



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 282 OF 2013**

**CLEMENT WEKESA MUUYI ..... PLAINTIFF**

**VERSUS**

**PATRICK WEKESA OKUMU (Sued as**

**Representative of the Estate of OKUMU**

**MASAI(DECEASED) .....DEFENDANT**

**CONSOLIDATED WITH**

**ELC CASE NO. 178 OF 2014**

**IDI WASIKE MASAI ..... PLAINTIFF**

**VERSUS**

**PATRICK WEKESA OKUMU (Sued as**

**Representative of the Estate of OKUMU**

**MASAI(DECEASED) .....DEFENDANT**

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

This suit was precipitated by the Judgment of **OMOLLO J** in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008** in which the Judge, while allowing the appeal, made the following order: -

*“For the reasons explained above, I find this appeal has merit. I therefore substitute the orders of the lower Court dismissing the application dated 30/6/2008 with an order that the said application be allowed in part in terms of prayer 6, 7 and 9. The Appellant to commence fresh suit for prayer NO 8 on cancellation of titles. The Appellant is also awarded costs of the appeal.”*

**CLEMENT WEKESA MUUYI** (hereinafter **MUUYI**) one of the plaintiffs herein was the Appellant in the appeal while **IDI WASIKE MASAI** (hereinafter **MASAI**) who is the other plaintiff together with **OKUMU MASAI** and another were the Respondents. **OKUMU MASAI** (now deceased), had sought as the Applicant in the subordinate Court the following orders against the defendant and two others and which are relevant to this suit: -

6. *“That the Land Registrar Bungoma Land Registry be inhibited from effecting any transfer of, registering any change or any dealings whatsoever in respect of land parcel EAST BUKUSU/WEST SANG’ALO/3249 and 3250 pending the hearing and determination of this suit.”*

7. *“That the orders of this Court made on 7/9/2006 and issued on 10/7/2007 be reviewed and or set aside and all acts consequent thereto be nullified.”*

8. *“That land parcel numbers EAST BUKUSU/WEST SANG’ALO 3249, 3250 and 433 be cancelled forthwith and the interested party’s title number EAST BUKUSU/WEST SANG’ALO/1710 be reverted to and or be restored.”*

9. *“That costs of this application be provided for.”*

The ruling being appealed had been delivered by **HON F. KYAMBIA (R.M)** on 9<sup>th</sup> October 2008 following an application dated 30<sup>th</sup> June 2008.

First, a background to the suit.

**MUUYI** filed **BUNGOMA ELC CASE NO 282 OF 2013** against **PATRICK WEKESA OKUMU** as the legal representative of **OKUMU MASAI** (deceased) seeking Judgment in the following terms: -

**14: "That the plaintiff's prayer therefore against the defendant is for orders that this Honourable Court be pleased to cancel the title numbers EAST BUKUSU/WEST SANG'ALO/3249 and EAST BUKUSU/WEST SANG'ALO 3250 and the plaintiff's land parcel EAST BUKUSU/WEST SANG'ALO/1710 be reverted to and or be restored."**

**15: "That the plaintiff further prays that the defendant, his relatives, families' servants, agents and properties be evicted from the plaintiff's land parcel number EAST BUKUSU/WEST SANG'ALO/1710."**

**16: "That plaintiff also prays for orders of permanent injunction to restrain the defendant and his heirs, agents and relatives from interfering with the plaintiff's use of his land parcel number EAST BUKUSU/WEST SANG'ALO/1710."**

The plaintiff also sought an order for costs. The basis of the suit was that the deceased had secretly moved the Resident Magistrate's Court in **BUNGOMA LDT CASE NO 20 OF 2005** following orders issued in **KANDUYI LAND DISPUTES TRIBUNAL** (the Tribunal) and obtained orders cancelling the plaintiff's title **NO EAST BUKUSU/WEST SANG'ALO/1710** without his knowledge. Together with his plaint and a copy of the title to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710**, **MUUYI** also filed his witness statement in which he stated that whereas he was the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710**, the deceased had maliciously and without legal basis filed a case against one **WILSON SIMIYU MASAI** and **IDDI WASIKE MASAI** at the Tribunal without his knowledge and obtained orders at the Subordinate Court cancelling his title again without his knowledge. The deceased thereafter evicted the plaintiff from his land in 2008 leading to the appeal in which **OMOLLO J** made the orders referred to above.

The defendant filed an amended defence denying that the suits in the Tribunal and the Subordinate Court were conducted in the plaintiff's absence. He added that his late father the deceased purchased the land 1976 and took possession thereof and has settled thereon and utilized it with his family to the exclusion of the plaintiff whose right is therefore extinguished. He added that this suit is res – judicata and statutorily barred in view of **BUNGOMA CASE NO 20 OF 2005**. Among his documents is a sale agreement between the deceased and **WILSON SIMIYU** and a copy of the title deed for parcel **NO E.BUKUSU/W.SANG'ALO/ 3250** in the names of the deceased.

A reply to the defence was filed in which the plaintiff joined issues with the defendant and reiterated the contents of his plaint. He added that the defence raised no triable issues and is a sham meant to delay justice.

**MASAI** on the other hand filed **BUNGOMA ELC CASE NO 178 OF 2014** seeking the following orders against the defendant: -

**13: "That the plaintiff's prayer therefore against the defendant is for orders that this Honourable Court be pleased to cancel the title numbers EAST BUKUSU/WEST SANG'ALO/3249 and EAST BUKUSU/WEST SANG'ALO/3250 and the plaintiff's land parcel NO EAST BUKUSU/WEST SANG'ALO/1709 be reverted to and be restored."**

**14: "That the plaintiff further prays that the defendant, his relatives, families, servants, agents and properties be evicted from the plaintiff's land parcel number EAST BUKUSU/WEST SANG'ALO/1709."**

**15: "That the plaintiff also prays for orders of permanent injunction to restrain the defendant and his heirs, agents and relatives from interfering with the plaintiff's use of his land parcel number EAST BUKUSU/WEST SANG'ALO/1709."**

The plaintiff also sought an order for costs.

The basis of the plaintiff's claim, just as was the case in **BUNGOMA ELC CASE NO 282 OF 2013**, was that at all material time he was the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1709** but the deceased had maliciously and without any legal basis filed a suit against him and one **WILSON SIMIYU** at the Tribunal in case **NO 16 OF 2005** claiming land **NO EAST BUKUSU/WEST SANG'ALO/433** and obtained Judgment which was adopted in **BUNGOMA LDT CASE NO 20 OF 2005** yet that parcel of land did not exist. Upon realizing that the said parcel of land did not exist, the deceased filed an application to have the plaintiff's title to parcel **NO EAST BUKUSU/ WEST SANG'ALO/1709** as well as titles to parcels **NO EAST BUKUSU/WEST SANG'ALO/1710** and **1708** cancelled to revert to the mother title number **EAST BUKUSU/WEST SANG'ALO/433**. That on 7<sup>th</sup> September 2006 and in his absence, the subordinate Court cancelled the plaintiff's title to parcel **NO EAST BUKUSU/WEST SANG'ALO/1709** and reverted to **EAST BUKUSU/WEST SANG'ALO/433** which was later sub – divided to give rise to parcels **NO EAST BUKUSU/WEST SANG'ALO/3249** and **3250** with the latter being registered in the names of the plaintiff without his knowledge. This led to the appeal and the orders by **OMOLLO J** referred to above.

Together with the plaint, **MASAI** filed his witness statement in the terms described above as well as the list of documents including the title deed to parcel **NO EAST BUKUSU/WEST SANG'ALO/1709**, Green Card to parcel **NO EAST BUKUSU/WEST SANG'ALO/433**, Certificates of Search in respect of parcels **NO EAST BUKUSU/WEST SANG'ALO/3249** and **3250** and Judgment in **BUNGOMA HIGH COURT APPEAL NO 70 OF 2008**.

The defendant filed a defence denying that the deceased, (who he is being sued as the legal representative), obtained registration of land parcel **NO EAST BUKUSU/WEST SANG'ALO/1709** secretly, illegally, unlawfully or un-procedurally adding that the acquisition was

done overboard, openly and with the plaintiff's knowledge. He added further that the deceased purchased the said parcel of land in 1976 and settled there with his family to the total exclusion of the plaintiff. The defendant pleaded that the suit is bad in law, res – judicata, time barred, incompetent and fundamentally defective and does not disclose a reasonable cause of action. He urged the Court to have it struck out and dismissed with costs. The defendant also filed his list of documents and witness statement.

By consent of the parties, the two cases were consolidated on 25<sup>th</sup> November 2014 and the trial commenced before the late **MUKUNYA J** on 4<sup>th</sup> November 2015.

**MUUYI** told the Court that he was at all material times the registered proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710** yet his title was cancelled following proceedings in **BUNGOMA LDT CASE NO 20 OF 2005** in which he was not a party. On 6<sup>th</sup> May 2008 he received a letter from **LUCY NANZUSHI ADVOCATE** to vacate the land and that was when he learnt that the deceased had filed a case leading to the cancellation of his title by the Magistrate's Court. An application to review the orders of the Magistrate was dismissed leading to the appeal in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008**. He added that his wife **CONCEPTA NASIMIYU WEKESA (PW 1)** and his son **MOSES WEKESA (PW 2)** were cultivating the land.

**CONCEPTA NASIMIYU WEKESA (PW 1)** and **MOSES WEKESA (PW 2)** confirmed that indeed they were cultivating sugarcane on the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710** and produced statements of accounts.

**MASAI**, the plaintiff in **BUNGOMA ELC CASE NO 178 OF 2014**, adopted as his evidence his witness statement dated 10<sup>th</sup> July 2014 contents of which I have already referred to above.

**PATRICK WEKESA OKUMU** the defendant herein who is sued as the representative of the deceased also adopted as his evidence his witness statement dated 8<sup>th</sup> October 2014 contents of which I have also already referred to above.

Submissions were subsequently filed both by **MS MUMALASI** advocate for the plaintiffs and **MR SHITSAMA** advocate for the defendant. The case file was then forwarded to the late Judge at **KERUGOYA ELC** for purposes of drafting a Judgment but he passed away before doing so. The file was therefore forwarded to me for purposes of preparing the Judgment.

I have considered the evidence by both the plaintiffs and the defendant as well as the submissions by counsel.

Before I delve into the merits or otherwise of the two plaintiff's cases, the defendant has raised in his defence two important issues that go to this Court's jurisdiction to determine this suit and which I must first consider. Those issues are: -

**1. That this suit is res – judicata.**

**2. That this suit is statute barred.**

**RES – JUDICATA:** -

Counsel for the defendant has submitted that this suit is res – judicata because the same issues were raised in **BUNGOMA CMCC LDT CASE NO 20 OF 2005** and **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008** which both involved the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3249, 3250 and 1710**. That the former suit involved the defendant's father whom the defendant subsequently substituted as a legal representative.

Res – judicata is defined in **Section 7 of the Civil Procedure Act** 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 their 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.”*

The ingredients of res – judicata therefore are: -

**1: The issue in dispute in the former suit between the parties must be directly or substantially in dispute in the suit where res – judicata is pleaded.**

**2: The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**

**3: The former suit must have been heard and finally decided.**

**4: The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA & ANOTHER .V. ATTORNEY GENERAL 2005 I E.A 83** and also **LOTTA .V. TANAKI 2003 2 E.A 556**.

It is not in doubt that the issues being raised in this consolidated suit were previously raised both in **BUNGOMA CMCC LDT CASE NO 20 OF 2005** and **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008**. For res – judicata to be up – held, the Court which

determined the previous suit must have been competent. In **BUNGOMA CMCC LDT CASE NO 20 OF 2005**, the Magistrate's Court had adopted as its Judgment the decision of the **KANDUYI LAND DISPUTES TRIBUNAL** in case **NO 16 OF 2005** involving ownership of land parcel **NO EAST BUKUSU/WEST SANG'ALO/433** and it was ordered that **MASAI** surrenders 6.5 acres to the deceased. It is clear however that a Tribunal exercising its jurisdiction under the repealed **LAND DISPUTES TRIBUNAL ACT** was not competent to determine a dispute relating to the ownership of registered land – see **JOTHAM AMUNAVI .V. CHAIRMAN SABATIA DIVISIONAL LAND DISPUTE TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO 256 OF 2002**. In the circumstances, the award of the **KANDUYI LAND DISPUTES TRIBUNAL** having been made by a Court without jurisdiction, a plea res – judicata cannot be sustained. In **MULLA THE CODE OF CIVIL PROCEDURE 18<sup>TH</sup> EDITION** page 285, it is stated that: -

*“A Judgment delivered by a Court not competent to deliver it cannot operate as res – judicata since such Judgment is not of any effect. It is well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, does not operate as res – judicata between the same parties in subsequent proceedings.”*

Clearly therefore, the proceedings in the Tribunal as adopted by the Magistrate's Court cannot be pleaded to sustain a plea of res – judicata.

And with regard to the decision in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008**, it is clear from the Judgment of **OMOLLO J** dated 25<sup>th</sup> June 2013 that the Judge did not deem it fit to determine the issue regarding the land titles subject of this suit. Indeed, she advised **MUUYI** who was the appellant in that appeal to file a fresh suit and that is the genesis of this case. Therefore, the dispute regarding the land titles in respect to parcels **NO EAST BUKUSU/WEST SANG'ALO/433, 1708, 1709, 3249 and 3250** was not **“heard and finally decided.”** in that appeal yet that is a key ingredient of the doctrine of res – judicata as provided under **Section 7 of the Civil Procedure Act**. That being the case, it follows that the defendant's plea that the plaintiff's suits are res – judicata is not well founded and must be dismissed which I hereby do.

#### **SUIT STATUTE BARRED: -**

The defendant has also pleaded that the plaintiff's claims are statute barred. In his witness statement dated 8<sup>th</sup> October 2015, the defendant states in paragraph 11 as follows: -

**11: “That my late father acquired land parcel known as E.BUKUSU/ W.SANG'ALO/3250 in 1976 a period over 12 years and the acquisition of the same was open, continuous and uninterrupted thus the plaintiff's claim herein is statutory time barred and extinguished by operation of the land.”**

This was in support of his amended defence dated 20<sup>th</sup> June 2014 where in paragraph **8 A** it is pleaded that other than being bad in law, res – judicata, incompetent and defective, the suit is also statutorily time barred. Counsel for the defendant has also made the following submission in respect to the order by **OMOLLO J** directing **MUUYI** to file a fresh suit for the cancellation of the titles:-

*“There is no provision in law for filing a fresh suit to challenge a portion of the Judgment or an entire Judgment if the party is not satisfied with it. If the plaintiff herein was not satisfied with any portion of the Judgment delivered by Justice OMOLLO A in BUNGOMA HCCA NO 70 OF 2008 he should have challenged the same by way of an appeal in the Court of Appeal or by way of an application for review before the same Court. The plaintiff did not exercise either of the options and he cannot now move this Court to revisit the same matter which Just OMOLLO A had considered fully. As a matter of fact and indeed as a principal (sic) of law the Court becomes functus officio once it has pronounced itself on a matter.”*

What I understand counsel to be saying in the above paragraph is that the plaintiff's suit is a challenge of a portion of the Judgment of **OMOLLO J** delivered on 25<sup>th</sup> June 2013 in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008**. Far from it. All that **OMOLLO J** did in the last paragraph of that Judgment was to advise **MUUYI** (who was the appellant) to commence a fresh suit for the cancellation of the titles. **MASAI** (who was the 3<sup>rd</sup> Respondent in that appeal) similarly took up that invitation and that is how the consolidated suits were filed. It is therefore not correct for counsel to submit that these suits are a challenge to a portion of the said Judgment.

On the issue of the Court being functus officio, **OMOLLO J** did nothing else in the appeal after delivering her Judgment on 25<sup>th</sup> June 2003. If the Judge did anything else thereafter, that has not been brought to the attention of this Court. The advice that she gave **MUUYI** about filing a fresh case was part of her Judgment and so the issue of functus officio does not arise.

On the submission by **MR SHITSAMA** counsel for the defendant that the consolidated suits are statute barred, it is clear from the plaints that **MUUYI** was seeking the cancellation of titles number **EAST BUKUSU/WEST SANG'ALO/3249 and 3250** and the original title number **EAST BUKUSU/WEST SANG'ALO/1710** be restored while **MASAI** was also seeking the cancellation of titles number **EAST BUKUSU/WEST SANG'ALO/3249 and 3250** and that title number **EAST BUKUSU/WEST SANG'ALO/1709** be reverted or restored in addition to other reliefs. It is clear from the record herein that the titles number **EAST BUKUSU/WEST SANG'ALO 3249 and 3250** which the plaintiffs seek to have cancelled were only created following the award of the Tribunal on 30<sup>th</sup> December 2005 which was subsequently adopted as a Judgment of the Magistrate's Court in **BUNGOMA LDT CASE NO 20 OF 2005** on 15<sup>th</sup> February 2006. The consolidated suits were filed on 30<sup>th</sup> October 2013 (**ELC CASE NO 282 OF 2013**) and 23<sup>rd</sup> September 2014 (**ELC CASE NO 178 OF 2014**). It is also clear from the record herein that the titles number **EAST BUKUSU/WEST SANG'ALO/3249 and 3250** which are sought to be cancelled were created on 18<sup>th</sup> June 2007 and 14<sup>th</sup> November 2007. Those must be the dates when the cause of action arose. **Section 7 of the Limitation of Action Act** provides that: -

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of*

*action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

The cause of action could only have occurred in 2007 when the titles subject of this suit were created. The suits having been filed in 2013 and 2014, it is clear that the claims herein are not statute barred. I must therefore also dismiss that objection.

I shall now consider the plaintiff's claims.

MUUYI's case appears to be hinged by the claim that the deceased ***“maliciously and without any legal basis”*** filed a suit at the Tribunal and ***“secretly”*** moved to the Magistrate's Court to have his title to land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710** cancelled. This is how he has pleaded in paragraphs 4, 6, and 7 of his plaint: -

**4: *“On or about the 30/12/2005, the deceased OKUMU MASAI maliciously and without any legal basis filed suit against one WILSON SIMIYU MASAI and IDDI WASIKE MASAI at the Land Disputes Tribunal sitting at KANDUYI vide TRIBUNAL CASE NO 16 OF 2005.”***

**6: *“That on 7<sup>th</sup> September 2006, the deceased secretly moved the Resident Magistrate's Court seeking to have the plaintiff's title for land parcel number EAST BUKUSU/WEST SANG'ALO/1710 cancelled.”***

**7: *“That on the same 7<sup>th</sup> September 2006, in the absence of the plaintiff and without jurisdiction, the Resident Magistrate granted the deceased's prayer by cancelling the plaintiff's title aforesaid.”***

MASAI also made similar averments against the defendant in paragraphs 4, 5, and 7 of his plaint. It is on the basis of those pleadings that both MUUYI and MASAI seek the cancellation of titles number **EAST BUKUSU/WEST SANG'ALO 3249** and **3250**. They also seek the eviction of the defendant from parcels number **EAST BUKUSU/WEST SANG'ALO 1709** and **1710**.

Have the plaintiffs in the consolidated suits laid out a basis for the cancellation of the said titles? That is what I shall now interrogate.

The traditional manner in which one's title to land is impeached is, as provided in **Section 26(1) of the Land Registration Act**, for the aggrieved party to plead that the said title was obtained through fraud, misrepresentation, illegally unprocedurally or through a corrupt scheme. The plaintiffs have not specifically pleaded fraud or misrepresentation. Instead, their grievances are predicated on what they consider to be the proceedings that took place ***“without any legal basis”*** in the Tribunal and adopted in the Magistrate's Court that led to the cancellation of their title numbers **EAST BUKUSU/WEST SANG'ALO/1709** and **1710** and precipitated the creation of the title numbers **EAST BUKUSU/WEST SANG'ALO/3249** and **3250** which the plaintiffs desire to be cancelled so that their titles can be restored. The plaintiffs in paragraphs 7 of their respective plaints are also pleading that the magistrate's Court acted ***“without jurisdiction”*** in cancelling their titles pursuant to flawed proceedings in the Tribunal. It must be remembered that the plaintiffs were not parties in the Tribunal proceedings and could not therefore file any appeals to the Appeal Committee under **Section 8(1) of the repealed Land Disputes Tribunal Act** which was the law that governed those proceedings. They could also not move the High Court to quash the orders issued by the Tribunal by way of Judicial Review applications obviously because the same would have been statute barred. The plaintiffs were therefore emboldened by the words of **OMOLLO J** when she allowed the appeal by MUUYI in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008** which gave them the ammunition to file this suit.

My understanding of the plaintiffs' case is that since the Tribunal acted ***“without jurisdiction”*** or ***“any legal basis”*** in cancelling their titles to land parcels **NO EAST BUKUSU/WEST SANG'ALO/1709** and **1710** and creating therefrom new titles being **EAST BUKUSU/WEST SANG'ALO/3249** and **3250**, those new titles ought to be cancelled and to revert to the original titles. That the Tribunal had no jurisdiction to make the award that it did and which was adopted as a Judgment of the Court in **BUNGOMA CMCC LDT CASE NO 20 OF 2005** cannot be controverted. It follows therefore that the Tribunal's award and the Subordinate Court's Judgment were both nullities and could not form the basis upon which the plaintiffs' titles could be cancelled and new ones created. That is why counsel for the plaintiffs has submitted, and rightly so in my view, that: -

***“In view of the foregoing, we submit that the process of cancellation of the plaintiffs' titles having been done unlawfully by a Court that did not have jurisdiction and having been set aside by this Court ought to be effected by nullifying the subsequent titles namely EAST BUKUSU/WEST SANG'ALO/3249 and EAST BUKUSU/WEST SANG'ALO/3250 and reverting to the original titles EAST BUKUSU/WEST SANG'ALO/1709 and EAST BUKUSU/WEST SANG'ALO/1710 to the plaintiffs herein.”***

I can only add what was stated in the case of **MCFOY .V. UNITED AFRICA CO LTD 1967 3 ALL E.R 1169** that anything which is a nullity is incurably bad and anything founded on it is also a nullity. On that basis, the law cannot protect the titles to land parcels **NO EAST BUKUSU/WEST SANG'ALO/3249** and **3250**. It is not correct therefore for the defendant to assert, as he has done in paragraph 7 of his defence: -

**7: *“That on the strength of the Judgment and orders in BUNGOMA SPMCC LDT NO 20 OF 2005 (his late father OKUMU) got legally registered as the registered owner of land parcel known as E.BUKUSU/W.SANG'ALO/3250 while the remaining portion E.BUKUSU/W.SANG'ALO/3249 was registered in the names of WILSON SIMIYU MASAI.”***

No legal process could be undertaken by bodies that had no jurisdiction to do what they purported to do. What resulted were mere nullities which could not cancel existing titles or create new ones. In **JOSEPH MALAKWEN LELEI & ANOTHER V. RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL NO 82 OF 2006 (2014 eKLR)**, the Court of Appeal stated as follows citing **MACFOY** (supra): -

***“ ..... it is trite that where a Court or Tribunal takes upon itself to exercise a jurisdiction which it does not possess, its***

***proceedings and decisions are null and void. It then follows that every other proceeding, decision or award that results from such a process must be construed as a nullity.***

By cancelling the titles to parcels number **EAST BUKUSU/WEST SANG'ALO/ 1709** and **1710**, the Tribunal either deliberately or otherwise fell into error by exercising a jurisdiction that it did not have. A Judgment obtained through mistake, fraud or illegally can be challenged in fresh proceedings – **JOHANA NYOKWOYO BUTI .V. WALTER RASUGU OMARIBA & OTHERS C.A CIVIL APPEAL NO 182 OF 2006 (2011 eKLR)**. Such proceedings may be through a declaratory suit or an ordinary suit which is the route that the plaintiffs herein have taken. The fact that the Tribunal had no jurisdiction to cancel the plaintiff's titles is not really contested and on that basis and guided by the authorities cited above, I am satisfied that the plaintiffs are entitled to the orders sought in the consolidated suits.

The defendant's counsel has submitted at page 8 of his submissions that the plaintiff has only pleaded malice and lack of jurisdiction as the basis for challenging the proceedings in **BUNGOMA CMCC LDT NO 20 OF 2005** and such grounds do not exist under Section 26 of the Land Registration Act. As I have already stated above, the plaintiffs pleaded both lack of **"jurisdiction"** and **"without legal basis"** as the reasons why they seek to impeach the orders cancelling their titles. **Section 26(1) (b) of the Land Registration Act** uses both the terms **"illegally"** and **"un – procedurally"** as grounds upon which a title can be challenged.

In his amended defence, the defendant suggests that in any event, he is entitled to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/1710** because his late father settled his family thereon since 1976 and has utilized it quietly, continuously and un – interrupted and therefore the plaintiffs titles are extinguished by operation of law – see paragraphs 6A and & 7A of the amended defence. The defendant is therefore pleadings entitlement to the land by way of adverse possession. However, there was no Counter – Claim filed and this Court cannot grant orders which were not sought. Besides, it is clear from the record herein that the defendant only took possession of the suit land after 2006 when the Tribunal's award was adopted as a Judgment of the Court. The consolidated suits were filed in 2013 and 2014 and therefore the limitation period of 12 years had not yet lapsed. Therefore, even if there was a Counter – Claim for adverse possession by the defendant, it would not have been sustainable in law.

Finally, it appears to me that notwithstanding the advice given by **OMOLLO J** in the Judgment dated 25<sup>th</sup> June 2013 in **BUNGOMA HIGH COURT CIVIL APPEAL NO 70 OF 2008**, this suit may, perhaps, be superfluous because the prayers sought had infact already been granted in the said appeal. The appeal was against the ruling of the Subordinate Court dated 9<sup>th</sup> October 2008 which was pursuant to an application by the original defendant **OKUMU MASAI** (deceased) in which he obtained orders cancelling the titles to parcel number **EAST BUKUSU/WEST SANG'ALO/1708, 1709** and **1710**. That order which was issued on 7<sup>th</sup> September 2006 precipitated an application dated 30<sup>th</sup> June 2008 for review which was however dismissed in a ruling dated 9<sup>th</sup> October 2008 hence the said appeal. The application dated 30<sup>th</sup> June 2008 sought, among other prayers, the following relief in prayer No. 7: -

***7: "That the orders of this Court made on 7/9/2006 and issued on 10/7/2007 be reviewed and or set aside and all acts consequent thereto be nullified."***

In the Judgment delivered on 25<sup>th</sup> June 2013, **OMOLLO J** in allowing the appeal granted prayer 6, 7, and 9. In my view, by allowing prayer No. 7 of the application dated 30<sup>th</sup> June 2008, the result was that the order made on 7<sup>th</sup> September 2006 by the Subordinate Court cancelling titles to the land parcels **NO EAST BUKUSU/ WEST SANG'ALO/1709** and **1710** was set aside and all consequent acts nullified. That means that the said titles reverted to the position before the impugned orders. The orders being sought in the consolidated suits are that the titles to land parcels number **EAST BUKUSU/WEST SANG'ALO/3249** and **3250** be cancelled and that titles number **EAST BUKUSU/WEST SANG'ALO/1709** and **1710** be reverted to and or be restored. I think that by allowing the appeal, **OMOLLO J** restored the titles to land parcels number **EAST BUKUSU/WEST SANG'ALO/1709** and **1710** which had been nullified by the Magistrate's Court.

Having said so and upon considering all the evidence herein, I am satisfied that the plaintiffs in the consolidated suits have proved their case as required in law.

There shall therefore be Judgment for the plaintiffs in the following terms: -

- 1. The titles to land parcels number EAST BUKUSU/WEST SANG'ALO/3249 and 3250 are cancelled and the plaintiffs' titles number EAST BUKUSU/WEST SANG'ALO/1709 and 1710 are reverted to and restored.**
- 2. The defendant, his relatives, families, servants, agents and properties should vacate the land parcels NO EAST BUKUSU/WEST SANG'ALO/1709 and 1710 within three (3) months from the date of this Judgment and in default, they be evicted therefrom by Court Bailiffs/Auctioneers in accordance with the law.**
- 3. An order of permanent injunction is hereby issued restraining the defendant, his agents, heirs and relatives from interfering with the plaintiffs use of the land parcels number EAST BUKUSU/WEST SANG'ALO/1709 and 1710.**
- 4. The plaintiffs are awarded costs.**

Boaz N. Olao.

J U D G E

21<sup>st</sup> November 2019.

Judgment dated, delivered and signed in Open Court this 21<sup>st</sup> day of November 2019 at Bungoma.

Clement Wekesa Muuyi - plaintiff present

Idi Wasike Masai – plaintiff absent

Defendant absent

Joy/Okwaro – Court Assistants

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> November 2019.**