



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**CIVIL CASE NO. 78 OF 2005**

**BENARD WAMALWA WANYONYI.....PLAINTIFF**

**VERSUS**

**FESTO MUNYASI MAUKO.....DEFENDANT**

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

By an amended plaint dated 11<sup>th</sup> December 2017, **BERNARD WAMALWA WANYONYI** (plaintiff herein) sought Judgment against **FESTO MUNYASI MAUKO** (defendant herein) in the following terms: -

- (a) A permanent injunction restraining the defendant, his agents, representatives, assigns and any person whosoever claiming through him from interfering with the plaintiff's lawful occupation, use and possession of land parcel number EAST BUKUSU/WEST SANG'ALO/3040 and EAST BUKUSU/WEST SANG'ALO/3041 respectively.**
- (b) Costs of the suit.**
- (c) Interest at Court rates.**

The basis of the plaintiff's claim is that he has been and is the registered proprietor and lawful owner in possession of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3040** and **EAST BUKUSU/WEST SANG'ALO/3041** (herein after the suit land) which was a resultant sub – division of land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**. That the defendant is a son of one **MAUKO KHATORO** now deceased who was the brother to the plaintiff's father one **MATHIAS KHATORO**. That **MAUKO KHATORO**'s land parcel **NO EAST BUKUSU/EAST SANG'ALO/677** measuring 8.12 Ha was sold to one **DOMIANO WANGILA** who now owns parcel **NO EAST BUKUSU/EAST SANG'ALO/1249**. The defendant and his late father having disposed their land parcel **NO EAST BUKUSU/EAST SANG'ALO/677** have now unlawfully encroached onto the suit land claiming interest and ownership hence this suit.

By an amended defence and Counter – Claim dated 2<sup>nd</sup> November 2018, the defendant pleaded that the registration of the plaintiff as proprietor of land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** and it's subsequent sub – division to create new numbers including the suit land was unlawful and fraudulent particulars of which are pleaded in paragraph 6A of the defence as follows:-

- (a) Misleading the Land Registrar into believing that MATIAS WAMALWA and BERNARD WAMALWA WANYONYI are one and the same person.**
- (b) Executing a false change of names to procure false registration.**
- (c) Obtaining and/or procuring registration in the names of the plaintiff whilst fully aware of the interest of MAUKO KHATORO thereon.**
- (d) Obtaining registration by means of deceit.**
- (e) Obtaining registration by means of false representations.**

While admitting that the plaintiff is the son of **MAUKO KHATORO** (deceased), the defendant denied that the deceased was the owner of parcel **NO EAST BUKUSU/EAST SANG'ALO/677**. The defendant added that the plaintiff's father **MATHIAS KHATORO** alias **MATIAS WAMALWA** was registered as proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** to hold in trust for the deceased but in breach of the said trust, the said **MATHIAS KHATORO** caused the said land to be registered in the names of the

plaintiff. The defendant therefore Counter – Claimed against the plaintiff as follows: -

**1. A declaration that the registration of plaintiff as proprietor of the land parcel NO EAST BUKUSU/WEST SANG'ALO/724 and subsequent new numbers created upon sub – division to wit EAST BUKUSU/WEST SANG'ALO 3037, 3038, 3039, 3040 and 3041 was fraudulent, a declaration that the defendant is entitled to 14 acres thereof or and on behalf of the Estate of the deceased from the aforesaid parcels of land, an order for rectification of the register and for partition and eventual transfer of the said 14 acres into the defendant's name in trust for the Estate of the deceased MAUKO KHATORO.**

**2. The plaintiff's suit be dismissed.**

The plaintiff filed a reply to the amended defence and defence to the Counter – Claim and joined issues with the defendant. The plaintiff denied the allegations of fraud adding that the Counter – Claim was vague and ambiguous. The plaintiff further denied that the deceased had any proprietary rights and interest in land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** during his life – time. The plaintiff pleaded further that the process of registration and sub – division of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was lawful and asked the Court to dismiss the Counter – Claim.

Together with their pleadings, the parties filed their statements including those of their witnesses and list of documents.

The trial commenced before **OMOLLO J** on 30<sup>th</sup> May 2013 when the plaintiff told the Court that the defendant is his cousin and that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was registered in his names during the Land Adjudication process as he was the only child. He added that his father **MATHIAS WANYONYI KHATORO** had eight (8) brothers including the defendant's father who had the following parcels registered in their names: -

- 1. KABUCHAI KHATORO – E/BUKUSU/WEST SANG'ALO/720**
- 2. RUBINI KHATORO – E/BUKUSU/WEST SANG'ALO/721**
- 3. MAKARABISO KHATORO – E/BUKUSU/WEST SANG'ALO/722**
- 4. JACOB MASIKHA - E/BUKUSU/WEST SANG'ALO/723**
- 5. MUREZIA KHATORO - E/BUKUSU/WEST SANG'ALO/725**
- 6. MAUKO KHATORO - E/BUKUSU/WEST SANG'ALO/677**
- 7. SIKONJO KHAMALA - E/BUKUSU/WEST SANG'ALO/666**

He added that the deceased father to the defendant sold his parcel to **MICHAEL MULONGO** and **DAMIANO WANGILA** and bought land elsewhere. That the defendant took advantage of his absence in Turbo where he lived and in 2000 started claiming the plaintiff's land. When the deceased passed away, the defendant filed a suit at the Tribunal but lost against the plaintiff. The plaintiff produced as his documentary evidence the copy of the title to land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** registered in his names and which he sub – divided into parcels **NO EAST BUKUSU/WEST SANG'ALO/3037** to **3041**. He denied having obtained the registration of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** fraudulently adding that he was the only child of his father and that it was the children of the deceased who sold their portions and are interfering with the suit land.

When I took over this case in June 2018 following my transfer to this Court, the parties agreed to recall the plaintiff who sought to rely on his witness statement dated 11<sup>th</sup> December 2017 filed together with the amended plaint and also his amended list of documents dated the same day. In that statement, he repeats the averments in his amended plaint that he is the registered proprietor of the suit land which is a sub – division of land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** and that the deceased father of the defendant had his land parcel **NO EAST BUKUSU/EAST SANG'ALO/677** which he sub – divided and sold to **DOMIANO WANGILA** and **MICHAEL MULONGO ELIMA**. That the defendant and his deceased father, having disposed off their land, have now unlawfully encroached onto the plaintiff's land over which they have no proprietary or other beneficial interest.

The defendant similarly adopted as his evidence his statement dated 4<sup>th</sup> October 2018, the list of documents filed on 5<sup>th</sup> October 2005 and supplementary list of documents filed on 16<sup>th</sup> October 2018 and a further list filed on 2<sup>nd</sup> November 2018.

The defendant also called the following five (5) defence witnesses: -

**SAIMON MUNYASI – DW 2**

**JULYDER NASIMIYU – DW 3**

**JULIANA NASAMBU – DW 4**

**CEPHAS WALUMBE – DW 5 and**

In his statement dated 4<sup>th</sup> October 2018, the defendant confirmed that his deceased father and the plaintiff's father **MATHIAS WANYONYI KHATORO** were brothers and that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/ 724** was given to his deceased father and the plaintiff's father by their father (defendant's grandfather) but the plaintiff's father fraudulently registered himself as the proprietor of the said parcel of land. That his father died on 16<sup>th</sup> August 2004 without knowing that the plaintiff had been registered as the proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** and that land parcel **NO EAST BUKUSU/EAST SANG'ALO/677** was only given to his deceased father by one **SIKORINJO** as a gift and he later sold it to **DOMIANO WANGILA** and **MICHAEL MULONGO ELIMA** because the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was their ancestral land which his father had been leasing out since 1977. That although his deceased father was buried in **TURBO** where he had purchased land, they never stopped using the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** which they have leased to: -

1. **JACOB MASIKA**
2. **EVANS JUMA**
3. **JULIANA NASAMBU**
4. **SEPHAS WALUMBE**
5. **TITUS BUKHEBI**
6. **YOLINDA SIMIYU** and
7. **WAFULA WANJALA**

He added that he has not erected any structure on the land and it was only in 2004 that he learnt that the plaintiff had been registered as the owner of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** yet the said land had been registered in the names of the plaintiff's father to hold in trust for the deceased. That he lodged a caution against the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** on 21<sup>st</sup> October 2002 but later learnt that the caution was removed on 3<sup>rd</sup> June 2004 by the Land Registrar Bungoma upon sub – division to create parcels **NO EAST BUKUSU/WEST SANG'ALO/3037 – 3041**. That the defendant is entitled to the land parcels **NO EAST BUKUSU/WEST SANG'ALO/3038, 3039, 3040** and **3041** and the plaintiff unlawfully and fraudulently caused himself to be registered as the owner of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** on 1<sup>st</sup> August 1990 through correction of name.

Other than **SAIMON MUNYASI (DW 2)** and **MIKE SITABUKA FWAMBA (DW 6)** the defendant's other witnesses had also been previously sued in this case before the claims against them were withdrawn.

In his statement dated 4<sup>th</sup> October 2018 and which he adopted as his evidence, **SAIMON MUNYASI (DW 2)** states that the parties are cousins and the plaintiff's father was one **MATHIAS WAMALWA KHATORO** while the defendant's father was one **MAUKO MUNYASI KHATORO** and in 1957, their father one **KHAEMBA NAMIKANYU KHATORO** divided his land among his sons and left parcel **NO EAST BUKUSU/WEST SANG'ALO/724** for **MATHIAS WAMALWA KHATORO** and **MAUKO MUNYASI KHATORO** who were then working in **TURBO**. However, during the land adjudication process in 1969, **MATHIAS WAMALWA KHATORO** registered himself as the owner of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** without the knowledge of his brother **MAUKO MUNYASI KHATORO** yet the said land had been equally shared between them with the boundaries clearly marked. Therefore the defendant's deceased father is entitled to half a share of the said land. That he was surprised during the "**LUFU**" ceremony of the late **MAUKO MUNYASI KHATORO** to learn that **MATHIAS WAMALWA KHATORO** had transferred the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** to the plaintiff who had sub – divided it to create new numbers being **EAST BUKUSU/WEST SANG'ALO/3037 – 3041**. That the defendant is entitled to land parcels **NO EAST BUKUSU/WEST SANG'ALO/3038 – 3041**.

**JULYDER NASIMIYU (DW 3)** in her statement dated 4<sup>th</sup> October 2018 states that she is a neighbour to the deceased **MAUKO MUNYASI KHATORO**'s family and between 2000 – 2004, she leased one (1) acre from him in the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**. That she later learnt that the plaintiff had sub – divided the said land to create new numbers being **EAST BUKUSU/WEST SANG'ALO/3037 – 3041** yet **MAUKO MUNYASI KHATORO** has a share therein.

**JULIANA NASAMBU SIMIYU (DW 4)** in her statement dated 4<sup>th</sup> October 2018 which she also adopted as her evidence told the Court that **MAUKO MUNYASI KHATORO** and **MATHIAS WAMALWA KHATOTO** were his uncles and had equal shares in the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**. That in 1988, **MAUKO MUNYASI KHATORO** gave her two (2) acres to plant sugar to enable pay fees for her eight (8) children as she had lost her husband. That she utilized the two (2) acres from 1990 upto 2005 without any interference from the plaintiff. That although the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was later sub – divided to create new numbers being **EAST BUKUSU/WEST SANG'ALO/3037 – 3041**, the boundaries are clearly marked on the ground and the defendant is entitled to parcels number **EAST BUKUSU/WEST SANG'ALO/3038 -3041**.

**CEPHAS WALUMBE (DW 5)** in his statement dated 4<sup>th</sup> October 2018 which he also adopted as his evidence states that the parties herein are her uncles and in 2003, she leased two (2) acres out of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** from the late **MAUKO KHATORO** who owned it jointly with **MATHIAS WANYONYI KHATORO**. However, **MATHIAS WANYONI KHATORO** fraudulently transferred the said land to the plaintiff without informing **MAUKO KHATORO** or the clan after which the plaintiff moved to evict her. That the title should therefore be rectified to indicate the plaintiff and defendant as joint owners.

**MIKE SITABUKA FWAMBA (DW 6)** also adopted as his evidence the witness statement dated 4<sup>th</sup> October 2018 in which he states that he was a Senior Chief of **EAST BUKUSU LOCATION** between 2000 to July 2008 when he retired. That the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was within his jurisdiction and was being utilized by both **MAUKO MUNYASI KHATORO** and **MATHIAS WAMALWA KHATORO** who are brothers and had shared it equally among themselves although they had settled in **TURBO**. That in 2005, he received a report from the defendant that following the death of his father, the plaintiff and his father had restrained people who had leased the land from utilizing it on the ground that it belongs to the plaintiff. So he summoned both the plaintiff and his father to his office but they refused to attend. He therefore referred the matter to the District Officer Kanduyi Division. The defendant later informed him that the title to the said land had been closed following its sub – division to create parcels number **EAST BUKUSU/WEST SANG'ALO/3037 – 3041**. He was also informed that the plaintiff had destroyed the crops of **CEPHAS WALUMBE**, **EDMOND WALUMBE** and **PATRICK WASIKE** and so he referred them to the Agricultural Extension Officer. He added that from his own knowledge, the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was being utilized by both **MAUKO MUNYASI KHATORO** and **MATHIAS WAMALWA KHATORO**.

Submissions were thereafter filed both by **MR OTSIULA** instructed by the firm of **J. B. OTSIULA & ASSOCIATES ADVOCATES** for the plaintiff and **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties together with their witnesses, the documents filed and the submissions by counsel.

While the plaintiff seeks orders restraining the defendant, his agents, representatives, assigns and any other persons from interfering with his occupation, use and possession of the suit land which is registered in his names, the defendant's case is that in fact that registration was obtained fraudulently and that the plaintiff holds fourteen (14) acres out of the resultant sub – divisions being **EAST BUKUSU/WEST SANG'ALO/3037 – 3041** in trust for the Estate of **MAUKO KHATORO** and therefore Counter – Claims for those orders.

It is common ground that the suit land is among other parcels of land sub – divided from the original land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**. It is also not in dispute that the suit land is registered in the names of the plaintiff who is a cousin to the defendant as their fathers were brothers. It is also not contested that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was first registered in the names of **MATIAS WAMALWA** on 2<sup>nd</sup> August 1969 before it was transferred to the plaintiff on 1<sup>st</sup> August 1990 and a title was issued to him. When he was cross – examined by **MR MURUNGA**, the plaintiff told the Court that **MATIAS WAMALWA** was his father although he later contradicted himself and said that **MATIAS WAMALWA** who was registered as the proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** on 2<sup>nd</sup> August 1969 and **BERNARD NAMALWA WANYONYI** refer to one and the same person adding that he changed his names following his baptism. It is clear from the evidence herein that the plaintiff's father who is referred to as **MATIAS WAMALWA** in the register of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** is the same person as **MATHIAS WAMALWA KHATORO** who was the defendant's uncle. This was also confirmed by the defendant's witness **MIKE SITABUKA FWAMBA (DW 6)** and even the defendant himself when he said as follows during re – examination by **MR MURUNGA**: -

*“I wish to state that the **MATIAS WAMALWA** named in the Green Card to the suit land is my uncle”*

This is also clear from the evidence of the other defence witnesses and so it cannot be correct when the plaintiff stated in cross – examination by **MR MURUNGA** as follows: -

*“What I want to tell the Court is that the **MATIAS WAMALWA** registered on 2<sup>nd</sup> August 1969 and the **BERNARD WAMALWA WANYONYI** registered as the proprietor of land parcel **NO E. BUKUSU/W. SANG'ALO/724** all refer to me.”*

That cannot factually be correct because the plaintiff could not have been transferring the land parcel **NO. EAST BUKUSU/WEST SANG'ALO/724** to himself on 1<sup>st</sup> August 1990 if it had already been registered in his name on 2<sup>nd</sup> August 1969. I make a finding that the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was first registered in the name of the plaintiff's father in 1969 before it was transferred in the plaintiff's name in 1990.

In my view, what I need to determine in this dispute is whether the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was registered in the names of the plaintiff's father as the sole proprietor in 1969 or whether in fact he held it in trust for the defendant's father and the plaintiff obtained registration in his name fraudulently and therefore his subsequent sub – division to create the suit land was also fraudulent and the defendant is entitled to 14 acres thereof.

By virtue of being the registered proprietor of the suit land and, before that, the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**, the plaintiff is entitled to the protection conferred by **Sections 27 and 28 of the repealed Registered Land Act** under which the titles were issued. Similar provisions are found in **Sections 24 and 25 of the new Land Registration Act 2012**. Those provisions confer absolute ownership of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724**, and the subsequent sub – divisions including the suit land, on the plaintiff. However, that registration does not relieve the plaintiff, and before that, his father from any duty or obligation to which they are subject as trustees. Further, those titles can be impeached if obtained fraudulently as pleaded by the defendant but once the plaintiff produced the titles to the land parcels **NO EAST BUKUSU/WEST SANG'ALO/724** as well as the suit land, that is prima facie evidence that he is the absolute proprietor of the said parcels of land. The evidential burden then shifted to the defendant to demonstrate that the registration of the plaintiff's father as the proprietor of the land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** was fraudulent and therefore the plaintiff has no proprietary interest in the suit land. That evidential burden, as was held in **GATARU PETER MUNYA .V. DICKSON MWENDA KITHINJI & OTHERS 2014 eKLR**,

*“ ..... is a shifting one and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non – existence of a fact in issue.”*

Section 108 of the Evidence Act also provides that: -

**108: “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

And Section 109 of the same Act states as follows: -

**109: “The burden of proof as to any particular fact lies on the person who wishes the Court to behave in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

In an attempt to impeach the plaintiff’s registration of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** and, subsequently the suit land, the defendant pleaded in paragraph 6A of his defence and Counter – Claim the allegations of fraud to include misleading the Land Registrar into believing that **MATIAS WAMALWA** and **BERNARD WAMALWA WANYONYI** are one and the same person, executing false change of name, obtaining registration by way of deceit and false representation fully aware of the interest of **MAUKO KHATORO**. It is true from the record herein that on 7<sup>th</sup> June 1990 the plaintiff swore an affidavit to the effect that the names **MATIAS WAMALWA** and **BERNARD WAMALWA WANYONYI** refer to the same person. It was on the basis of that affidavit that the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** was transferred into the plaintiff’s name on 1<sup>st</sup> August 1990. Indeed, the Green Card shows against the plaintiff’s name the initials “**C/NAMES**” which can only mean “**change of names.**” An allegation of fraud is a serious one that must be proved to the required standard and I am satisfied in this case that the defendant has proved that the registration of land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** in the plaintiff’s name in 1990 was procured fraudulently. It is worth noting that when the plaintiff was cross – examined by **MR MURUNGA**, this is what he said in reference to the names **MATIAS WAMALWA** and the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724**: -

**“I can see from the Green Card to that parcel the first entry was on 2<sup>nd</sup> August 1969 in the names MATIAS WAMALWA. I was then 10 years old. MATIAS WAMALWA was my father. I was baptized in 1978 and that was when I became BERNARD WANYONYI. Before being baptized, I was called WAMALWA only. I had one name only. We went to the Land Control Board on 1<sup>st</sup> August 1990 and that is when the parcel NO E.BUKUSU/W.SANG’ALO/724 was transferred into my names. I have never been called MATIAS. I am called WAMALWA.”**

If, as confirmed by the plaintiff himself, his father was called **MATIAS WAMALWA** and he (plaintiff) has “**never been called MATIAS**”, it follows that the affidavit he swore on 7<sup>th</sup> June 1990 and which was the basis upon which he acquired a proprietary interest in the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** was a false affidavit. Therefore, the plaintiff’s acquisition of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** and all the resultant sub – divisions including the suit land was premised on an illegality because, as was held in **MACFOY .V. UNITED AFRICA CO LTD 1961 3 ALL ER 1179**, something cannot stand on nothing and a nullity always begets a nullity.

On the issue of trust, it common knowledge that the parties fathers were brothers both being the children of one **KHAEMBA NAMIKANYA KHATORO**. Evidence was led that the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** was utilized by both the plaintiff’s and defendant’s fathers. This was confirmed by the plaintiff himself during cross – examination by **MR MURUNGA** when he said: -

**“It is true that even MAUKO KHATORO the father of 1<sup>st</sup> defendant was using the land in dispute but that was before I became of age.”**

That admission confirmed the evidence of the then area Chief **MIKE SITABUKA FWAMBA**, whom I would regard as an independent witness and whose demeanor I had no reason to doubt, when he states in paragraph 4, 5, 6 and 7 as follows: -

**4: “That I know of my own knowledge that land parcel NO E. BUKUSU/W. SANG’ALO/724 was within my area of jurisdiction.”**

**5: “The land was being utilized by MAUKO MUNYASI KHATORO and MATHIAS WAMALWA who were brothers.”**

**6: “That I also know that land parcel NO E. BUKUSU/W. SANG’ALO/724 was equally divided between the two brothers and there is an existing boundary on the ground.”**

**7: “The two brothers were settled in Turbo Settlement Scheme and were only leasing their respective portions of land to their neighbours to plough.”**

There is also the evidence of **SAIMON MUNYASI (DW 2)** that he was present when the original owner of the land parcel **NO E. BUKUSU/WEST SANG’ALO /724** (one **KHAEMBA NAMIKANYA KHATORO**) divided it among his two sons being the fathers to the parties herein in 1957. In addition to that, there is the evidence of **SAIMON MUNYASI (DW 2)**, **JULIDER NASIMIYU (DW 3)**, **JULIANA NASAMBU (DW 4)** and **CEPHAS WALUMBA (DW 5)** that they leased various portions out of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** from the defendant’s father without any interference from the plaintiff. Indeed, problems only started in 2005 when the defendant’s father passed away. All that evidence goes to prove that the both **MAUKO MUNYASI KHATORO** and **MATHIAS WAMALWA KHATORO** had an interest in the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** which was given to them by their father. That is sufficient evidence upon which this Court can conclude, which I hereby do, that the plaintiff’s father, and therefore the plaintiff, held the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** and the resultant sub – divisions in trust for the defendant’s father and his family including the defendant. It is also now clear that the plaintiff’s registration as the proprietor of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/724** and the resultant sub – divisions including the suit land was obtained through fraud.

The plaintiff's titles are therefore not protected by the law and did not confer absolute ownership to the plaintiff. He, and before him his father, were mere trustees. The land parcel **NO EAST BUKUSU/WEST SANG'ALO/724** measures 39.5 acres as per the copy of the title deed. The defendant seeks a declaration that he is entitled to 14 acres thereof. That claim is well merited taking into account that it is even less than half of the land in dispute. I also note from the Certificates of Searches produced herein that whereas parcels **NO EAST BUKUSU/WEST SANG'ALO/3038, 3039 and 3040** are registered in the plaintiff's name, parcel **NO EAST BUKUSU/WEST SANG'ALO/3041** is now registered in the names of one **SHADRACK WAMALWA** who was not a party in these proceedings. That registration was done on 12<sup>th</sup> May 2005 and shall not be affected by this Judgment. I could not trace the Certificate of Search in respect of land parcel **NO EAST BUKUSU/WEST SANG'ALO/3037** so it is not clear whether it is still registered in the names of the plaintiff.

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

- 1. The plaintiff's claim is dismissed.**
- 2. The defendant's Counter – Claim is allowed and a declaration is issued that he is entitled to 14 acres out of the resultant sub – divisions of the original land parcel NO EAST BUKUSU/WEST SANG'ALO/724 including the suit land which is held in trust for the Estate of the late MAUKO KHATORO.**
- 3. That trust is hereby determined and the plaintiff shall, within 30 days of this Judgment, execute all the relevant transfer documents to facilitate that registration in the name of the defendant and in default, the Deputy Registrar shall do so.**
- 4. The defendant is entitled to costs of the dismissed plaint and the Counter – Claim.**

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> November 2019.**

Judgment dated, delivered and signed in Open Court this 14<sup>th</sup> day of November 2019 at Bungoma.

Mr Murunga for defendant present

Mr Kweyu for Mr Otsiula for plaintiff present

Defendant present

Plaintiff present

Joy – Court Assistant

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> November 2019.**