim dated 27th October 2017, the defendant pleaded, inter alia that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** was previously registered in the names of his grandfather **WABOYA** but the plaintiffs' father **MUTOKA** illegally transferred it into his names on 15th May 2000 through a change of name. That the plaintiffs also filed the succession proceedings in respect to the Estate of **MUTOKA** without the consent of **WABOMBA** yet they knew that **WABOMBA** had an interest in the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** having been allocated three (3) acres by **WABOYA** and whose boundaries were clearly marked and which **WABOMBA** was utilizing until 2011 when he started ailing. Therefore, the plaintiffs' registration as the proprietors of the land parcels **NO EAST BUKUSU/ WEST SANG'ALO/3839, 3840** and **3841** is subject to the defendant's un – registered interests by dint of the provisions of **Sections 27(1) (a) and 28 (b) of the Land Registration Act**. The defendant therefore denied that the plaintiffs are entitled to the declaration and other remedy sought.

In his Counter – Claim, the defendant sought an order that the defendant and his family or the Estate of the late **WABOMBA** is entitled to a share of three (3) acres comprised in land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840** and **3841** and that the plaintiffs should be compelled to transfer the said three (3) acres to the defendant as the legal representative of the Estate of **WABOMBA** to hold in trust for his siblings and that in default, the Deputy Registrar of this Court should be ordered to execute all the necessary transfer forms to vest title for a portion measuring three (3) acres to the defendant.

The basis of the Counter – Claim is that during his life time, **WABOYA** had allocated **WABOMBA** three (3) acres out of the land parcel **NO EAST BUKUSU/ WEST SANG'ALO/774** in 1963. That in 1964 **WABOYA** sub – divided the said land parcel among his six (6) sons and the defendant and his family have been in occupation of three (3) acres until 2011 when **WABOMBA** started ailing and in 2017, the defendant was restrained by Administration Police Officers when he had gone to plough it. It is the defendant's case that the registration of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** in the names of **MUTOKA** by way of correction of names on 15th May 2000 was illegal, irregular and unlawful. Particulars of the said irregularity and/or illegality are pleaded in paragraph 12 (c) as follows: -

- (a) **Misleading the Land Registrar to register him as the owner of land parcel NO EAST BUKUSU/WEST SANG'ALO/774 by way of correction of name when he was fully aware that his father who was then registered as the owner was alive.**

(b) Causing himself to be registered as the owner of the land parcel NO EAST BUKUSU/WEST SANG'ALO without disclosing the interest of the defendant's father and his other siblings.

(c) Causing himself to be registered as the owner of the land parcel NO EAST BUKUSU/WEST SANG'ALO/774 without the consent of the registered owner.

(d) Causing the sub – division of the land parcel NO EAST BUKUSU/WEST SANG'ALO/774 without the consent of his siblings the defendant included.

It is the defendant's case that the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** by **MUTOKA** was aimed at dis – inheriting the defendant's family and other beneficiaries. That the plaintiffs therefore hold three (3) acres out of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/ 3839, 3820 and 3840** in trust for the defendant and his family.

Together with his amended defence and Counter – Claim, the defendant also filed his statement and those of his witnesses **ELIZABETH NASIPWONI WABOMBA (DW 2), BENARD SIMIYU KHAEMBA (DW 3), JONATHAN WANYAMA WEKESA (DW 4)** and **PATRICK WEKESA WABOYA (DW 5)**. An attempt by the defendant to call one **MIKE FWAMBA** as a witness was rejected for the reasons contained in my ruling dated 27th May 2020 and his witness statement was expunged from the record. The defendant also filed a list of documents dated 26th May 2017 and two supplementary lists of documents dated 27th October 2017 and 8th February 2018. The said lists contained the following documents: -

- 1. Copy of Certificate of Death for WABOMBA.**
- 2. Copy of harvest ticket from Nzoia Sugar Company.**
- 3. Copy of agreement dated 11th September 2002.**
- 4. Copy of Certificate of official Search for the land parcel NO EAST BUKUSU/WEST SANG'ALO/774.**
- 5. Copy of agreement dated 1st February 1987 and acknowledgement dated 21st May 1987.**
- 6. Copy of transfer form.**
- 7. Certified copy of the register for land parcel NO EAST BUKUSU/WEST SANG'ALO/774.**
- 8. Certificate of Search for land parcels NO EAST BUKUSU/WEST SANG'ALO/3839 and 3940.**
- 9. Copy of sketch map for the schedule of distribution done on 4th May 1984.**
- 10. Copy of Limited Grant Ad Litem issued to the defendant in respect to the Estate of WABOMBA.**
- 11. Certified copy of the register for land parcel NO EAST BUKUSU/WEST SANG'ALO/774.**
- 12. Certified copies of the registers for the land parcels NO EAST BUKUSU/WEST SANG'ALO/3841 and 3839.**
- 13. Copy of the Mutation form for land parcel NO EAST BUKUSU/WEST SANG'ALO/774.**

In his statement filed on 26th May 2017, the defendant states that the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839** and **3840** were as a result of the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/ 774** which was registered in the names of his grandfather **WABOYA**. That prior to his demise, **WABOYA** had distributed the said land to his sons including the defendant's father **WABOMBA** and the plaintiff's father **MUTOKA** as follows: -

- (a) WILLIAM WABOMBA MUTOKA – 3 acres**
- (b) JOHN WATAMBEKO MUTOKA – 2 acres**
- (c) MARTIN KUNDU MUTOKA – 2 acres**
- (d) PATRICK NEKESA MUTOKA – 2 acres**
- (e) FREDRICK WABOYA MUTOKA – 2 acres**
- (f) JUMA WANJALA MUTOKA – 2 acres**
- (g) MOSES WAMALWA MUTOKA – 2 acres**

That the boundaries of those sub – divisions were demarcated on the ground and the balance was reserved for the 3rd house because the children were still minors and since 1984, **WABOMBA** had been utilizing the three (3) acres until 2002 when he leased two (2) acres to one **SIKUKU MIYANGA**. However, from 2011 **WABOMBA** started ailing and did not utilize his three (3) acres until his demise on 23rd November 2016. When the defendant went to plough **WABOMBA**'s portion in March 2017 he was stopped by the Administration Police Officers following a report made by the plaintiffs at **NAMWACHA POLICE POST**. That the said three (3) acres is now comprised in the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839** and **3840** and **MUTOKA** was registered as proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to hold in trust for his siblings including **WABOMBA** and the sub – division thereof was not done in line with the distribution by **WABOYA** and the plaintiffs therefore hold three (3) acres in trust for the family of **WABOMBA**. That **WABOMBA** had previously contracted as a farmer for **NZOIA SUGAR COMPANY LTD** and therefore the defendant is entitled to use the three (3) acres by dint of the provisions of **Sections 28(b) and 27(1) (a) of the Land Registration Act**.

ELIZABETH NASIPWONI WABOMBA (DW 2) is the widow to **WABOMBA**. She states in her witness statement dated 26th May 2017 that the defendant is her eldest son and that following her marriage in 1961, she recalled that in 1963 her father – in – law **WABOYA** allocated to **WABOMBA** a portion of land measuring three (3) acres out of the land parcel **NO EAST BUKUSU/ WEST SANG'ALO/774** on which they lived until 1987 when **WABOMBA** bought three (3) acres of land at **NAMANJALALA** where they migrated to. However, they were still utilizing their portion of three (3) acres which they were ploughing until 2011 when **WABOMBA** started ailing. She added that in 1984, **WABOYA** had sub – divided the land parcel **NO BUKUSU/WEST SANG'ALO/ 774** among his six (6) sons with **WABOMBA** getting three (3) acres and **MUTOKA** and the other siblings two (2) acres each while the balance remained in his names for the benefit of the minor children namely **NICK MUTOKA, KENNEDY MUTOKA, CALEB MUTOKA and DICKSON MUTOKA**. That she does not know how **MUTOKA** transferred the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** into his names and that it was not until April 2017 that the defendant discovered that the said parcel had been sub – divided on 15th May 2000 to create titles **NO EAST BUKUSU/WEST SANG'ALO/3839** and **3841**. That the reason why **WABOMBA** and his family did not utilize their three (3) acres of the said land is because he and her two children were ailing and the family had to take care of them but unfortunately, they all died.

BENARD SIMIYU KHAEMBA (DW 3) is an uncle to the parties herein and his statement dated 26th May 2017 mirrors that of **ELIZABETH NASIPWONI WABOMBA (DW 2)**. Similarly, **JONATHAN WANYAMA WEKESA (DW 4)** and an uncle to the parties confirmed in his statement dated 26th May 2017 that in 1963, **WABOYA** had apportioned three (3) acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to **WABOMBA** and two (2) acres each to his other children including **MUTOKA**. That following the demise of **WABOMBA** on 23rd November 2016, the defendant attempted to utilize his portion of the land but was stopped by Administration Police Officers. A meeting of the clan summoned the plaintiffs in order to resolve the dispute but they refused to attend when summoned by the clan chairman on 7th April 2017.

PATRICK WEKESA WABOYA (DW 5) is a step brother to **WABOMBA** and also an uncle to the parties. He too recorded a statement dated 26th May 2017 in which he states that his father **WABOYA** had in 1984 sub – divided his land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** among his son. That **WABOMBA**, was allocated three (3) acres while the others including himself and the plaintiffs' father **MUTOKA** were each given two (2) acres and the balance remained in his name for the benefit of the minor children. That **WABOMBA** utilized his portion until his demise on 23rd November 2016 but in April 2017, the defendant complained to him that he had been stopped by Police Officers when he went to plough his father's portion. A clan meeting called on 7th April to try and settle the dispute did not yield anything since the plaintiffs refused to attend.

The plaintiffs filed a reply to the defendant's Counter – Claim in which they denied that **WABOMBA** had been allocated land by **WABOYA** out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** or that in 1984, **WABOYA** had sub – divided the said parcel among his sons.

The plaintiffs further denied that the defendant and his family have been utilizing three (3) acres of the said land until 2011 and put the defendant to strict proof. The plaintiffs also denied that they hold the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3820** and **3840** in trust for the defendant or that the transfer of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** was done illegally. Further, that the Counter – Claim is infact statute barred having been filed seventeen (17) years after **MUTOKA** had obtained titled.

The hearing commenced on 4th February 2020. The 1st plaintiff testified and called one witness **ROSE NAMUVUYA BARASA (PW 2)** while the defendant also testified and called as his witnesses **ELIZABETH NASIPWONI WABOMBA (DW 2), BENARD SIMIYU KHAEMBA (DW 3), JONATHAN WANYAMA WEKESA (DW 4)** and **PATRICK WEKESA WABOYA (DW 5)**. They all adopted as their evidence the contents of their statements which I have summarized above and also produced their documentary exhibits.

Submissions were thereafter filled both by MR WERE instructed by the firm of **WERE & COMPANY ADVOCATES** for the plaintiffs and **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by all the parties including the documents filed and the submissions by Counsel.

The following facts are not really in dispute: -

- 1: That the land parcel NO EAST BUKUSU/WEST SANG'ALO/774 was first registered in the names of WABOYA on 2nd August 1969.**
- 2: That among WABOYA's sons were MUTOKA father to the plaintiffs and WABOMBA father to the defendant and who are both deceased.**
- 3: That on 15th May 2000 the land parcel NO EAST BUKUSU/WEST SANG'ALO/774 was transferred into the names of**

MUTOKA.

4: That on 3rd May 2010, the title to parcel NO EAST BUKUSU/WEST SANG'ALO/774 was closed upon sub – division to give rise to parcels NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841.

5: Parcels NO EAST BUKUSU/WEST SANG'ALO/3839 and 3840 are registered in the joint names of all the plaintiffs while the land parcel NO EAST BUKUSU/WEST SANG'ALO/3841 is registered in the sole names of PETER MAMBIRI WATEMBEKO the 3rd plaintiff. This is as per the copy of register of those parcels.

I must at this stage point out that although there has been a reference in the pleadings herein to land parcel NO EAST BUKUSU/SOUTH KANDUYI/3832, the Green Card to land parcel NO EAST BUKUSU/WEST SANG'ALO/774 shows that it was closed on 3rd May 2010 upon sub – division to create parcels NO EAST BUKUSU/WEST SANG'ALO/3839 – 3841. Therefore, neither land parcel NO EAST BUKUSU/SOUTH KANDUYI/3832 nor the plot NO 11 NZOIA MARKET though referred to in the plaint will be the subject of this Judgment nor the final orders.

Whereas the plaintiffs claim that they are the absolute registered proprietors of the land parcels NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841 by virtue of the titles that they hold and also following the Confirmation of Grant issued in BUNGOMA HIGH COURT SUCCESSION CAUSE NO 199 OF 2011, the defendant's Counter – Claim is that infact the plaintiffs hold three (3) acres out of that title in trust on his behalf. I must also at this stage point out that I have perused the said Grant dated 19th June 2014 and confirm that it only involved the following properties: -

1. L.R NO EAST BUKUSU/WEST SANG'ALO/3839.

2. L.R NO EAST BUKUSU/SOUTH KANDUYI/3832.

3. L.R NO EAST BUKUSU/WEST SANG'ALO/3840.

4. L.R NO KWALE/GANDINI/301

and

5. PLOT NO 11 NZOIA MARKET.

There is no reference in that Grant to land parcel NO EAST BUKUSU/WEST SANG'ALO/3841.

As the registered proprietors of the land parcels NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841, the plaintiffs enjoy the protection of Sections 25 and 26 of the Land Registration Act as their counsel MR WERE has rightly submitted. Section 25(1) of the Land Registration Act provides that: -

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -.”

Sections 24 and 26 of the same Act vests in the registered proprietor of land *“the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”* Section 26 on the other hand provides that a Certificate of Title *“shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.”*

Sections 27 and 28 of the repealed Registered Land Act under which the titles in dispute were issued also protect the rights of a registered proprietor of land as being *“absolute”* and *“not liable to be defeated except as provided in the Act.”* That is the right that the plaintiffs seek to enforce against the defendant when they pray for orders that they are the absolute owners of the land parcels NO EAST BUKUSU/WEST SANG'ALO/3839, and 3840, EAST BUKUSU/SOUTH KANDUYI/3832 and PLOT NO 11 NZOIA MARKET. However, there are provisos in both Sections 25(2) of the Land Registration Act and Section 28 of the repealed Registered Land Act. Section 25(2) of the Land Registration Act provides as follows: -

“Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 28 of the repealed Registered Land Act also had the following proviso: -

“Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

It is this obligation of trustee that the defendant seeks to enforce against the plaintiffs in his Counter – Claim with respect to the land parcels NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841. It is now well settled that the registration of land in the name of a party does not relieve him of the duty which he owes other parties in trust including a customary trust. See KANYI MUTHIORA .V. MARITHA NYOKABI MUTHIORA 1984 KLR 712, MUMO .V. MAKAU 2004 1 KLR 13 and MUKANGU .V. MBUI 2004 2 KLR 256 among other cases.

The plaintiffs in their defence to the Counter – Claim pleaded that the defendant’s claim in trust is statutory time barred as it offends the mandatory provisions of **Sections 4 and 7 of the Limitation of Action Act**. Further, that it offends the provisions of **Section 7 of the Civil Procedure Act** as the issue of ownership of the land was determined in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 199 OF 2001**. However, as Counsel for the defendant has correctly submitted citing **KIHARI .V. KIHARI C.A CIVIL APPEAL NO 170 OF 1993** and also **STEPHEN & OTHERS .V. STEPHEN & ANOTHER 1987 KLR 125**, the Limitation period prescribed in **Section 20(2) of the Limitation of Actions Act** does not apply to a customary trust. The land continues to be held in trust even for decades.

And as to whether the defendant's Counter — Claim is barred by the provisions of **Section 7 of the Civil Procedure Act**, that provision provides as follows: -

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

That provision which is the doctrine of res —judicata only applies in the following circumstances: -

1. **The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.**
2. **The former suit must have been between the same parties or parties under whom they claim.**
3. **The parties must have litigated under the same title.**
4. **The Court which decided the former suit must have been competent and; lastly,**
5. **The former suit must have been heard and finally decided by the Court.**

Res —judicata cannot be invoked in this case to defeat the defendant's Counter Claim in trust. This is because, any dispute over ownership of land on the basis of a trust is not a matter for a Probate Court. It is a matter for this Court. That is why **Rule 41(3) of the Probate and Administration Rules** provides that:

"Where a question arises as to the identity, share or Estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to such share or Estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI Rule I of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant. "

The jurisdiction of this Court is provided under **Sections 13 of the Environment and Land Court** and also **Section 150 of the Land Act**. This is the Court that determines disputes and any other actions over interests in land. Therefore, the defendant's Counter — Claim based on trust was not and could not have been determined in **BUNGOMA HIGH COURT SUCCESSION CAUSE No. 199 of 2011**. In any event, the defendant confirmed during cross examination by **MR WERE** that the plaintiffs did not involve him in the succession process. It cannot therefore be argued that the defendant's Counter Claim offends **Section 7 of the Civil Procedure Act** for being res —judicata. This is because, the role of the Court in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 199 of 2011** was confined to distributing the Estate of **MUTOKA** which it did. It was not called upon to determine any dispute relating to a trust.

The plaintiffs have also questioned the defendant's locus standi to file the Counter — Claim as he is neither the legal representative nor the Administrator of the Estate of **WABOMBA** on whose behalf he purports to act. At paragraph 16 of the amended defence and Counter — Claim, the defendant has pleaded as follows:-

*"The defendant's claim against the plaintiffs herein is for a declaration that the defendant and his family or the Estate of the late **WILLIAM WABOMBA MUTOKA** is entitled to a share of 3 acres comprised in land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841** and an order compelling the plaintiffs to transfer 3 acres of land to the defendant herein being the legal and personal representative of the Estate of **WILLIAM WABOMBA MUTOKA** to hold in trust for his siblings in default the Deputy Registrar of this Honourable Court be ordered to vest title for a portion of land measuring 3 acres to the defendant. "*

Among the defendant's documents is a supplementary list of documents dated 27th October 2017 which contains a copy of Limited Grant Ad Litem issued to the defendant to the defendant in **BUNGOMA CHIEF MAGISTRATE'S COURT SUCCESSION CAUSE No 470 of 2017** limited for the purpose of filing a suit on behalf of the Estate of **WABOMBA**. And in paragraph 13 of the same defence and Counter — Claim, the defendant has pleaded as follows: -

"The defendant and his family have been in occupation of the aforesaid 3 acres of land until the year 2011 when the defendant's father started ailing and only returned to plough the said land in the year 2017 after the demise of his father. "

The defendant has therefore moved to this Court both in his own right as a person who has utilized the three (3) acres of land which he seeks and he also has obtained a Limited Grant to enable him agitate **WABOMBA's** right to the same. It cannot therefore be said that he lacks the locus standi to litigate this claim.

I must now consider whether the defendant has proved that the plaintiffs hold the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841** in trust for him and his family as sought in the Counter — Claim.

As the party alleging a trust, the burden was on the defendant to lead evidence to prove the existence of a trust which in the case, is a customary one. **Section 107(1) (2) the Evidence Act** provides that: -

1. "Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence off acts which he asserts must prove that those facts exist. "

2. "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. "

Section 109 of the same Act provides that: -

"The burden of proof as to any particular fact lies on the person who wishes the Court to believe in it's existence, unless it is provided by any law that the proof of that fact shall lied on any particular person."

In **MBOTHU & OTHERS .V. WAITIMU & OTHERS 1986 KLR 171**, it was held that:

"The law never implies, the Court never presume a trust but in a case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. "

In urging this Court to reject the defendant's claim to the land in dispute on the basis of a trust, **MR WERE** has submitted that the land in dispute is private land and there is nothing on the title to suggest that it was subject to a trust. This is how Counsel has put it at page 6 of his submissions: -

"Looking at the history of the land EAST BUCUSU/WEST SANG'ALO/774 and the subsequent sub- divisions EAST BUKUSU/WEST SANG'ALO/3839, EAST BUCUSU/KANDUYI /3832, EASTBUCUSU/WEST SANG'ALO/3840 we do not see anywhere where a trust was envisaged when the titles were registered in the names of any of title holders."

However, trusts including customary trusts are among the overriding interests recognized under both **Section 28 of the Land Registration Act** and **Section 30 of the repealed Registered Land Act** and which need not be noted on the register. In **GATIMU KINGURU .V. MUYA GATHANGI 1976 KLR 253 MADAN J** (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of land does not affect the enforceability of the trust. That decision has been followed in many cases including by the Court of Appeal in **PAUL MUTHUITA .V. WANOE 1982 eKLR**.

In **ISACK M'INANGA KIEBIA .V. ISAAAYA THEURI M'INTARI &**

ANOTHER 2018 eKLR, the Supreme Court stated the following in paragraph 53 with regard to what a Court should consider in cases of customary trusts: -

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in KIARIE . V. KINUTHIA, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust should be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: -

- 1. The land in question was before registration, family clan or group land.**
- 2. The Claimant belongs to such family, clan or group.**
- 3. The relationship of the Claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
- 4. The Claimant could have been entitled to be registered as owner or other beneficiary of the land but for some intervening circumstances.**
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group."**

The above factors are not exhaustive and that is why the Supreme Court, aware that family or clan relations, particularly in the African context, can be very dynamic, advisedly used the words **"some of the elements that would qualify a Claimant as a trustee."** During cross – examination by **MR MURUNGA**, the 1st plaintiff conceded that the original land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** was ancestral land. This is what he said: -

"I confirm that the parcel NO. E. BUKUSU/W/SANG'ALO/774 belonged to my grandfather. It is true that land parcel NO E. BUKUSU/W. SANG'ALO/77 4 was ancestral land. My grandfather had 4 sons who I know. Those are WILLIAM WABOMBA, MARTIN NIXON and PATRICK."

In light of the above unequivocal admission by the I plaintiff, **MR WERE** cannot be correct when he makes the following submission at page 6:

"The defendant believes that a trust is formed spontaneously in any proprietorship as long as the proprietor has dependants. This false notion because there is a clear distinction between private land and community/ancestral land. There can be no trust formed out of a private land even if the proprietor has children."

Whereas it is correct that the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841** which the defendant claims the plaintiffs hold three (3) acres thereof in trust for him and his family are now registered in the plaintiffs' names, this Court cannot lose sight of the fact those parcels were resultant sub — divisions of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** which the plaintiff admits was ancestral land first registered in the names of the parties grandfather **WABOYA**. That is evidence upon which this Court can conclude the existence of a trust in the defendant's favour.

In their testimonies, both the 1st plaintiff and his witness **ROSE NAMUVUYA BARASA (PW 2)** denied that the defendant and his family had been utilizing three (3) acres out of the parcel **NO EAST BUKUSU/WEST SANG'ALO/774** upto 2011 when **WABOMBA** started ailing. However, there was documentary evidence in the form of a lease agreement dated 11th September 2002 showing that agreement which was translated on my instructions reads in paragraph I as follows: -

"NASIANDA 11.9.2002 AREA

LEASE OF LAND A GREETMENT TO PLANT CANE PLOT 774

WILLIAM WABOMBA MUTOKA

ID NO 6649196 HAS TODAY LEASED SIKUKU MIYANGA

ID NO 2255558, 2 ACRES OF LAND FOR KSH 30,000

EACH ACRE Kshs 15,000. "

It cannot be in doubt, and it was never disputed, that the reference to plot **NO 774** can only mean the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774**. Surely **WABOMBA** could not be leasing land which he did not possess. Then there is the evidence of **WABOMBA's** widow **ELIZABETH NASIPWONI WABOMBA (DW 2)** and the parties common uncles **BENARD SIMIYU KHAEMBA (DW 3)** and **PATRICK WEKESA WABOYA (DW 5)** who all confirmed that to their knowledge, **WABOMBA** had been apportioned three (3) acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** by **WABOYA** in 1963 for his use. I found these witnesses to be credible and their evidence cogent unlike the plaintiffs' witness **ROSE NAMUVUYA BARASA (PW 2)** who, having admitted in cross — examination that she had moved to *"Kitale long time ago"*, still denied that **WABOMBA** utilized a portion of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** even in the face of documentary evidence which I have already referred to above showing that **WABOMBA** had in fact leased a portion of that land to **SIKUKU MIYANGA** in 2002.

The plaintiffs produced as part of their documentary evidence a letter dated 29th April 1998 bearing the thumb print of **WABOYA** and headed

"REF: TRANSFER OF

LAND NO E/BUKUSU/

S/KANDUYI, W/SANG'ALO

774 TO MR JOHN WA TAMBEKO"

The letter is addressed to the **DISTRICT LAND CONTROL BOARD BUNGOMA** and states, in Kiswahili language, that **WABOYA** had signed the relevant forms to transfer 21.8 acres to **JOHN WATAMBEKO**. The plaintiffs also produced as part of their documentary evidence incomplete transfer forms by which **WABOYA** was transferring as a gift to **MUTOKA** the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774**. The said transfer form is un — dated and was never registered. These documents only show that whereas there may have been an intention to transfer the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to **MUTOKA**, this was not effected and no reasons have been advanced for that by the plaintiffs. The result is that **WABOYA** did not transfer the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to **MUTOKA** or any other person during his life — time.

In my view, taking into account the un — disputed fact that the land parcel

NO EAST BUKUSU/WEST SANG'ALO/774 which gave rise to land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840 and 3841** was ancestral land first registered in the names of the parties' grandfather **WABOYA**, the fact that the parties are family and that the defendant and his family were utilizing a portion thereof until 2011 when **WABOMBA** was taken ill together with his two children and so the family concentrated on nursing them before 'they all died, there is sufficient evidence on which this Court can make a finding which I hereby do, that the defendant has proved his entitlement to a portion measuring three (3) acres thereof on the basis of a customary trust.

But that is not all. There is sufficient direct evidence on which this Court can find in favour of the defendant on the basis of a constructive trust. As was held by the Court of Appeal in **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED AL HEIDY & OTHERS 2015 eKLR:-**

"A constructive trust is an equitable remedy imposed by the Court against one who had acquired property by wrong doing It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust Imposition of a constructive trust is thus meant to guard against unjust enrichment. "

In **BLACK'S LAW DICTIONARY 10TH EDITION**, a Constructive trust is defined in the following terms: -

"An equitable remedy by which a Court recognizes that a claimant has a better right to certain property than the person who had legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title. "

In his amended defence and Counter — Claim, the defendant pleaded several particulars of irregularity and/or illegality in the manner in which **MUTOKA** obtained title to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/ 774**. One of which was by misleading the Land Registrar to register him as the proprietor thereof by way of correction of names when the registered owner **WABOYA** was still alive. When he was cross — examined by **MR WERE**, the defendant confirmed that **WABOYA** died in 2005 yet in 2000, the register for the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** was changed from the name of **WABOYA** to the name of **MUTOKA**. This, as I have already stated above, is indeed confirmed by the register to the said land parcel which, against the date of 15th May 2000, shows that it was registered in the names of **JOHN WATEMBEKO MUTOKA** through change of names. It is now common knowledge that **JOHN WATEMBEKO MUTOKA** and **WABOYA** are two different persons being son and father respectively. The 1st plaintiff confirmed as much when cross — examined by **MR MURUNGA** when he said:

"I can see the Green Card to the suit land. It shows that the suit land was registered in the names of my grandfather on 2nd August 1969. I can see it was transferred to my father on 15th May 2000 through change of names. That is to mean that JOHN WATEMBEKO MUTOKA and MUTOKA WABOYA are one and the same person.

That is not true. "

The change of ownership of the land parcel **NO EAST BUKUSU/WEST**

SANG'ALO/774 from **WABOYA** to **MUTOKA** purportedly through a change of names was therefore a fraud perpetrated with the sole purpose of defrauding not only the original owner but also other persons with an interest therein, including the defendant, of their rights to the said land. This Court, as a Court of equity, must therefore intervene and ensure that the defendant gets back what he has been deprived through fraud. The imposition of a Constructive trust is well merited in the circumstance of this case. In the face of that clear illegality in the manner in which their father **MUTOKA** acquired the land parcel **NO EAST BUKUSU/ WEST SANG' ALO/774**, the plaintiffs cannot therefore claim, as they have done in their plaint, that they obtained proper titles and are the absolute registered of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840** and **3841** which are resultant sub — divisions of the original title following the succession

proceedings in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 199 of 2011**. That is because, the purported transfer of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to **MUTOKA** was a nullity ab initio and as was held in **BENJAMIN LEONARD MACFOY .V. UNITED AFRICA CO LTD 1962 AC 152**, something cannot stand on nothing and a nullity always begets a nullity. That is the fate of the transfer of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/774** to **MUTOKA** as well as the resultant subdivisions. In short therefore, the plaintiffs' claim that they are the absolute registered proprietors of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3839, 3840** and **3841** and entitled to an order permanently injunctiong

the defendant therefrom is premised on quick sand and cannot be protected by **Article 40 of the Constitution**.

Before I end this Judgment, I must again return to where I started. And that is about the need by parties to always explore alternative mechanisms to dispute resolution. As is now clear from the provisions of **Article 159(2) of the**

Constitution, the mandate of serving justice is no longer the preserve of Courts and Tribunals. Indeed, it never was even before the promulgation of the 2010 Constitution and I would encourage that where families are involved, they should embrace those other mechanisms in solving their problems as much as possible because they are effective, cheaper and can achieve a win — win result for all the parties involved. And if I may borrow the words of **HONOURABLE MOSES WETANGULA** a son and Senator of this County, Court processes can also, like divorces or political re — alignments, be equally *"messy and noisy"* which should be avoided if, as required under **Article 45(1) of the Constitution**, the country hopes to recognize and protect the family as *"the natural and fundamental unit of society. "*

Ultimately therefore, and having considered all the evidence herein, this Court's final Judgment is as follows:

1. The plaintiffs' suit is dismissed.

2. The defendant's Counter — Claim is allowed in the following terms:

(a) A declaration is made that the plaintiffs hold the land parcels NO EAST BUKUSU/WEST SANGALO/3839, 3840

and 3841 in trust for the defendant and his family.

(b) An order is made that the plaintiffs do execute all the relevant documents to facilitate the transfer of three (3) acres out of the land parcels NO EAST BUKUSU/WEST SANG'ALO /3839, 3840 and 3841 to the defendant within thirty 30 days from the date of this Judgment.

(c) In default of (b) above, the Deputy Registrar of this Court shall be at liberty to execute those documents on behalf of the plaintiffs.

(d) As the parties are family and in order to forestall any messy and noisy taxation, I direct that each party meets their own costs.

Boaz N. Olao.

JUDGE

24th September 2020.

Judgment dated, delivered and signed at **BUNGOMA** this 24th day of September

2020. The same is delivered by electronic mail as the parties were advised on 29th

June 2020 in keeping with the **COVID — 19** guidelines.

Boaz N. Olao.

JUDGE

24th September 2020.