



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA.**

**ELC. NO. 122 OF 2013. (FORMERLY HCC. NO.5B OF 2006)**

**PASKAL OUMA MUDAKI & 3 OTHERS.....PLAINTIFF**

**=VERSUS=**

**HABIL NDISI & 10 OTHERS.....DEFENDANTS**

**(CONSOLIDATED WITH BUSIA CMCC. 482 OF 2010 –**

**FREDRICK O. ADEMBA & ANOR –V- THE LAND REGISTRAR, BUSIA & ANOTHER.)**

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

Through the ‘‘second Amended plaint’’ dated 16<sup>th</sup> February, 2011, Paskal Ouma Mudakhi, Michael Juma Mudakhi, Grace Auma Sikuku and Mary Sikuku, hereinafter referred to as 1<sup>st</sup> to 4<sup>th</sup> Defendants sued Habil Ndisi, Calisto Aleri, Alicio Canory O. Oloo, Moses Wambani Okwalo, James Omolo, Joshua Collins Nyulia, Pamela Ademba, John Leonard Okunga, Margaret Tatu Olunga and Samuel Khatenya hereinafter referred to as 1<sup>st</sup> to 11<sup>th</sup> Defendants for a declaratory order that Bukhayo/Kisoko/740 is property of the estate of Mudakhi Munene Ndege. They also pray for eviction orders against Defendants and costs.

The 1<sup>st</sup> Plaintiff avers that he was appointed the administrator of the estate of Mudakhi Munene Ndege, hereinafter referred to as the deceased, in requisite documents for transmission of the deceased’s properties to his names. That in about 2006, he discovered the transmission had not been effected. That between 1998 and 2010, the Defendants took possession of portions of Bukhayo/Kisoko/740 without the administrator’s consent claiming they had bought their portions from Teresa Nyangweso Mudakhi, one of the deceased’s widows. The Plaintiffs avers that the said Teresa Nyangweso Mudakhi did not have the capacity to sell the land to the Defendants as her interest over the land was limited. The Plaintiffs sets out the particulars of fraud attributed to the Defendants under paragraph 8B of the seconded Amended plaint summarized as follows;-

1. Forging land sale agreements to show Teresa Nyangweso Mudakhi had carefully acquired Bukhayo/Kisoko/740 under the Law of Succession.
2. Forgoing Land Control Board applications, mutations and transfers’ of portions subdivided from Bukhayo/Kisoko/740.
3. Corroborating with the surveyor, Land Registrar, District Officer and area Chief to falsely assert Teresa Nyangweso’s rights over Bukhayo/Kisoko/740 to illegally advance their claim over

the suit land.

The Plaintiffs therefore avers that the agreements for sale of land do not confer rights of a purchase to the Defendant. That the transfers executed by Teresa Nyangweso did not confer to the Defendants legal title to the land and therefore none of the Defendant is legally and lawfully registered as owner of the portions of land they occupy. That had any of the Defendants occupied the land under license from Teresa Nyangweso, the license ended on 27<sup>th</sup> April, 2007 when Teresa died.

“The Defendants filed their defence to the second Amended Plaint” dated 25<sup>th</sup> May, 2011. They aver that the suit land Bukhayo/Kisoko/740 was at all material times owned by Teresa Nyangweso Ndaki who in 1993 obtained the Land Control Board Consent to subdivide it and did subdivide it to Bukhayo/Kisoko/3291 to 3294 and registered the parcels as follows;

- a. Bukhayo/Kisoko/3291 and 3292 - Gabriel Barasa Mudakhi.
- b. Bukhayo/Kisoko/3293 – 7<sup>th</sup> and 8<sup>th</sup> Defendants.
- c. Bukhayo/Kisoko/3294 – Teresa Nyangweso Ndaki.

The Defendants further aver that the titles to the said parcels were issued by the Lands office which however failed to close the register of the parent title Bukhayo/Kisoko/740. That the Teresa Nyangweso latter subdivided Bukhayo/Kisoko/3294 into parcels 4823 to 4825 and registered them as follows;

- a. Bukhayo/Kisoko/4823 – 4<sup>th</sup> Defendant.
- b. Bukhayo/Kisoko/4824 – Teresa Nyangweso Ndaki.
- c. Bukhayo/Kisoko/4825 – 1<sup>st</sup> Defendant.

They further aver that Teresa Nyangweso further subdivided Bukhayo/Kisoko/4824 and registered the two parcels arising there from as follows;

- a. Bukhayo/Kisoko/5825 – Teresa Nyangweso Ndaki.
- b. Bukhayo/Kisoko/5826 – 2<sup>nd</sup> defendant (Calisto Aleri)

That 2<sup>nd</sup> Defendant then subdivided parcel Bukhayo/Kisoko/5826 and registered the two parcels arising therefrom as follows;

- a. Bukhayo/Kisoko/5927 – 9<sup>th</sup> Defendant.
- b. Bukhayo/Kisoko/5928 – 3<sup>rd</sup> Defendant.

That in 1998, one Haron Nyaiyeni Myuliah purchased a portion of land Bukhayo/Kisoko/5035 from Gabriel Barasa Mudakhi which is used by 6<sup>th</sup> Defendant.

The Defendant’s aver that they took possession of their respective portions and developed them with the knowledge of the Plaintiffs who never challenged their titles during the life time of Teresa Nyangweso Ndaki. That the Defendants are bonafide purchasers for value without notice of fraud and have been in possession for long and Plaintiffs’ suit should be dismissed with costs.

While this suit was subsisting Busia PMCC. NO. 482 of 2010 was filed in that suit Fredrick O. Admeba and Pamela N. Ademba, who are 8<sup>th</sup> and 7<sup>th</sup> Defendants in this suit are indicated as the plaintiffs while the land Registrar, Busia and Attorney General are indicated as the Defendants the 8<sup>th</sup> and 7<sup>th</sup>

Defendants prayers is that the District Land Registrar, Busia be directed to close the register for Bukhayo/Kisoko/740 and costs. A defence dated 8<sup>th</sup> November, 2010 filed for the two defendants in Busia PMCC. No.482 of 2010 averring to the following among others.

***“ 7. The defendants deny that L.R Bukhayo/Kisoko/740 has given rise to several other titles and that the defendants have failed to close the register.***

8. In the alternative and without prejudice to the foregoing, the Defendants aver that all action taken with regard to L.R. No. Bukhayo/Kisoko/740 has been lawful, procedural, and devoid of mistake.”

The two Defendants goes to pray that the suit be dismissed with costs.

This court allowed the application dated 19<sup>th</sup> January, 2011 to consolidate Busia PMCC. 482 of 2010 with this suit. I however notice that the status of the Defendants in Busia PMCC. 482 of 2010 was not stated and as they did not participate in the subsequent proceedings they will be taken as Interested Parties.

M/S. Balongo & co. advocates and Bogonko, Otanga & co. advocates appeared for the Plaintiffs and Defendants respectively while the Litigations Counsel filed memorandum of appearance and defence for the Interested Parties. The Plaintiffs counsel filed evidence affidavits of the following:-

1. Paskal Ouma Mudakhi as PW 1.
2. Florence Nasimiyu as PW 2
3. Michael Juma Mudakhi as PW 3
4. Gilbert Ondari Ondigo, the Land Registrar, Busia as PW 4.
5. Betty Maloba as PW 5 to produce the affidavit of Emmanuel Murere now deceased which she commissioned on 28<sup>th</sup> July, 2010.
6. Grace Auma Sikuku as PW 6 and
7. Mary Nekesa as PW 7.

For the Defendants case, their counsel called the following to the witness box;

1. Habil Ndisi as DW 1
2. Calistus Cuinis Aleri as DW 2.
3. Alcanory Okwara Oloo as DW 3.
4. Moses Wambani Okwqaro as DW 4.
5. Harun Myanjeni as DW 5 in support of the defence of 6<sup>th</sup> Defendant who is his son.
6. Fredrick Odemba as DW 6.
7. Christopher Wabwire Okitwi as DW 7.
8. Serafina Auma Otsieno as DW 8.

Counsel for the Plaintiffs and Defendants had on 25<sup>th</sup> June, 2009 filed their eleven statement of agreed

issues dated 22<sup>nd</sup> June, 2009 which I have considered when coming up with the following issues for determination.

#### ISSUES.

1. When the 1<sup>st</sup> Plaintiff was appointed the administrator of the estate of Mudakhi Juma Ndege.
2. Whether the suit land Bukhayo/Kisoko/740 was still in the names of Mudakhi Juma Ndege when 1<sup>st</sup> Plaintiff was appointed the administrator of the deceased's estate.
3. Whether Teresa Nyangweso Ndaki got registered as proprietor of the suit land Bukhayo/Kisoko/740 and if so when.
4. Whether Teresa Nyangweso Ndaki subdivided the suit land and transferred the parcels arising therefrom to among others, some of the Defendants.
5. Whether there was fraud in the process through which Teresa Nyangweso Ndaki got registered with the suit land and her subsequent dealings with the suit land and subdivisions thereof and if so whether the Defendants knew or were involved in the fraud.
6. Whether the Plaintiff knew of Teresa Nyangweso Ndaki transactions in the suit land Bukhayo/Kisoko/740 and if so whether they are entitled to the orders sort.
7. Whether the Defendants were bona fide purchasers of their respective parcels and if so whether the 1<sup>st</sup> Interested Party should be ordered to close the register for the suit land Bukhayo/Kisoko/740.
8. Who pays costs in the suits.

#### **SUMMARY OF PLAINTIFFS CASE.**

1. That the suit land Bukhayo/Kisoko/740 was first registered on 21<sup>st</sup> May, 1971 in the names of Mudakhi Murere, the deceased, who died in 1984.
2. That the deceased also owned Bukhayo/Kisoko/737.
3. That the deceased had before his death apportioned parcels Bukhayo/Kisoko/737 to the house of his first wife, Wilimina Nyongesa Mudakhi and Bukhayo/Kisoko/740 to the house of 2<sup>nd</sup> and 3<sup>rd</sup> wives namely Philista Nyongesa and Teresa Nyangweso.
4. That the 1<sup>st</sup> Plaintiff who is the elder son of the deceased and the first wife filed a Succession Cause number 75 of 1993 and annexed the certificate of confirmation of a grant dated 28<sup>th</sup> November, 1996 in Nairobi H.C. Succession Cause No. 75 of 1993.
5. That the families of Teresa Nyangweso and Philista Nyangweso to subdivide Bukhayo/Kisoko/740 for subdivision and distribution but the 1<sup>st</sup> widows family subdivided and distributed Bukhayo/Kisoko/737.
6. That the 1<sup>st</sup> Plaintiff discovered that the documents he had lodged with the lands office to transmit the suit land from the deceased to his names and those of other beneficiaries on 28<sup>th</sup> September, 1996 had not been registered and were missing.
7. That the 1<sup>st</sup> Plaintiff obtained certified copies of the grant, form LR 7 and 30 and took them to the Land Registrar and were registered upon paying Kshs.250 under receipt number 446205 on 2<sup>nd</sup> December 2006 in settlement of Busia PM CC. No.298 of 2006 in which he had sued the land Registrar and Attorney General.

8. That the 1<sup>st</sup> Interested Party registered the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Plaintiffs and Barasa Mudakhi as registered owners in equal shares of Bukhayo/Kisoko/740 on 28<sup>th</sup> September, 2006.
9. That Defendants had all along knew that the land they had bought from Teresa Nyangweso belonged to the deceased and that Teresa Nyangweso had no capacity to sell it.
10. That Teresa Nyangweso had sold the land at throw away prices and the Defendants who have made permanent constructions on the land did so while aware of the Plaintiffs claim.
11. That Teresa Nyangweso and deceased had three sons namely, Peter Michael Sikuku, Gabriel Barasa and Jomo Mudakhi and five daughters namely Florence Nasimiyu Auma, Seraphina Auma Otsieno, (Sorofina Tabu), Alexina Anyango, Everlyn Nabwire and Beatrice Auma are now deceased.
12. That the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiff's were widows to Michael Shikuku Mudakhi.
13. That the 2<sup>nd</sup> Plaintiff and other male beneficiaries of Bukhayo/Kisoko/740 have residences on that land but no title to the land.
14. That none of the daughters of the two houses who were to inherit Bukhayo/Kisoko/740 have houses on that land.
15. That 3<sup>rd</sup> Plaintiff had not separated from Michael Shikuku Mudakhi by the time he died.
16. That the 2<sup>nd</sup> Plaintiff was to inherit from Bukhayo/Kisoko/740.
17. That Teresa Nyangweso had sold and transferred portions of Bukhayo/Kisoko/740 to the Defendants before she died on 24<sup>th</sup> April, 2007.
18. That the Nairobi H.C. succession Cause No.75 of 1993 involved the two parcels of land Bukhayo/Kisoko/737 and 740 but two different certificates of confirmation for each parcel had been issued. Only the copy of certificate of confirmation for parcel Bukhayo/Kisoko/740 was however attached to the evidence affidavits.
19. That the 1<sup>st</sup> Plaintiff registered the certificate for confirmation for Bukhayo/Kisoko/737 on 11<sup>th</sup> June, 1996 under receipt number 530807 and that for Bukhayo/Kisoko/740 on 28<sup>th</sup> September, 2006 under receipt number 0706443.
20. That Defendants started taking possession and developing the land they had bought from Bukhayo/Kisoko/740 in 1998 but 1<sup>st</sup> Plaintiff could not stop them as the Succession Cause documents had gone missing from the Lands Office.
21. That even though this suit was commenced when Teresa Nyangweso was alive the Plaintiffs could not enjoin her as a Plaintiff as they were not in good terms for having done the transactions involving Bukhayo/Kisoko/740 secretly without involving them.
22. That PW 2 learnt that the Defendants had settled on her mother's land (Bukhayo/Kisoko/740) in 2000 but took no action to stop or evict them.
23. That 2<sup>nd</sup> Plaintiff (PW 3) is the only child of Philista Nyongesa and has lived in Uganda since 1999 though he retains a house on Bukhayo/Kisoko/740 he had built when the deceased was alive. That his mother Philista lives in a rented house at Kimilili whose rent he pays.
24. That the register for Bukhayo/Kisoko/740 had been indicated to have been closed on subdivision to 3293 and 3294 under entry number 2 on 22<sup>nd</sup> May, 2006 but that entry was not signed. [that the entry

had thereafter been cancelled by being ~~cross-out~~ but again the cancellation was not signed for.

25. That PW 4, the Land Registrar Busia, upon being shown the copies of titles and certificate of official searches in respect of the parcels of land registered in the Defendants names, agreed that was an indication that Bukhayo/Kisoko/740 had been subdivided and parcels arising therefrom transferred to various persons.

26. That PW 4 did not know why his predecessors had declined to register the transmission documents issued in Nairobi HCC.Succession Cause No. 75 of 1993 until the order compelling the registration was issued in Busia PM.CC. No. 208 of 2006. The witness denied having seen the Defendants' counsel's letter dated 13<sup>th</sup> June, 2013 asking for documents relating to parcels Bukhayo/Kisoko/3291 to 3294 and all resultant subdivisions thereof.

27. That the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were chased away by Teresa Nyangweso in 1998 after the death of their husband Michael Peter Shikuku in 1996.

28. That Teresa Nyangweso and her sons Gabriel Barasa and Michael Peter Sikuku sold parcels of Bukhayo/Kisoko/740 after the death of the deceased but without involving the 1<sup>st</sup> Plaintiff who had been appointed the administrator of the estate.

29. That upon the death of the deceased, all his assets including the suit land Bukhayo/Kisoko/740 became subject to the application of the Law of Succession Act, Cap 160 of L.O.K. To this end the Plaintiffs complied with the require mental of the Law and were validly registered as proprietors of the suit land under section 119 (3) of the Registered Land Act (Repealed).

30. That Teresa Nyangweso never acquired the rights of a proprietor under the Registered land Act (Repealed) and therefore lacked capacity to subdivide and sell the suit land. Further the title deeds issued to the Defendants were irregular and illegal as they are not anchored to know parcel registers contrary to section 32 (1) of the Registered Land Act (Repealed).

31. That the prayers to close the register for Bukhayo/Kisoko/740 cannot be granted as the Plaintiffs were not enjoined as parties to Busia CM.CC 482 of 2010 and were the registered proprietors.

32. That the transactions between Teresa Nyangweso and the Defendants were criminal and in breach of section 45 (1) of the Law of Succession Act.

33. That the developments done by the Defendants on the suit land cannot be a bar to their eviction.

34. That Teresa Nyangweso was not a proprietor of the suit land in terms of the definition of the terms "proprietor" in Registered Land Act (Repealed) and had no capacity to execute dispositions documents in respect of the suit land as required under S. 109 (1) of Registered Land Act (Repealed).

35. That the Defendants should not have been issued with title deeds to the portions subdivided from Bukhayo/Kisoko/740 as their names had not been entered in the register as proprietors.

36. That as Teresa Nyangweso did not confer title of portions subdivided from Bukhayo/Kisoko/740 and as the Defendants did not obtain the Plaintiffs authority prior to taking possession of those parcels, they should be evicted irrespective of the developments carried out on their respective portions.

37. That Defendants aided and abetted in forging land sale agreements, letters of consent, transfers, title deeds and breached the legal provisions relating to dealings in a deceased persons property and the transactions were ineffectual to transfer interest in land as provided for under section 38 of Registered Land Act (Repealed).

38. That to allow the prayers in Busia CM.CC.482 of 2010 without enjoining the Plaintiff's tantamount to bypassing the Plaintiffs who are registered proprietors and transfer the land to Defendants in

contravention of section 37 (1) of the Land Act number 3 of 2012 which requires a proprietor to execute the document to dispose interest in land.

39. That the consolidation of Busia CMCC. No.482 of 2010 with this case did not make the Plaintiffs parties to that case.

40. That the certificate of confirmation issued to the 1<sup>st</sup> Plaintiff in respect of the deceased's estate has not been challenged and that failure to produce the letter of administration is not fatal to the plaintiffs case.

41. That the Defendants had not counterclaimed for cancellation, rectification or closure of the register of the suit land in this case.

42. That the two authorities cited by the Defendants' counsel are irrelevant and inapplicable to the circumstances of this case.

### **SUMMARY OF THE DEFENDANTS CASE.**

1. That before Mudakhi Murere Ndege died in 1984 he had settled the family of his first wife Wilimina Nyongesa on Bukhaya/Kisoko/737 and that of his second wife Teresa Nyangweso on Bukhaya/Kisoko/740. The acreage for Bukhaya/Kisoko/737 was 4.0 hectares and that of Bukhaya/Kisoko/740 was 3.4 hectares.

2. That Teresa Nyangweso succeeded and caused Bukhaya/Kisoko/740 to be registered in her names and on 10<sup>th</sup> February, 1993 applied to the Nambale Land Control Board for consent to subdivide it into four portions. The board granted her consent dated 11<sup>th</sup> February, 1993 and she subdivided the land into parcels 3291 to 3294.

3. That Teresa Nyangweso retained Bukhaya/Kisoko/3294 in her names and transferred Bukhaya/Kisoko/3293 to 7<sup>th</sup> and 8<sup>th</sup> Defendants names on 17<sup>th</sup> July, 1996 and Bukhaya/Kisoko/3292 in names of her son Gabriel Barasa Mudakhi as trustee for his deceased brother's Michael Sikuku Mudakhi's family and parcel Bukhaya/Kisoko/3291 to Gabriel Barasa Mudakhi.

4. That 2<sup>nd</sup> Plaintiff was a child of the deceased born out of wedlock who deceased brought home and stayed with the family of the first wife Wilimina. That deceased later bought an acre of land from Edewa Mania and built a house for him there. That when 2<sup>nd</sup> plaintiff's wife died, he buried her there and moved to Mbale in Uganda.

5. That the Plaintiffs did not object to Teresa Nyangweso subdividing and transferring portions of Bukhaya/Kisoko/740 and the complainants lodged to the Land Registrar and subject matter of the letter dated 27<sup>th</sup> April, 2006 was addressed and transactions cleared by the District Officers as shown in the letter dated 19<sup>th</sup> May, 2006.

6. That Teresa Nyangweso entered into a sale agreement with 1<sup>st</sup> Defendant on 4<sup>th</sup> December, 1998 under which she sold 0.20 hectares from Bukhaya/Kisoko/3294 to him. She then applied for and obtained Land Control Board consent to transfer Bukhaya/Kisoko/4825 to 1<sup>st</sup> Defendant on 3<sup>rd</sup> December, 1998. The 1<sup>st</sup> Defendant was on 23<sup>rd</sup> April, 1999 registered as proprietor of the said parcel and title deed issued.

7. That on 12<sup>th</sup> February, 1999 Defendant made a sale agreement under which 2<sup>nd</sup> Defendant bought 0.2 hectares of land at Kshs.20,000/= from Bukhaya/Kisoko/3294. That Teresa Nyangweso first subdivided the land to cater for other transactions and was left with Bukhaya/Kisoko/4824 which she subsequently subdivided into parcels Bukhaya/Kisoko/4824 which she subsequently subdivided into parcels Bukhaya/Kisoko/5825 and 5826. That the former parcel was retained in the names of Teresa Nyangweso

and the latter parcel was registered in the names of 2<sup>nd</sup> defendant.

8. That the 2<sup>nd</sup> Defendant subsequently subdivided Bukhayo/Kisoko/5826 into Bukhayo/Kisoko/5927 and 5928. That he transferred the former parcel to 9<sup>th</sup> Defendant and the latter to 3<sup>rd</sup> Defendant.

9. That the 3<sup>rd</sup> Defendant took possession of the land he bought from 2<sup>nd</sup> Defendant and built a three bed roomed permanent house on it in 2003. That upon this suit being filed, he conducted a search at the land office and obtained a certificate of search dated 12<sup>th</sup> September, 2006 showing he was the registered proprietor of Bukhayo/Kisoko/5928. The 3<sup>rd</sup> Defendant also attached to his evidence affidavit a letter from the District Surveyor Busia/Teso dated 18<sup>th</sup> April, 2006 resubmitting mutation forms for subdivisions of Bukhayo/Kisoko/740 and 3294 to replace the earlier ones that had gone missing after registration.

10. That in 1998, the 4<sup>th</sup> Defendant purchased 0.86 hectares from Teresa Nyangweso out of Bukhayo/Kisoko/3294. That Teresa Nyangweso applied for and obtained Land Control Board Consent to subdivide the parcel and subdivided the parcel into Bukhayo/Kisoko/4823 to 4825. That parcel 4823 was meant to be for 4<sup>th</sup> Defendant and he took possession for it in 1996 and has put up permanent building on it.

11. That on 10<sup>th</sup> June, 1998, the father of 6<sup>th</sup> Defendant named Harun Nyanjeri Nyuliah bough 0.41 hectares of land from Gabriel Barasa Mudakhi out of parcel Bukahyo/Kisoko/3938 at Kshs.37,000/=. That parcel Bukhayo/Kisoko/3938 was a subdivision from Bukhayo/Kisoko/740 and the vendor applied and obtained Land Control Board consent to subdivide Bukhayo/Kisoko/3938 into two parcels namely Bukhayo/Kisoko/5034 and 5035 and transferred the later to him after obtaining Land Control Board Consent to transfer . that it is on parcel Bukhayo/Kisoko/5035 where the 6<sup>th</sup> Defendant resides.

12. That Bukhayo/Kisoko/3293 which is a subdivision from Bukhayo/Kisoko/740 was transferred to the names of 7<sup>th</sup> and 8<sup>th</sup> Defendants who are wife and husband on 17<sup>th</sup> July, 1996. That the 7<sup>th</sup> and 8<sup>th</sup> Defendant took possession of Bukhayo/Kisoko/3293 in 1996 and have developed it with full knowledge of the plaintiffs who are taking advantage of the lands office failure to close the register for Bukhayo/Kisoko/740. A certificate of official search for parcel Bukhayo/Kisoko/3293 dated 27<sup>th</sup> January, 1999 shows the 7<sup>th</sup> and 8<sup>th</sup> Defendant as the registered proprietors and has a note of stay of registration in the register.

13. That when Teresa Nyangweso died in 2007, she was buried on land parcel Bukhayo/Kisoko/5625 which was a subdivision from Bukhayo/Kisoko/740.

14. That Defendants did not know the land Teresa Nyangweso was selling to them was part of the estate of the deceased whose administrator was 1<sup>st</sup> Plaintiff. That the Defendants did not file objection proceedings in the Succession Cause filed by 1<sup>st</sup> Plaintiff as the land they had bought was not part of the deceased's estate.

15. That the Chief called a meeting in 2006 which 3<sup>rd</sup> Defendant attended. That 3<sup>rd</sup> Defendant did not hear any of the deceased's family members raise objection to the sale of the land by Teresa Nyangweso.

16. That 7<sup>th</sup> and 8<sup>th</sup> Defendants had bought Bukhayo/Kisoko/3293 from Teresa Nyangweso without knowing it had come from a parcel registered in the names of a deceased person. That they had conducted an official search on Bukhayo/Kisoko/3293 and found it was in the names of Teresa Nyangweso making them believe she had the capacity to sell it to them. That they filed Busia CMCC. No.482 of 2010 and still prays that the Land Registrar, Busia be directed to close the register for Bukhayo/Kisoko/740 to reflect the subdivision arising from it including Bukhayo/Kisoko/3293.

17. That Teresa Nyangweso had consulted her children including the two sons before selling portions

of the land she inherited from the deceased as confirmed by DW 7 and DW 8.

18. That 1<sup>st</sup> Plaintiff filed a Succession Cause in respect of his mother's land parcel Bukhayo/Kisoko/737 and 740.

19. That the plaintiffs did not challenge Teresa Nyangweso when she caused Bukhayo/Kisoko/740 to be registered into her names. They also did not challenge Teresa Nyangweso in the manner she dealt with the suit land up to her death in 2007.

20. That the Defendants acquired title to the portions they acquired and extensively developed them without the Plaintiffs raising any objections.

21. That the land transactions between Teresa Nyangweso and the Defendants received the requisite consents of Nambale Land Control Board and that Defendants obtained title to their parcels after paying valuable considerations and without knowledge of omission, fraud or mistake on the part of the vendor and or the lands office.

22. That the 1<sup>st</sup> Plaintiff have failed to produce a copy of letters of administration as required under section 79 of the Law of Succession Act Cap 160 L.O.K and has therefore failed to prove he is the administrator of the deceased's estate.

23. That at the time of issuance of confirmation of grant on 28<sup>th</sup> November, 1996 to the Plaintiffs, Bukhayo/Kisoko/740 was not a "free property" of the deceased's estate as the same had been registered in the names of Teresa Nyangweso and subdivided into Bukhayo/Kisoko/3291 to 3294.

24. That the title of Teresa Nyangweso to Bukhayo/Kisoko/740 could only have been challenged through a direct suit against her and not by Suing the Defendants who had acquired title to the land for valuable consideration and taken possession.

25. That the court should exercise its powers under section 143 of Registered Land Act (Repealed) and order rectification as no fraud attributable to the Defendants has been proved. The Defendants counsel referred to the Ugandan case of *Kampala Bottlers Ltd -V- Damanico (U) E. ALR (1990 -1994)141* where the court held;

**“ To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof of fraud must be heavier than a balance of probabilities generally applied in Civil matters.”**

26. That the Plaintiffs have admitted that the Defendants paid monies to Teresa Mudakhi as purchase price for the portions of the land they occupy and that Teresa Mudakhi executed the instruments of transfer to the Defendants favour but counter that by saying the documents of transfer were null and void and could not confer any interests to the Defendants in respect of the suit land.

27. That it is not the duty of the Defendants to explain how Teresa Nyangweso got registered with the suit land without obtaining letters of administration in the estate of the deceased. That the plaintiffs should have taken the issue up with Teresa Nyangweso when she was selling the land. This was especially so for the 1<sup>st</sup> Plaintiff if indeed he was the administrator of the deceased's estate.

28 That the Defendants were not under an obligation to inquire as to how Teresa Nyangweso acquired the registration with the land she was offering to sell to them. It was enough for the Defendants to satisfy themselves that indeed she was the registered proprietor and that the land exists on the ground.

29. That if Teresa Nyangweso obtained the registration of the suit land in her names by omission, fraud

or mistake, the plaintiffs have not proved that the Defendants were implicated and had any knowledge of the omission, fraud or mistake or that the Defendants caused such omission, fraud or mistake or substantially contributed to the omission, fraud or mistake. The Defendants counsel cited the Court of Appeal decision in *Maingi Mutisya Nzioka -V- Mbuki Kisavi* Nairobi. C.A.C.A No. 97 of 2004 where the court held;

***“ Under Section 143 of the Registered Land Act, the High Court (by dint of Section 159 of the said Act) has jurisdiction to order rectification of the register of land where it is proved that a particular registration, not being a first registration, was obtained, made or omitted by a fraud or mistake. As the Appellant herein was himself implicated in the fraud, and not being an innocent purchaser for value, he would be unable but for the first registration, to resist the rectification by order of court that should flow from the finding of fraud.”***

30. That the Plaintiffs are stopped from challenging the Defendants title to the suit land as they failed to challenge the transactions done by Teresa Nyangweso and Gabriel Barasa Mudakhi when they were selling the portions from the suit land Bukhayo/Kisoko/740.

31. That the register for Bukhayo/Kisoko/740 was left open by omission and or mistake on the part of the Lands Office and this court should order its closure as prayed for by 7<sup>th</sup> and 8<sup>th</sup> Defendant in Busia CMCC. 482 of 2010.

32. That the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants bought their portions of land from Teresa Nyangweso while 3<sup>rd</sup> and 5<sup>th</sup> Defendants bought theirs from the 2<sup>nd</sup> Defendant and the portion occupied by the 6<sup>th</sup> Defendant was bought from Gabriel Barasa Mudakhi. That at the time of the sale, the sellers/vendors were the registered proprietors of the parcels they sold to the respective Defendants. That Plaintiffs have not prayed for an order to cancel the Defendants titles and the court cannot grant prayer not sought by the parties.

33. That the prayers sought by the plaintiffs in the second Amended Complaint cannot be granted against Defendants as they are holders of valid titles to parcels of land created from Bukhayo/Kisoko/740.

## **FINDINGS.**

Having heard the evidence adduced by the parties and witnesses who testified before the court, the contents of the evidence affidavits filed by the parties and the annexures thereto plus the submissions by both counsel, the court finds as follows;

1. That as confirmed by the Land Register, Busia County, who testified as PW 4, the suit land Bukhayo/Kisoko/740 was on first registration registered in the names of Mudakhi Murere, who is the deceased herein, on 21<sup>st</sup> May, 1971. That the deceased also owned Bukhayo/Kisoko/737 by the time he died in 1984.

2. That upon the death of the deceased, his estate including the two parcels of land listed in (10 above were to be dealt with as provided under the Law of Succession Act Chapter 160 Laws of Kenya.

3. That the deceased family members are in agreement that the deceased had indicated his preference when alive on how he wished his estate to be shared among his widows and their children. That Bukhayo/Kisoko/7378 was to be inherited by the house of his first widow Wilimina while Bukhayo/Kisoko/740 was to be inherited by the house of the second widow Teresa Nyangweso. There was mention of a third widow namely, Philista, by the Plaintiffs but those from Teresa's house disputed. It is notable that the said Philista was reported to have left the deceased's properties and gone to live in a rental premises paid for by PW 3 and that she has not lodged any claim over the deceased estate.

4. That the deceased, having made his preference on how he wished his estate to be shared, and his family members not apparently appeared to disagree with his arrangement, what remained of the heirs of

the estate was to move in accordance with the law of Succession Act Cap 160 and distribute the estate. The Plaintiffs case is that the 1<sup>st</sup> Plaintiff being the deceased's eldest son, filed a Succession Cause and was appointed the administrator of the deceased estate in Nairobi H.C. Succession Cause No. 75 of 1993.

5. That though the 1<sup>st</sup> Plaintiff claim that he had after obtaining the necessary documents from the Succession Cause filed them in the Lands office for purposes of transmitting the title for Bukhayo/Kisoko/740 to the names of the heirs in 1996, this claim is not supported by evidence availed before this court. Unlike in respect of Bukhayo/Kisoko/737 where he exhibited a filing receipt dated 11<sup>th</sup> June, 1996, the relevant receipt in respect of Bukhayo/Kisoko/740 he annexed is dated 28<sup>th</sup> September, 2006.

6. That the certificate of confirmation of grant exhibited by the 1<sup>st</sup> Plaintiff and said to have been issued in Nairobi H.C. Succession Cause No. 75 of 1993 has only one parcel of land that is Bukhayo/Kisoko/740 for distribution. The court was only told of one succession Cause having been filed for the estate of the deceased and is left wondering of the whereabouts of the certificate of confirmation of grant in respect to Bukhayo/Kisoko/737. This is a critical and important issue that the Plaintiffs needed to set straight as the process this court knows is that only one certificate of confirmation of grant is issued in each Succession Cause setting out the distribution of an estate.

7. That the Succession documents were filed in Bukhayo/Kisoko/737 on 12<sup>th</sup> June, 1996 and 2<sup>nd</sup> December, 1996 as confirmed in the copy of the register annexed to the evidence affidavit of DW 7. The 1<sup>st</sup> Plaintiff has indicated that he had also lodged similar set of papers in respect of Bukhayo/Kisoko/740 which were later found missing in 2006. It is also in that year that he found the documents had not been registered meaning the heirs as ascertained in the certificate of confirmation of grant had not been registered as proprietors. On conducting further enquires he discovered that the Defendants had occupied portions of Bukhayo/Kisoko/740 without his consent or that of the other Plaintiffs and commenced these proceedings.

8. That it is clear the Defendants were not authorized by the 1<sup>st</sup> Plaintiff as administrator or the other Plaintiff as heirs of the deceased estate to occupy the suit land. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants claim their right from Teresa Nyangweso who was one of the widows of the deceased. The 3<sup>rd</sup> and 5<sup>th</sup> Defendants claim their right from the 2<sup>nd</sup> Defendant as he sold to them the portion he had bought from Teresa Nyangweso. The father to the 6<sup>th</sup> Defendant claim his right for the portion occupied by 6<sup>th</sup> Defendant from Gabriel Barasa Mudakhi now deceased and a son to Teresa Nyangweso. Gabriel Barasa had also obtained the land from which he sold a portion to 6<sup>th</sup> Defendants father from his mother Teresa Nyangweso. The foregoing shows clearly that all the parcels the Defendants occupy, hold title to and from which the Plaintiffs want them evicted arose from Bukhayo/Kisoko/740.

9. That there is no evidence presented before this court to show the process Teresa Nyangweso followed to have the land that her deceased husband had left for her family's distribution transferred to her names. The brother to Teresa Nyangweso and daughter to Teresa Nyangweso testified as DW 7 and DW 8 respectively and neither of them had any information. They only said what the Defendants have consistently said that Teresa Nyangweso had title to the parcels of land she was selling and that due process including written sale agreements, Land Control Board Consents and official searches at the lands office were conducted.

10. That as the deceased had died in 1984 and the Law of Succession Act Cap 160 of L.O.K had commenced on 1<sup>st</sup> July, 1981, the interest of Teresa Nyangweso as a widow to the property meant for her house, that is, Bukhayo/Kisoko/740 was only life interest as provided for under sections 35 of the said Act. A surviving spouse power to dispose of property under section 37 of the Act which states;

1. " 37. A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with ***the consent of all co-trustees and all children of full age, or with the consent of the court***, may, during the period of the life interest, sell any of the property subject to that interest if

it is necessary for his own, maintenance;

Provided that, in the case of immovable property, the exercise of that ***power shall always be subject to the consent of the court.***”

There is nothing provided to this court to show that indeed Teresa Nyangweso had followed the provisions of the Law in the process of being registered as proprietor of Bukhayo/Kisoko/740. Had that been the case, the title would have noted that her interest was only a life interest would have been forced to seek the concurrence of her children including DW 8 or consent of the court to sell the said land.

11. That having found as in (10) above and noting that some of the Defendants had been issued with title deeds to the parcels which are subdivisions from Bukhayo/Kisoko/740, the court can only conclude that Teresa Nyangweso had in collusion with a person or persons in the Land Registrars office, Busia, without following the due process got registered as the proprietor of parcel Bukhayo/Kisoko/740. That in the process the lands office created registers under which Bukhayo/Kisoko/740 was subdivided with further sub divisions on the parcels arising therefrom. It was from the registers created through this process that the certificates of official searches obtained by some of the Defendants herein were delved from. All along, the original register for Bukhayo/Kisoko/740 was left intact as confirmed by PW 4.

12. That the process by which Teresa Nyangweso got a register created showing, she was the registered proprietor of Bukhayo/Kisoko/740 must have been through fraudulent means involving an officer or officers in the Busia County Land office. It was through the collusion of the Lands office that subsequent titles from subdivisions arising from Bukhayo/Kisoko/740 continued to be processed and certificates of official searches issued. Had the Plaintiffs especially the 1<sup>st</sup> Plaintiff been diligent enough, Teresa Nyangweso could have been prosecuted for intermeddling with the property of a deceased person under Section 45 (2) (a) of Law of Succession Cap 160 of L.O.K. Alternatively action would have been taken early enough to stop the intermeddling as the property of a deceased person is protected under section 45 of said Act which states.

**“ 45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose off, or otherwise intermeddle with, any free property.”**

13. That for reasons not disclosed to this court by the Plaintiffs, they did not find it necessary to enjoin Teresa Nyangweso in this suit. Even the Defendants did not apply to enjoin her even though she was alive until April, 2007 when she died. The Defendants must have know about the history of the suit land as they have all except the 8<sup>th</sup> Defendant indicated that they hail from Nambale. It is in that neighbourhood that the suit land is situated. There was also the complaint that resulted to the Land Registrar and District Officer writing the letters dated 27.4.2006 and 19.5.2006. [The 7<sup>th</sup> and 8<sup>th</sup> Defendants filed Busia PM.CC No.482 of 2010 against the Land Registrar and Attorney General to compel the office to close the register for Bukhayo/Kisoko/740 on the realization that it was still open. The fact that the register had not been closed meant all the subdivisions that had been created from that parcel had not been registered.

14. That looking at the documents annexed to the evidence affidavit of 1<sup>st</sup> Defendant, the court notes the following;

a. That the space for the signature or mark for Teresa Nyangweso is blank.

b. The agreement is dated 4<sup>th</sup> December, 1998 while the letter of consent is dated 3<sup>rd</sup> December, 1998 which is the day before the agreement.

As usually a sale agreement should come before the Land Control Board consent is granted, the court would have expected the 1<sup>st</sup> Defendant to officer all explanation and did not. If a signature or mark attributable to the said Teresa is visible on the original copy of the agreement, the Defendant had a duty to

present it to the court.

15. That the sale agreement annexed to the evidence affidavit of 2<sup>nd</sup> Defendant shows he was buying 0.2 hectares from Bukhayo/Kisoko/3294 but his testimony showed the land he got was a subdivision from Bukhayo/Kisoko/4824. No sale agreement was availed in respect of buying 0.2 hectares from Bukhayo/Kisoko/4824.

16. That the 4<sup>th</sup> Defendant did not avail any documentary evidence to confirm the existence of a sale agreement between him and Teresa Nyangweso over 0.86 hectares from Bukhayo/Kisoko/3294 or exhibit any documentary evidence to confirm that Bukhayo/Kisoko/4823 was a subdivision of Bukhayo/Kisoko/3294 and that it was transferred and registered in his names as alleged in his evidence affidavit.

17. That in relation to the documents attached to the evidence affidavit of Harun Nyanjeni Myuliah father to 6<sup>th</sup> Defendant, the court noted the following;

a. That while in the sale agreement dated 10<sup>th</sup> June, 1998 Gabriel Barasa Mudakhi the vendor, wrote his name as a signature the space for the owner in the application for land Control Board consent to subdivide and no explanation was offered.

b. There Land Control Board Consent to subdivide was not annexed.

c. That mutation forms show the survey was done on 8<sup>th</sup> July, 1998 but at the top right corner bears the date of 27<sup>th</sup> February, 2006 as the date it was registered. The top left corner carries the date of 9<sup>th</sup> September, 1998.

d. The application for Land Control Board consent to transfer and the letter of consent issued thereon are undated.

e. The copy of the transfer bears the date of 9<sup>th</sup> September, 1998.

The discrepancies set about were not explained and the court is left wondering whether all the transactions were done and completed during the lifetime of Gabriel Barasa Mudakhi who reportedly died in 1998.

18. That the evidence presented by the Plaintiffs and the anomalies noted on some of the documents annexed to the evidence affidavits of the Defendants and their witnesses leads the court to conclude that the Defendants were not bona fide purchasers for value for the parcels they claim. A bona fide purchaser for value is one who buys a property without notice of another's claim to the property. A bona fide purchaser has no actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title but is one who in good faith paid valuable consideration for property without notice of previous adverse claims. The Defendants herein of the history of the suit land. They knew of the claims of the Plaintiffs that had culminated to the complaint to the Land Registrar prompting the letters of 27.4.2006 and 19.5.2006 and the hearing that took place before the chief. They also knew there were problems with the registrations of their transactions at the Lands Office as the register to the suit land Bukhayo/Kisoko/740, from which their parcels had not been closed. The Defendants' may not directly been involved in the fraudulent transaction under which Teresa Nyangweso acquired registration of Bukhayo/Kisoko/740. They however knew that the title to the suit land and the subdivisions thereof had been illegally or un procedurally acquired. Section 26 of the Land Registration Act No. 3 of 2012 is relevant and states;

**“ 26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions**

**contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except –**

- a. on the ground of fraud or misrepresentation or which the person is proved to be a party, or
- b. Where the certificate of title has been acquired illegally. Un procedurally or through a corrupt scheme.’’

The import of this section was recently considered in *Elijah Makeri Nyangwra \_vs- Stephen Mungai Njuguna & Another [2013]* eKLR where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

**‘‘ First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.’’**

I concur with the Learned Judges view.

19. That the titles held by the Defendants for parcels subdivided from the suit land Bukhayo/Kisoki/740 were illegally and unprocedurally acquired as they are not based on any registers as confirmed by the Land registrar who testified as PW 4. The certificates of official searches obtained by the Defendants in respect of the parcels they claim were likewise illegally and unprocedurally acquired as the records maintained at the Lands office shows the suit land Bukhayo/Kisoko/740 has never been subdivided to create the parcels they claim to own.

20. That in view of the finding above especially in the (19) the prayers sought by 7<sup>th</sup> and 8<sup>th</sup> Defendants in Busia PMCC. No.482 of 2010 cannot be issued as to issue the orders would amount to giving a clean bill of health to transactions that were illegal and unprocedural.

Based on the foregoing the Plaintiff’s in this case, ELC. 122 of 2013 (formerly HCC. No.5B of 2006) have proved their case on a balance of probabilities and the court issues the following orders;

- a. A declaration is hereby issued that the suit land, Bukhayo/Kisoko/740 is part of the property of the deceased Mudakhi Murere Ndege.
- b. That the Defendants do vacate from the suit land Bukhayo/Kisoko/740 in ninety (90) days failure to which eviction orders to issue.
- c. That Busia PMCC. No. 482 of 2010 without merit and is dismissed with no orders.
- d. That due to the fact that the main architect of the scheme that resulted to this case, that is, Teresa Nyangweso, was not a party in this suit and in any has since passed on, each party will bear his/her own costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 10<sup>TH</sup> DAY OF JULY, 2014**

**IN THE PRESENCE OF;**

**JUDGE.**