



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC NO. 127 OF 2016.**

**WATENYA WA MURAMBI RAMADHAN.....PLAINTIFF**

**VERSUS**

**MOHAMED JUMA PONDA.....DEFENDANT**

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

**WATENYA WA MURAMBI RAMADHAN** (the plaintiff herein) moved to this Court by his plaint dated 24<sup>th</sup> October 2016 and filed on the same day seeking Judgment against **MOHAMED JUMA PONDA** (the defendant herein) in the following terms: -

**(a) That the Honourable Court be pleased to cancel the defendant's registration as the proprietor of land parcel number EAST BUKUSU/SOUTH KANDUYI/8381 and that the same be registered in the name of the plaintiff.**

**(b) Costs of the suit.**

The basis of the plaintiff's claim is that at all material time, he and his late brother one **IBRAHIM MAKOKHA OMARI** were the registered proprietors of the land parcel number **EAST BUKUSU/SOUTH KANDUYI/8381** (the suit land) which they had received as a gift from their father. In 1999, their relatives illegally occupied the suit land and so the plaintiff and his late brother who had difficulties evicting them, sought the help of the defendant to evict them and it was agreed that the suit land would be registered in the names of the defendant solely for the purpose of evicting the illegal occupants after which the suit land would revert to the plaintiff and his late brother. Since the parties are Muslims and not conversant with legal or land matters, they requested the Kadhi at Bungom Law Courts to assist them in the transfer process and the documents were prepared and signed on 22<sup>nd</sup> November 1999. However, no consideration was paid by the defendant since the suit land was expected to revert to the plaintiff and his late brother once the illegal occupants had vacated. The defendant was therefore registered as the proprietor of the suit land on 13<sup>th</sup> October 2000 but after the illegal occupants had vacated, the defendant refused to transfer it back to the plaintiff and on 31<sup>st</sup> October 2013, the plaintiff placed a caution on the suit land. On 1<sup>st</sup> October 2016, the defendant acknowledged the plaintiff's proprietary rights over the suit land and signed an agreement stating that the plaintiff had a share on the same. That the defendant's refusal to revert the suit land to the plaintiff is unlawful, fraudulent and intended to deprive the plaintiff of his property thus necessitating this suit.

Together with the statements of his witnesses, the plaintiff also filed his list of documents which are the Green Card for the suit land and a copy of the agreement dated 1<sup>st</sup> October 2016.

The defendant filed a defence admitting that the plaintiff and his late brother were originally the registered proprietors of the suit land. He however denied that the plaintiff had approached him to assist in the eviction of the illegal occupants from the suit land or that the same would be registered in the defendant's names for that purpose only. He added that the plaintiff and his late brother voluntarily sold the suit land to him and full consideration was paid after which he became the legally registered proprietor thereof on 13<sup>th</sup> October 2000 after undergoing all legal processes. The defendant added that the plaintiff is a well educated and qualified secondary school teacher conversant with legal and land matters and voluntarily executed the sale agreement. He termed the plaintiff's allegations that no consideration was paid for the suit land as being malicious and meant to embarrass him. He added that the suit is not only res – judicata in view of **BUNGOMA HIGH COURT CIVIL CASE NO 3 OF 2000** but it is also statute barred and a Preliminary Objection would be raised on points of law. He argues that the suit be struck out and dismissed as the plaintiff's verifying affidavit is also in contravention of **Order 4 Rule 1 (3) of the Civil Procedure Rules**.

In a reply to the defence however, the plaintiff joined issues with the defendant and reiterated the contents of his plaint. He added that he is not an expert in land matters and that the defendant was only holding the suit land in trust and that this suit has been filed within time and denied that the suit is res – judicata or that there existed **BUNGOMA HIGH COURT CIVIL CASE NO 3 OF 2000** or that the verifying affidavit offends the provisions of **Order 4 Rule 3 (1) of the Civil procedure Rules**.

The defendant also filed his list of documents dated 10<sup>th</sup> November 2016 bearing exhibits 1 to 9 but during trial, the original sale agreement dated 22<sup>nd</sup> November 1999 was produced after counsel for the plaintiff, **MS MUMALASI**; informed the Court that the said original agreement was different from the copy produced by the defendant.

The trial commenced before **MUKUNYA J** on 25<sup>th</sup> April 2017 who heard the plaintiff and his witness **SHABAN WANJALA MASINDE (PW 2)** before I took over the case on 20<sup>th</sup> June 2018 and completed the evidence of PW 2 after which the plaintiff called other witnesses being **CASSIM SIMIYU WESONGA (PW 3)** and **CHAUSIKU SAGANA (PW 4)** Thereafter, the defendant testified and closed his case.

In his testimony before **MUKUNYA J**, the plaintiff stated that he is a retired teacher and the defendant is his brother in law. That the suit land belonged to him and his late brother **IBRAHIM MAKOKHA OMARI** who died on 2<sup>nd</sup> April 2001. In 1999, there had problems evicting relatives who were living on the suit land and so he and his late brother approached the defendant to help them evict the relatives. They entered into an agreement in which the suit land was sold to the defendant at a consideration of Kshs. 60,000/= although no money was exchanged. After the defendant had evicted the relatives, the plaintiff asked the defendant to return the suit land but he refused and demanded that if the plaintiff wanted the suit land back, he must pay the market rate for it. The plaintiff placed a caution on the suit land. They later entered into another agreement dated 1<sup>st</sup> October 2016 where the defendant recognized that the plaintiff's share in the suit land was Kshs. 1.7 million. The plaintiff therefore sought the return of the suit land and filed this suit.

**SHABAN WANJALA MASINDE (PW 2)** is an uncle to the plaintiff and told the Court that the plaintiff and his late brother were given the land by their father also deceased. That in 1999, the plaintiff and his late brother approached him to help them remove some people from the suit land and it was agreed that the suit land be transferred to the defendant for that purpose.

**CASSIM SIMIYU WERUNGA (PW 3)** adopted as her evidence the witness statement dated 24<sup>th</sup> October 2016. In that statement, she states that in November 1999, one **SHABAN WANJALA MASINDE** an uncle of the plaintiff requested him to hold the suit land in trust for the plaintiff's family for purposes of removing the illegal occupants. He promised to think about the request but before he could give his answer, he was informed that with the assistance of the **KADHI**, the suit land had been transferred to the defendant who had refused to transfer it back to the plaintiff.

**CHAUSIKU SAGANA (PW 4)** is the widow of **IBRAHIM MAKOKHA OMARI** one of the co – proprietors of the suit land. She too adopted as her evidence the witness statement dated 24<sup>th</sup> October 2016 in which it is stated, inter alia, that due to the illegal occupation of the suit land by relatives, it was agreed that a trustworthy person be approached to whom the suit land could be entrusted for purposes of evicting the said occupants. The name of **CASSIM WERUNGA (PW 3)** was suggested before they settled on the defendant who agreed to have the suit land transferred to him for purposes of evicting the illegal occupants. On 22<sup>nd</sup> November 1999 and with the help of the **KADHI BUNGOMA COURT**, the suit land was transferred to the defendant and by 2010, the illegal occupants had been removed following a court case. The plaintiff meanwhile allowed the defendant, as a sign of gratitude, to use the suit land as a garage but he refused to return it to the plaintiff. In October 2013 the plaintiff and others approached the defendant for purposes of transferring the suit land back to the plaintiff but he became hostile and chased them away. The defendant also chased the witness away from his shop where she was carrying out tailoring business. That no consideration was paid for the transfer of the suit land to the defendant who breached the trust. That on 1<sup>st</sup> October 2016, the defendant acknowledged that the suit land belonged to the plaintiff and his family and an agreement was signed to that effect. The suit land should therefore revert to the plaintiff.

The defendant was the only witness in support of his case and he too adopted as his evidence the witness statements dated 10<sup>th</sup> November 2016 and 7<sup>th</sup> November 2016 as well as his list of documents dated 23<sup>rd</sup> November 2016. At the application of **MS MUMALASI** counsel for the plaintiff, the original sale agreement dated 22<sup>nd</sup> November 1999 (which counsel said was different to the one in the defendant's documents) was produced and marked as plaintiff's exhibit No. 10.

In the said two statements, the defendant confirms that in 1999 and at the request of the plaintiff and his deceased brother, he bought the suit land at a consideration of Kshs. 60,000/= which he paid and he took possession. That the agreement was prepared by the **KADHI BUNGOMA** one **ABUBAKAR BWANAKAI** and witnessed by **JULIUS OIRO YIRE** now deceased. That the agreement was signed by the parties and the **KADHI** counted the purchase price before handing it over to the plaintiff and his deceased brother. That the consent of the Land Control Board was obtained and the defendant was registered as the proprietor of the suit land on 13<sup>th</sup> October 2000. That in the same year, one **MARK BARASA WANYONYI** (deceased) sued the plaintiff and his late brother in **HIGH COURT CIVIL CASE NO 3 OF 2000** where the defendant was subsequently enjoined as a co – defendant and in that case, the plaintiff and his late brother never claimed that the suit land belonged to them and until 2016, they never questioned the defendant's registration as the proprietor of the same. That in September 2016 the defendant was faced with financial difficulties and offered the suit land for sale and that was when he discovered that the plaintiff had placed a caution on it on 13<sup>th</sup> October 2016. On 1<sup>st</sup> October 2016 he filed an application seeking the removal of the caution and that was when the plaintiff, PW 4 and others, through the chairman of the Mosque approached him to consider giving them some money to enable them build a home for PW 4. It was then agreed that the defendant gives PW 4 Kshs. 1,700,00/= to build a home once the suit land is sold. That the said agreement was signed on humanitarian grounds and although the plaintiff agreed to remove the caution to enable the defendant sell the suit land, he became evasive and demanded the Kshs. 1,700,000/= first. The defendant therefore prayed for the dismissal of the suit as being malicious claiming that the plaintiff and his late brother parted with the suit land in 2000 and there was no way that he can recognize the plaintiff as the owner of the same.

At the end of the trial, submissions were filed both by **MS MUMALASI** instructed by **ANNET MUMALASI & CO. ADVOCATES** for the plaintiff and **MR ONYANDO** instructed by **ONYANDO & CO. ADVOCATES** for the defendant.

I have considered all the evidence by both parties and the submissions by counsel.

In paragraphs 16 and 17 of his defence, the defendant has pleaded that this suit is statute barred and also res – judicata. Although it was pleaded that a Preliminary Objection would be raised on those two points, that was not done. However, nothing precludes this Court from

considering those two issues even this late in the trial since they touch on the jurisdiction of this Court to determine this dispute. So crucial is the issue of the Court's jurisdiction to determine a dispute that it should be raised at the threshold stage and can even be raised by the Court on its own motion – **OWNERS & MASTERS OF THE MOTOR VESSEL “JOEY” V. OWNERS & MASTERS OF THE MOTOR TUG “BARBARA” & “STEVE B” 2008 1 E.A 367.**

On the plea of res – judicata, I have looked at the pleadings in **BUNGOMA HIGH COURT CIVIL CASE NO 3 OF 2000** in which the plaintiff was one **MARK BARASA WANYONYI** while the plaintiff herein was the 1<sup>st</sup> defendant and the defendant herein was the 4<sup>th</sup> defendant. There were three other defendants in that case who are not parties herein. The dispute related to the same land subject matter of this suit. However, from the documents filed by the defendant herein, all that I can see is the ruling by **SERGON J** delivered on 30<sup>th</sup> September 2005 dismissing the defendant's Preliminary Objection. I have not seen any Judgment finally determining that dispute yet **Section 7 of the Civil Procedure Act** requires that for the plea of res – judicata to be up – held, the previous suit should have **“been heard and finally decided by such court.”** The onus is on the party raising the plea of res – judicata to place before the Court evidence to that effect. The defendant has not done so and the plea of res – judicata is not properly taken. It is dismissed.

On the plea that this suit is statute barred, counsel for the defendant has submitted that the suit land was sold in 1999 and this suit was filed in 2016 more than sixteen (16) years later and contravenes the provisions of **Section 7 of the Limitation of Actions Act**. That section 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 occurred to him or, if it first accrued to some person through whom he claims, to that person.”**

Counsel has also cited **Section 20 of the Limitation of Action Act** for the proposition that a claim for breach of trust cannot be brought after the end of six (6) years from the date on which the cause of action arose. My understanding is that there is no Limitation period where trust is pleaded – **STEPHENS & SIX OTHERS .V. STEPHEN & ANOTHER 1987 KLR 125**. What this Court will however be determining later in this Judgment is whether in fact this is a claim based on trust or fraud. The bottom line however, as per the evidence of the parties, is that the agreement to transfer the suit land to the defendant was signed in 1999. However, it was not until 2013 that the plaintiff requested the defendant to transfer the suit land back to him but the defendant refused. The cause of action could not have arisen in 1999 but rather in 2013. This suit was filed in 2016 and it is not caught up by the statute of Limitation. That plea is also rejected.

I shall now determine the merits or otherwise of the plaintiff's claim against the defendant.

From paragraph 16 of his plaint, the plaintiff seeks Judgment against the defendant in the following terms: -

**16 (a) “That the Honourable Court be pleased to cancel the defendant's registration as the proprietor of the land parcel number EAST BUKUSU/SOUTH KANDUYI/8381 and that the same be registered in the name of the plaintiff.”**

**(b) Costs of the suit.**

From my perusal of the plaint herein, I do not find any specific pleading of trust or fraud on the part of the defendant in the manner in which he obtained the suit land. Reference to a trust is only made in paragraph 6 of the reply to defence in the following terms: -

**6 “In response to paragraph 11 of the defendant's defence, the plaintiff reiterates the contents of paragraph 9 of the plaint and asserts that the defendant was merely holding the land in trust and never paid consideration for the suit land”**

Paragraph 9 of the plaint reads: -

**9 “The defendant was therefore registered as the proprietor of the suit land for the purposes aforesaid on 13<sup>th</sup> October 2000”**

The purposes aforesaid as per paragraph 8 of the plaint are that the defendant paid no consideration for the suit land and was expected to revert the title to the plaintiff and his late brother once the illegal occupants had vacated. It is noteworthy that in paragraph 11 of his defence, the defendant pleaded that he was legally and lawfully registered as the proprietor of the suit land. Clearly, the plaint herein does not meet the requirements of the **Order 2 Rule 10(1)(a) of the Civil Procedure Rules** which provides that: -

**“Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –**

**(a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and**

**(b) \_\_\_\_\_ .”**

Therefore, where a party is pleading fraud or trust as a basis of his claim, that must be specifically pleaded and proved. In **CALTEX OIL (KENYA) LTD .V. RONO LIMITED C.A CIVIL APPEAL NO 97 OF 2008 (2016 eKLR)**, the Court said: -

**“If a party wishes the Court to determine or grant a prayer, it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayer he seeks to be granted in his favour. Where no such prayer is pleaded in specific and somewhat particularized manner, the party is not entitled to benefit and the Court has no jurisdiction**

*to whimsically grant those orders.”*

In **JOSPEH MBUTA NZIU .V. KENYA ORIENT INSURANCE COMPANY LTD 2015 eKLR** the Court cited with approval the decision of the **NIGERIAN SUPREME COURT IN ADETOUN OLADEJI (NIG) LTD .V. NIGERIA BREWERIES PLC S.C 91/2002** wherein it was held that

*“ ..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”*

However, as I will be demonstrating later in this Judgment, there are instances when a Court will determine a dispute on issues that have not been pleaded and base it's Judgment on such unpleaded issues. Each case depends on its own peculiar circumstances.

Having said so, an important issue that calls for my determination in this case is whether the sale agreement dated 22<sup>nd</sup> November 1999 by which the plaintiff and his late brother are alleged to have transferred the suit land to the defendant is a valid legal document. It is unfortunate that the **KADHI BUNGOMA** before whom it was signed was not called by any of the parties in this case. Two versions of the agreement have been put forward. The defendant's version has page 2 bearing his signature and that of one **JULIO OIRO YIRE** while the plaintiff's version has only page 1 and does not bear the signature of the defendant or any witnesses. Counsel for the plaintiff has asked me to look at the two agreements and find that the defendant's version is a forgery *“tailor made to counter this suit.”* This Court is not an expert in documents and it would have been better if the two agreements had been subjected to forensic examination by a document examiner to confirm if the two page agreement produced by the defendant is indeed a forgery. However, even in the absence of such expert evidence, the Court still has the power and indeed the duty, looking at the evidence in its totality, to determine which of two documents placed before it is a forgery. In any event, even where an expert witness testifies on whether or not a document is a forgery, it is always the responsibility of the Court to satisfy itself whether such expert opinion can be accepted. The Court is not bound to blindly accept such opinion. Looking at the two versions of the agreement, I notice, as has counsel for the plaintiff, that the first page is clearly different from the second page and the defendant's version can only be a forgery. That explain why it has a second page attached by cellotape and the fonts of typing is clearly different. That confirms the plaintiff's statement at paragraph 14 of his witness statement dated 24<sup>th</sup> October 2016 that although the **KADHI BUNGOMA** prepared the sale agreement, the defendant did not sign it and it had no places for witnesses to sign. The agreement was therefore only signed by the plaintiff and his late brother **IBRAHIM MAKOKHA OMARI**.

The sale agreement was drawn on 22<sup>nd</sup> November 1999. Prior to the amendment of the **Law of Contract Act in 2003, Section 3(3)** thereof provided as follows: -

*“No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it .....”*

The plaintiff and his late brother signed the agreement and they are the persons *“to be charged”* and bearing in mind that this agreement was signed in 1999, **MS MUMALASI** cannot be correct when she submits that the contract had to be signed by two witnesses. That was not the law in 1999 when it was executed.

However, what the plaintiff is pleading, in not very clear terms, is the doctrine of **“NON EST FACTUM”** i.e. *“it is not my deed.”* Whereas the agreement dated 22<sup>nd</sup> November 1999 clearly transferred the suit land to the defendant who proceeded to obtain a title thereto, I understand the plaintiff to be saying that was not the intention of the parties to the agreement. The doctrine of **NON EST FACTUM** was discussed in the case of **MARVCO COLOUR RESEARCH LTD .V. HARRIS [1982] 2 SCR 774** thus: -

*“Where a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of non est factum on the basis that his mind at the time of execution of the document did not follow his hand”*

In paragraph 11 of his witness statement, the plaintiff has stated as follows: -

*“That we settled on MOHAMED JUMA PONDA and when we approached him, he agreed to be registered as the proprietor of our land only for purposes of getting rid of the illegal occupants.”*

The above statement is in support of the plaintiff's pleading in paragraph 8 of his plaint where he has pleaded that the suit land was supposed to revert back to him. And in response to paragraph 8 of the plaint, the defendant pleaded in paragraph 10 of his defence that the said *“allegations are malicious and intended to embarrass the defendant.”* In my view, the determination of this suit revolves around those pleadings hence the doctrine of **“NON EST FACTUM.”** I am also alive to the fact that the plea of **“NON EST FACTUM”** can only rarely be established by a person of full capacity and the plaintiff is certainly such a person. The plaintiff is also literate and confirmed in cross – examination that he is a holder of a Diploma Certificate and a retired Secondary School teacher. I also take note of the fact that in **BUNGOMA HIGH COURT CIVIL CASE NO 3 OF 2000**, the plaintiff, who together with the defendant herein were both defendants in a suit filed by one **MARK WANYONYI**, swore a replying affidavit dated 1<sup>st</sup> March 2004 in which he averred at paragraph 4 that he and his deceased brother had sold the suit land to the defendant herein. The transfer of the suit land to the defendant is therefore a matter of fact which cannot be disputed. What I must determine is what the parties intended when they executed the agreement dated 22<sup>nd</sup> November 1999 because the Court cannot ignore the doctrine of **“NON EST FACTUM”** in arriving at just resolution of this dispute. It is also not lost to this Court that a claim for restitution can properly be founded where it would be unjust to allow one party to retain the benefits of an unjust enrichment. It can also apply where a benefit has been conferred perhaps through mistake, compulsion or necessity.

Looking at the evidence herein, it is clear that the plaintiff's claim that the suit land would revert to him has been supported by other witnesses. In his evidence in chief, **SHABAN WANJALA MASINDE (PW 2)** stated as follows: -

***"In 1999, IBRAHIM MAKOKHA and WATENYA came to my house and said there was a person who has refused in the suit land. They asked me if I could get a person to transfer to. Once they get rid of the case, he could transfer to him. They wanted a person who was not their jamii (clan) to hold the land. Anyone could hold only that he had to be faithful."***

And before the plaintiff and his deceased brother settled on the defendant, they had first reached out to **CASSIM SIMIYU WERUNGA (PW 3)** to help them. This is what the witness has recorded in paragraphs 4, 5 and 9 of his witness statement dated 24<sup>th</sup> October 2016.

**4: "That in November 1999, one SHABAN WANJALA MASINDE an uncle of the plaintiff herein approached me and requested me that his nephew the plaintiff herein had requested him to talk to me and request me if I could agree to hold the suit land in trust for the family of the plaintiff."**

**5: "That the said SHABAN WANJALA MASINDE asked if I could agree to have the land transferred to me so that I could ask the illegal occupants of the suit land to vacate as they were related to them and were unable to get them out of the land."**

**9: "That according to the request by the plaintiff, the registration and/or transfer of the suit land was to be without any consideration and that once the illegal occupations (sic) were dealt with, the land was supposed to revert to the owners, the plaintiff and his late brother."**

On her part, **CHAUSIKU SAGANA (PW 4)** the widow to **IBRAHIM MAKOKHA OMARI** has stated as follows in paragraphs 7, 13 and 14 of her statement also dated 24<sup>th</sup> October 2014: -

**7: "That my husband informed me that they needed to get a trustworthy person to whom they would entrust the land by transferring the suit land to him, then the person could help evict the illegal occupants and thereafter revert the land to my husband and his brother."**

**13: "That sometime in November 1999, my husband and my brother in law the plaintiff herein talked to the defendant herein about their need and requested him to have the land registered in his name so that he would be the one to ask the illegal occupants to leave the land."**

**14: "That the defendant agreed."**

When she was cross – examined by **MR ONYANDO**, this witness said: -

***"It is not true that the suit land was sold. What I know is that there were people illegally living on the land and were related to my husband and the plaintiff. So, they requested the defendant to help evict those persons after which the land would revert to the plaintiff and late husband."***

All that was denied by the defendant. In his statement dated 10<sup>th</sup> November 2016, he states as follows in the penultimate paragraph: -

***"That I wish to reiterate that the land belongs to me and the claim by the plaintiff is frivolous, malicious and I seek that the same be dismissed with costs."***

In his other statement dated 7<sup>th</sup> November 2016, the defendant also terms the plaintiff's claim as malicious and unlawful adding that he purchased the suit land from the plaintiff and his brother and paid the consideration of Kshs. 60,000/=. It is these conflicting versions that this Court must consider.

The view I take of this matter is that there was really no intention by the plaintiff to transfer the suit land to the defendant as his absolute property. This is because of the following reasons: -

Firstly, the parties decided to have their agreement drafted by a **KADHI** rather than an advocate who would ordinarily be the right person to draft such legal documents. It transpired during the trial that it is not un-usual among Muslims for one to give another property in trustees before the **KADHI**. This is what **SHABAN WANJALA MASINDE (PW 2)** stated when cross – examined by **MR ONYANDO**: -

***"I did not sign the agreement. KADHI told me there was no need giving land in trust is available to Muslims. We never wrote a counter – agreement to re-transfer the land to owners."***

On his part, the defendant said as follows when cross – examined by **MS MUMALASI**: -

***"It is true that among Muslims, the element of trust is taken very seriously. Among Muslims, if I hold something in trust, I must abide by that undertaking. If one fails to do so, it is a sin and Allah will punish you. Muslims organize their activities by the Koran."***

It is clear to me that the reason why the parties herein, both being Muslims, opted to have their agreement drawn by their **KADHI** and not

one of the many advocates in **BUNGOMA** is because the plaintiff expected the defendant (in line with their faith as he has himself confirmed) to transfer the suit land back to him once the illegal occupants had been removed.

Secondly, it is common ground that on 1<sup>st</sup> October 2016, the parties again entered into another agreement with respect to the suit land. This agreement was necessary because the plaintiff had on 31<sup>st</sup> October 2013 placed a caution on the suit land. The agreement was signed by both the plaintiff and the defendant as well as four (4) witnesses and the relevant provisions are as follows: -

**“AGREEMENT BETWEEN MR MOHAMED PONDA JUMA and RAMADHAN MURAMBI & THE FAMILY OF THE LATE IBRAHIM MURAMBI**

**SUBJECT**

**The above agreement concerns the sell of land (plot) NO EAST BUKUSU/SOUTH KANDUYI/8381 in Bungoma town.**

**The two parties have agreed to settle the agreement of the above plot in the following conditions: -**

- 1. MR RAMADHANI MURAMBI & FAMILY to receive the sum of (Kshs. 1,0700) One million seven hundred thousand only**
- 2. MR MURAMBI RAMADHAN of I.D NO 0827069 immediately after the settlement of the cash he agreed to remove the restriction he had put on the above land – SIGN**
- 3. MR MOHAMMED PONDA JUMA the bearer of title deed committed himself to pay them there share as started above**

**I.D NO 0132468 – SIGN”**

The gist of that agreement which is of course not so elegantly drafted, (and that of course has been the thorn in this dispute), is that the defendant acknowledged that the plaintiff and his family had a share in the suit land (assessed at Kshs. 1.7 million) which sum he undertook to refund the plaintiff after the land is sold once the restriction is removed. Now it's beats logic that the defendant could have paid a consideration of Kshs. 60,000/= for the suit land in 1999 yet seventeen (17) years later, acknowledge that the plaintiff still has a share in the same land. The only irresistible conclusion that this Court can arrive at is that the agreement dated 22<sup>nd</sup> November 1999 was never meant to transfer the suit land absolutely to the defendant but rather, as the plaintiff and his witnesses have testified, the defendant was expected to transfer it back to the plaintiff once the objective of the initial transfer had been met. The defendant's evidence is that the Kshs. 1.7 million was being paid to the plaintiff and his family on humanitarian grounds. This is how he puts it in his witness statement dated 7<sup>th</sup> November 2016: -

**“That we discovered the issue and the plaintiff said if I was to give one CHAUSIKU SAGANA Kshs. 1,700,000/= will be sufficient to enable her purchase land and build.”**

**“That on humanitarian ground I agreed that I could give Kshs. 1.7 million to CHAUSIKU SAGANA once I sell the plot.”**

I don't think that any person can believe that narrative. It is only the stuff that fraudsters are made of and I dismiss it as such. I am satisfied that the truth of the matter is as stated by the plaintiff and his witnesses whom I found credible.

Having said so, at the commencement of this Judgment, I made reference to the fact that the plaintiff had neither pleaded fraud or trust and that parties are bound by their pleadings and so the Court can only pronounce itself on matters arising from the pleadings. However, in **ODD JOBS .V. MUBIA 1970 E.A 476**, the then Court of Appeal for East Africa held that where parties have canvassed an issue and left it to the Court to decide, the Court can pronounce Judgment on it though it was not pleaded. **LAW JA** put it in the following words at page 478: -

**“In East Africa the position is that a Court may allow evidence to be called and may base a decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has infact been left to the Court for decision.”**

That authority has been followed in many cases including in **NGUGI TICHA .V. KIRITU TICHA & OTHERS C.A CIVIL APPEAL NO 40 OF 2004 [2014 eKLR]**. See also the case of **UYAS INDUSTRIES .V. DIOCESE OF MERU 1982 KLR 114** where the Court of Appeal held, inter alia, that a Court of Law may base its decision on an unpleaded issue if during the course of the trial, the issue had been left for the decision of the Court. A perusal of the evidence herein shows that the issue of trust was raised by the parties in their testimonies and was left to the Court to decide. For instance, when the plaintiff was re – examined by **MS MUMALASI**, he said: -

**“We took a copy because this was a matter of trust”**

**SHABAN WANJALA MASINDE (PW 2)** also referred to a trust when he said: -

**“I did not tell the KADHI about my doubt when we wrote the agreement. I did not sign the agreement. KADHI told me there was no need giving land in trust is available to Muslims”**

**CASSIM SIMIYU WERUNGA (PW 3)** and **CHAUSIKU SAGANA (PW 4)** on their part make reference in their statements to the fact

that the suit land was to revert back to the plaintiff once the defendant had done what was required of him. All that can of course only be in reference to a trust. The defendant denied that the suit land was transferred to him to hold in trust. When he was re – examined by his counsel, he said: -

***“It is not true that I was only holding the land as security. The agreement dated 1999 was entered into by persons who were adults. The plaintiff was by then a Principal in a Secondary School so he knew what he was doing. If I was only to hold the title as security, they would have kept a copy of the title. That would have been reflected in the agreement of 1999.”***

Both counsels also refer to the issue of trust in their submissions. In her submissions, counsel for the plaintiff states as follows in the penultimate paragraph: -

***“It is therefore our submission that there was no proper agreement upon which land could be transferred to the defendant in the year 2000. We also submit that the plaintiff has proved that the transfer of the suit land to the defendant was done for purposes of the defendant holding the land in trust for the plaintiff and his brother. That is why in the agreement of 01/10/2016 the defendant signed an agreement of the said dated acknowledging that the plaintiff had a share in the said land.”***

On his part, counsel for the defendant made the following submission on that issue at page 3: -

***“The plaintiff does not deny the existence of the agreement but alleges in his evidence that there was another condition which condition he alleges that the land was not sold but it was supposed to be held in trust. These allegations are not as if that was the condition, then the same should have been included in the agreement.”***

It is therefore clear, beyond peradventure, that the issue of trust, though not specifically pleaded in the plaint, was raised by the parties in their testimonies and by counsel in their submissions and was left to the Court to make a decision on the same. This Court, guided by the decision in **ODD JOBS .V. MUBIA** (supra) will do just that.

In urging the Court to protect the defendant’s title as conferring absolute ownership to him, counsel for the defendant referred to **Section 24, 25 and 26 of the Land Registration Act** adding that no fraud or misrepresentation had been proved to enable this Court cancel the defendant’s title. It is of course true, as counsel for the defendant has submitted citing the case of **ELIJAH MAKERI NYANGWARA .V. STEPHEN MUNGAI NJUGUNA & ANOTHER 2013 eKLR**, that the law is extremely protective of title and the same can only be challenged on grounds of fraud, misrepresentation or if obtained illegally, unprocedurally or through a corrupt scheme. However, under **Section 28 of the Land Registration Act**, one of the overriding interests to which registered land is subject to include trusts. And among those trusts is the resulting trust which is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as follows: -

***“A remedy imposed by equity when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property.”***

Such trusts are also referred to as implied or presumptive trust and can be inferred from the accompanying facts and circumstances. Taking into account the facts in this case which are that the parties opted to go to their spiritual leader rather than an advocate to draft their agreement and more significantly, that the defendant subsequently acknowledged that the plaintiff and his family have a share in the suit land, is sufficient evidence upon which to make a finding, which I hereby do, that the defendant holds the suit land in trust for the plaintiff and his late brother. Further, that by the agreement dated 22<sup>nd</sup> November 1999, the plaintiff and his late brother did not intend to transfer their interest in the suit land to the defendant who is therefore only a trustee. In making the final orders in this case, I shall also bear in mind that when the suit land was transferred to the defendant in 1999, it was jointly owned by the plaintiff and his late brother **IBRAHIM MAKOKHA OMARI** who was survived by his wife **CHAUSIKU SAGANA (PW 2)** a fact that is not contested.

Ultimately therefore, there shall be Judgment for the plaintiff against the defendant in the following terms: -

- 1. An order that the defendant is registered as the proprietor of land parcel NO EAST BUKUSU/SOUTH KANDUYI/8381 in trust for the plaintiff and the Estate of his late brother IBRAHIM MAKOKHA OMARI.**
- 2. The trust is determined and the registration of the defendant as the proprietor of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8381 is hereby cancelled.**
- 3. The Land Registrar Bungoma shall issue a new title in respect to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/8381 in the joint names of the plaintiff and CHAUSIKU SAGANA.**
- 4. Costs to the plaintiff.**

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 Ms Wakoli for plaintiff present

Mr Onyando for defendant present

Joy – Court Assistant

Plaintiff absent

Defendant present

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

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