



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA.

LAND CASE NO. 169 OF 2013.

ELIUD WEPUKHULU KHAUKA.....PLAINTIFF

VERSUS

FRED WANYAMA KOROSIA.....1ST DEFENDANT

NELSON MASIKA.....2ND DEFENDANT

ZEBEDAYO MATIAS KOROSIA.....3RD DEFENDANT

JOSEPH OGINGA.....4TH DEFENDANT

JOB WANYONYI.....5TH DEFENDANT

ABRAHAM MABONGA.....6TH DEFENDANT

BEWNATE NAMBOKO MUKHEBI.....7TH DEFENDANT

JAMIN WEPUKHULU.....8TH DEFENDANT

MOSES BARASA WEPUKHULU.....9TH DEFENDANT

SAULO KHAEMBA WEPUHULU.....10TH DEFENDANT

PATRICK NJURU KAMAU.....11TH DEFENDANT

SYLVESTER WAKOLI BIFWOLI.....12TH DEFENDANT

MESHACK SIMIYU WEKESA.....13TH DEFENDANT

J U D G M E N T

The history:

[1]. The 3rd and 8th defendant herein filed a claim in the Chwele land disputes tribunal in miscellaneous application no. 395 of 2005. The case was filed on behalf of their brothers the 1st, 6th and 10th defendants. They claimed title and ownership of parcel number Bokoli/Chwele/1092. The claimants were awarded the land on behalf of their brothers aforesaid. The award was adopted by the Bungoma

Senior Principal Magistrate's court on 4/7/2005. After the confirmation they went ahead to obtain title and subdivided the suit land and sold the various resultant parcels to the rest of the defendants who are purchasers.

[2]. The Plaintiff herein filed Bungoma High Court miscellaneous application No. 395 of 2005 for Judicial Review of the orders of the Chwele land disputes tribunal and the adoption thereof by the Bungoma Senior Principal Magistrates court. The court on 9/12/2008 set aside the orders of the Tribunal and quashed the adoption thereof by the Bungoma SPM's Court. The 3rd defendant herein filed an appeal in the Court of Appeal. The Court of Appeal upheld the Judgment of the High Court and directed that the entries made on the 5th July 2005 in the register of Title Bokoli/Chwele/1092 be reversed forthwith and the title do revert to the respondent, Eliud Wepukhulu Khauka. The court of appeal made it clear that it was not dismissing the Appellants and his siblings claim if any to the suit that the appellant and his siblings were at liberty to file a fresh suit in a court with competent jurisdiction and have the dispute determined once and for all.

The Pleadings:

[3]. The Plaintiff in this suit filed this suit against all the defendants herein and prayed for Eviction from parcel Bokoli/Chwele/1092. Further by a notice of motion dated 18th June 2013 the Plaintiff herein sought for a temporary injunction to issue against the 13 defendants mentioned therein restraining them from constructing, ploughing, erecting structures or in any way remaining on LR Bokoli/Chwele/1092 pending the determination of this suit. The Judge on 4/2/2014 granted the restraining order on all the titles that emanated from Bokoli/Chwele/1092 i.e. Bokoli/Chwele/1924, 1927, 1928, 2157, 2158, 2197, 2198, 2230, 2652, 2654, 2655, 2656, 2657, 2680, 2681, 2750, 2751, 2752 and 2753.

[4]. The defendants herein filed their defences. The 1st 3rd 6th 8th 9th and 10th filed their joint defence and counterclaim through Ocharo Kebira & Co. Advocates. They stated that the registration of the plaintiff as owner of Bokoli/Chwele/1092 was faulted with irregularities, fraud and illegalities. In their counterclaim, they set out particulars of Irregularities, fraud and illegalities. The plaintiff equally filed his reply to the counterclaim and denied the same. They claimed that the land was held by the plaintiff in trust for them.

[5]. The 2nd 5th 11th 12th and 13th defendants filed their defence and counterclaim on 12th July 2013. They alleged that they are strangers to the contents of paragraph 16, 17 and 18 of the Plaint. They stated that they are *bona fide* purchasers of land from the 10th defendant (by then the registered owner) for value without any notice of defect in their respective titles LR Bokoli Chwele 2753, 2751, 2157, 2656 and 2655. They averred that when they bought their respective pieces and there was no overriding interest being held by the Plaintiff or defect on the title. They counterclaimed that they are *bona fide* purchasers, for value without notice.

The Plaintiff filed a reply to their counterclaim and denied the same. He denied holding the suit land in trust for any of the defendants. He states that he genuinely bought the suit land and went through transfer process and obtained consent to transfer the same to himself. He avers that the counterclaim is an afterthought and it ought to be dismissed with costs to him.

The evidence:

[6]. The Plaintiff ELIUD WEPUKHULU KHAUKA. He said that the 1st, 6th and 10th defendants are sons of his late brother Isiah Masaba Khauka and that the rest are purchasers. He told the Court that he had his own land and his brother had his own land which he (his brother) sold to Kaptein Waitene and moved from Chwele to Uganda with some of his children while some remained and stayed at the market in Chwele. He said that Kaptein had not paid for four acres. He only paid Kshs.600 for those acres and left a balance of Kshs.2000 in 1958. He said that he has however paid Kshs.2,600 to Kaptein and the land was transferred to him in 1967. He said he had planted coffee 200 stems and bananas. He said that when he bought the land the defendants were not on the land. They came to the land in 2003. He adopted his

statement filed in Court. On cross examination by Mr. Ocharo Learned counsel for 1st 3rd 6th 8th 9th and 10th defendants, he said his father gave him land which is Bokoli/Chwele/450. This is the land where his father mother and wife are buried. The father of the defendants and their mother are buried there too. He admitted that the 1st defendant Wanyama Korosia and his family and 10th defendant live on the suit land. He admitted that one Kaptein did not pay for the entire land and that there was an agreement that the four and a half acres be returned. He said he gave Kaptein Kshs.2,600. This was done before the assistant chief and that at the time his brother was in Uganda. The Plaintiff said that he went to the land control board in 1969 and that the consent granted to him was in the name of Munyokoli Mutolo who is also the person who signed the forms of Land Control Board. He admitted that the sons of his brother are on the land no. 1092 which was subdivided from parcel 253. Under cross examination by Mr. Ocharo Learned Counsel for the 1st 3rd 6th 8th 9th and 10th defendants he admitted that there was a family meeting in the year 2005 when he offered the children of his brother two and a half (2½) acres and they refused to accept the same.

On cross examination by Madam Wakoli Learned Counsel for the 2nd 5th 11th 12th and 13th defendants he said that Munyokoli Mutolo is another name for Kaptein Wetesi. He admitted to court that he does not live on the four acres. That the children of his brother removed the coffee trees in 2005-2006. He also conceded that he has no home in the suit premises and that he lives on parcel 250.

[7]. JAMIN WEKESA WEPUKHULU gave evidence and said that the 1st, 3rd 6th and 10th defendant are his brothers. That his father died on 22/5/1980 he produced a death certificate. He said that his father was buried on his grandfather's land Bokoli/Chwele parcel 250. That his uncles and his family are all buried on parcel 250. He said the parcel 250 is in the name of the Plaintiff and the 1st and 10th defendant live there with the Plaintiff. He said that his father bought the suit land. He then sold it to Kaptein Wetesi. He produced the agreement between his father and Kaptein Wetesi as Def Exhibit 2. The land was registered as Bokoli/Chwele/253 in the name of Kaptein Wetesi. The agreement was that since Kaptein Wetesi was unable to pay for the whole land, he should retain 6½ acres and the witnesses father was to have 4½ acres. Further, that Kaptein Wetesi was to be paid Kshs.600 for the bananas and coffee. The witness said that the Kshs.600/= was paid and land parcel Bokoli/Chwele/253 was subdivided into parcels Bokoli/Chwele 1091 and 1092. Green card for 253 was produced as D Exh. No. 4. The witness said that when his father died and they wanted to do succession they found out that the land was in the name of the Plaintiff. The witness said that they went to the defendant to ask him to transfer the land to them, that he refused and they went to the clan in 1987 for help. The Plaintiff then offered to give them two and a half (2½) acres but they refused to accept that offer. That is when they went to the Chwele land disputes tribunal to file the case. The tribunal said that the Land belonged to their father and it should revert to his children. When the witness was re-examined by Mr. Ocharo Learned counsel for the defendant, he said that when he came from Uganda, he found that his house had fallen after his father had died and he build a house in 2007 on parcel number 1092. That his brother Abraham Mabanga the 6th defendant was living on the land. He said that his father was not buried in plot 1092 but was buried in the ancestral land plot Bokoli/Chwele 250.

[8]. Defendant witness No. 2. ELIJAH WATESI MUTOLO said that he was 91 years old. That he was the son of Kaptein Wetesi Mutolo. He said that he knew MASABA KAUKA (the defendant's father) because his father Kaptein bought Land from him in 1957. He said that the land was Eleven (11) acres. That the land was bought with 9 cows and Kshs.378. That his father did not pay Four (4) cows out of the nine which were valued at Kshs.2,000/=. He said that his father got title. He told the court that his father was unable to purchase those four acres and they decided to take what they had paid for. They therefore decided that the vendor should be refunded the 4½ acres and the coffee and the bananas planted therein should be compensated. He said that his father was paid for the coffee and the bananas. He said that there was an agreement for that refund. The witness said that when this money was being refunded the defendant's father was in Uganda and the Plaintiff herein (his brother) was to take over the land as trustee and he was to give the land to the sons of Isiah (defendants father) as some were on the land and did not go to Uganda with their father. They were to be given land when they grew up. He stated that these sons lived on the suit land and that there were distinct boundaries on that land. The witness said that his father subdivided the land and they remained with 6½ acres and the defendants were to have 4½ acres. He was

categorical that the plaintiff herein never bought the land from his father. He said that his father had no other names and that he was not called Munyokoli Mutolo. That the plaintiff lied when he made such statement and that statement was a lie. On cross examination by Mr. Sichangi Learned Counsel for the Plaintiff, he said that when the Land was bought he had married and that he was a witness when the case was heard at the Chwele Land disputes tribunal. He stated that the defendant's father while in Uganda had said that the land had to be subdivided and 4½ acres should be given to the Plaintiff in trust for his sons and that they should be given that land when they grew up. He emphasized that he was involved in the whole transaction and he knew that the plaintiff never bought any land from his father.

ELIAS WANAKWANYI gave evidence as Defendant witness number 3. He said he was 70 years old. He said that the plaintiff was his elder brother and Isiah Khauka (the defendant's father) was his brother. That Kaptein Wetesi was his cousin. He said that he wrote the agreement. He adopted his statement dated 28/2/2014. In his statement, he explained how his brother Isiah Masaba Khauka had his land in Chwele which was approximately 11 acres. That in 1957 his brother sold the entire 11 acres to one Kaptein Wetesi for 9 heads of cattle and Kshs.278 and that there was an agreement to that effect. That in 1964 the land was registered in the name of Kaptein Wetesi as Bokoli/Chwele/253. That his brother complained that the said Kaptein Wetesi had not completed paying for the land. That a subdivision was done and the land was subdivided into Bokoli/Chwele/1091 and Bokoli/Chwele/1092 measuring 6.5 acres and 4.5 acres respectively. That the said Kaptein Wetesi called the Assistant chief one Ayub Wanyimbi to come and witness the agreement in which Kaptein Wetesi was surrendering 4.5 acres of land back to Isaya Masaba Khauka for failing to pay 4 heads of cattle whose value was agreed at Kshs.2,000/=. That the said Kaptein Wetesi demanded Kshs.600/= the value of the crops on the said land. That the said money was paid to Kaptein Wetesi by his brother Isiah Masaba Khauka through the Plaintiff because by then the said Isaya Masaba Khauka was in Uganda on a church mission. He went to state that the sons of his brother started to live on Bokoli/Chwele/1092 in the year 1971 and that his brother Isiah Masaba died in 1980.

That the sons of the said Isiah discovered in 1987 that the Parcel they were living in, was registered in the name of the plaintiff when they had commenced their father's succession. That in the year 2005 the clan took the case on behalf of the children of Isiah Khauka to the assistant chief. The plaintiff then proposed that the land be divided and 2 acres were to be for him and 2.5 acres to the sons of Isiah Masaba Khauka. This proposal was rejected by the clan and the sons of Isiah Masaba Khauka. The chief then advised them to go to the Chwele land disputes tribunal where they were given the entire land and after confirmation of the award by the Senior Principal Magistrates Court in Bungoma, the Land was subdivided among the sons of Isiah Masaba Khauka.

[9]. The 2nd 5th 11th and 12th defendant relied on the evidence of the 13th defendant and all the documents he had filed. The 13th defendant in his evidence to court gives the history of the suit land. He states that on 19th September, 1967 Kaptein Wetesi Mutolo and Isiah Masaba Khauka revoked their old agreement for sale of the land and a fresh agreement was entered into where it was agreed that 4.5 acres should be surrendered back to Isiah Masaba Khauka (he attached documents). He says that the Plaintiff was authorized by Isiah Masaba Khauka to deal with the land but not to transfer ownership to himself. That the land was subdivided in the year 1969 to give rise to Bokoli/Chwele/1091 and 1092. That the plaintiff fraudulently transferred Bokoli/Chwele/1092 to his name without the knowledge of the late Isiah Masaba Khauka. The 13th defendant says that on the subdivision aforesaid the sons of the said Isiah Khauka took possession of the land and are still in possession to date. He said that the land was later subdivided into Bokoli/Chwele/1924, 1927, 1928, 217, 2158, 2197, 2198, 2229, 2230, 2652, 2654, 2655, 2656, 2657, 2680, 2681, 2750, 2751 and 2753.

The 13th defendant identified the plots that were sold to 2nd 5th 11th and 12th defendants. He prayed that the Plaintiff suit against the 2nd 5th 11th and 12th defendant be dismissed.

The submissions:

[10]. The plaintiff submits that the plaintiff holds a valid title protected under Section 25(1) of the Land

Registration Act No. 3 of 2012 and that the defendants can only come to court by filing a fresh suit not through a counterclaim. The defendant denied any trust and/or fraud. He further argues that the defendants counterclaim is misconceived since they claim the interests of their father Isiah Masaba Khauka deceased and they have no letters of administration of his estate. The plaintiff finally argues that the eviction order is justified since the titles they hold were cancelled by the court of Appeal and that the eviction order is proper.

[11]. The 1st 3rd 6th 8th and 10th defendants who are brothers filed a counterclaim. They argue in their submissions that the main issue is how the Plaintiff got registered as owner of Bokoli/Chwele/1092. That there was no agreement for sale, that the Consent for sale of the land was from one Munyokoli Mutolo and not Kaptein Wetesi. That the transfer was not attested to. That from the defendants exhibit no. 3, the plaintiff was an agent and that he abused the trust bestowed on him by his brother. The defendant further submit that Sec. 26(1) of the Land Act no 3 of 2012 exempts the challenge of a first registration on grounds of fraud misrepresentation to which the person is proved to be party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

[12]. The 2nd 5th 11th 12th and 13th defendants submit that he who alleges must prove. That the Plaintiff in this case relied on a Judgment of the court of Appeal allowing the cancellation of titles originating from Bokoli/Chwele/1902 but failed to consider the sentiments of the Learned Judges that ownership of the land should be decided by a court of competent jurisdiction like this one. That the Plaintiff did not prove to court that he purchased the land either from Kaptein Wetesi Mutolo or Isiah Masaba Khauka. That the suit property was registered in his name under unclear circumstances. That he held the said Land in trust for the children of Isiah Masaba. Finally that the 2nd 5th 11th 12th and 13th defendants state that they are innocent purchasers for value and that their title was indivisible.

The issues:

[13]. These being the submissions by the parties what are the issues herein? The same can be framed as follows;

- (i). *For whom did the plaintiff obtain land parcel Bokoli/Chwele/1092?*
- (ii). *Can title Bokoli/Chwele in the name of the Plaintiff be challenged?*
- (iii). *In filing their counterclaim, do the 1st 3rd 6th 8th and 10th defendants need Letters of administration of their deceased father?*
- (iv). *Do the defendants herein need to file a fresh suit in compliance with the court of Appeals advice?*
- (v). *What orders should be made?*

Issue (i):

[14]. Evidence on record which is not disputed show that the Plaintiff and the father of 1st 3rd 6th 8th and 10th defendant are brothers. The 1st defendant witness JAMIN WEKESA WEPUKHULU is also a brother to the Plaintiff. The plaintiff and the defendant agree that Parcel number Bokoli/Chwele 253 was bought from the 1st 3rd 6th 8th and 10th defendants father by one Kaptein Wetesi. That the purchase price was not fully paid. And it was agreed between Isiah Masaba Khauka (the said defendant's father) and Kaptein Wetesi that Wetesi would return 4 ½ acres and retain 6½ acres. What is disputed here is how that transaction was done. According to the Plaintiff, the said Kaptein had not completed to pay for the land. The balance of the purchase price Kshs.2,000/= and Kshs.600 the amount demanded for coffee planted on the land and bananas was still outstanding. The plaintiff says he paid the said amount to Kaptein Wetesi and the land was therefore registered in his name. He says that he was taken to the Land Control Board by the owner Munyokoli Mutolo who also signed the application to the land control board

and transfer documents. He said he had no sale agreement. That he gave Kaptein Wetesi Kshs.2,600/= in front of the Chief.

[15]. The defendant JAMIN WEKESA WEPUKHULU said on the point that when Kaptein Wetesi was unable to pay for the 4½ acres he agreed to release and retransfer the 4½ acres to the vendor Isiah Masaba Khauka. He however insisted on being paid Kshs.600/= for the banana and coffee he had planted on the 4½ acres. It was also explained by ELIJAH WETESI MUTOLO 91 years, the son of the purchaser Kaptein Wetesi, that the 4½ acres were arrived at as the value of four cows that were never paid as purchase of the original 11 acres. The four cows were valued at Kshs.2,000/=. The original purchase price was 9 cows and Kshs.378/=. It was therefore agreed that the 4½ acres be returned to Isiah Masaba Khauka. The only thing Isiah Masaba Khauka was to pay was Kshs.600/= for the coffee and bananas on the 4½ acres. He said the money was refunded by Isiah Masaba Khauka who was then in Uganda. The plaintiff (his brother) was to take over the 4½ acres for the children of Isiah and they were to be given when they grew up. The land parcel Bokoli/Chwele/253 was subdivided into Bokoli/Chwele/1091 and 1092 of 6.5 acres and 4.5 acres respectively. An agreement for that arrangement was produced in Court by the witness.

[16]. The question to be asked here is, why was the plaintiff paying Kshs.2,000/= to Kaptein Wetesi? The 4½ acres were being returned because Kaptein Wetesi was unable to pay the four cows balance for the said land. Further, why did he not have an agreement for sale or have a witness who saw him refund the money? Another intriguing question is why was the land control consent granted in the names of Munyokoli Mutolo and not in the names of Kaptein Wetesi? Why was the consideration of the land in the Land Register indicated as Kshs.1,200/= and not Kshs.2,600/=? These inconsistencies mitigate against the truth of the evidence of the plaintiff herein.

[17]. It is not difficult to reflect back and see that when the Kshs.600/= was paid by the plaintiff's brother who was by then in Uganda and a request went to the plaintiff that he should take the 4½ acres on behalf of Isiah Masaba Khauka's children he had the 4½ acres registered in his name. If that fact is not so, why was he thereafter offering to give his brothers children 2½ acres of the said land when the clan confronted him? I have no difficulty in finding that the Plaintiff received this Land Parcel Bokoli/Chwele/1092 on behalf and in trust of Isiah Masaba Khauka's children the 1st 3rd 6th 8th and 10th defendants.

(ii) Can title for Bokoli/Chwele/1092 be challenged in view of Sec. 25 (1) of the Land Act 2012?

[18]. The Land Registration Act no 3 of 2012 recognizes the sanctity of title under Sec, 25(1) of the Land Act 2012. However Sec 26(1) of the Land Act 2012 provides that, the sanctity can be challenged if it is established that the title was acquired through fraud, irregularity or illegal means. The same provides as follows;

“26(1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of the proprietor shall not be subject to challenge, except (underlining mine)

- a). *On the grounds of fraud or misrepresentation to which the person is proved to be a party, or*
- b). *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

(iii). On letters of administration

[19]. Land parcel Bokoli/Chwele/1092 was registered on 9th August 1969. It was registered in the name of Kaptein Wetesi and on the same day it was registered in the name of Wepukhulu Khauka. The register

shows a consideration of Kshs.1,200/= a title deed was issued on 23rd September, 1969. At the filing of this suit it was still in the plaintiff's name. Isiah Masaba Khauka the father of 1st 3rd 6th 8th and 10th defendants died on 22nd May 1980. By the time the said Isiah Masaba Khauka died, the suit land was not in his name and therefore not part of his estate. The filing of letters of administration (for their fathers estate) by the 1st 3rd 6th 8th and 10th defendants herein will therefore be of no consequence to the suit land.

(iv). Filing a fresh Suit by the defendants.

[20]. The Plaintiff filed this suit for eviction pursuant to the Court of Appeal Judgment on Appeal regarding quashing the orders of the Land Disputes Tribunals orders. The original title Bokoli/Chwele/1092 was reinstated in the name of the plaintiffs. But in doing so the court of Appeal cautioned,

“I should not be misunderstood as dismissing the Appellant's and his siblings' claim, if any, to the suit. Having held that Chwele Land disputes Tribunal had no jurisdiction to adjudicate on ownership dispute over the suit land, the Appellant and/or his siblings are at liberty to file a fresh suit in court of competent jurisdiction and have the dispute determined once and for all”.

So, when the plaintiff herein filed his suit for eviction the defendant found their chance to file their suit through a counterclaim. A counterclaim is a suit. The defendants herein do not need to file a fresh suit. Indeed, the plaintiff has filed the replies on all the respective counterclaims. The decision herein will determine the plaint and the counterclaims. This in my view will determine this suit once and for all.

[21]. I find that the 1st 3rd 6th 8th and 10th defendants have proved their counterclaim. That the Plaintiff registered himself as owner of title Bokoli/Chwele/1092 irregularly fraudulently and illegally. I find also that they have proved that the plaintiff is holding the title No. Bokoli/Chwele/1092 in trust for them and they are entitled to an order for transfer of the said land to them.

I further find that the 2nd 5th 11th 12th and 13th defendants were purchasers of portions of the suit land. The Subdivision aforesaid were prompted by the decision of the Chwele land disputes tribunal that was confirmed by the Senior Principal Magistrate's Court Bungoma. However, the decision of the Tribunal aforesaid was quashed by the High Court and the court of Appeal. The titles they held were nullified by the court of Appeal. The 2nd 3rd 11th and 12th defendants at the moment hold no title. The claim that can arise from them in my view, is the purchase price and developments effected on the portions they occupy. The claim will of course be to the persons who sold the land to them. This issue is not before me. I make no finding on the same.

[22]. The 2nd 5th 11th 12th and 13th defendants contended in their counterclaim, that they are *bona fide* purchasers for value without notice. But what did they purchase? What they purchased was nullified by the High Court and the court of Appeal. You cannot purchase nothing and have something.

In the case of Sir Ali Bin Salim Vs. Mohammed Sharry, 1938 KLR it was stated;

“(i) If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

Further;

In Macfoy -Vs- United Africa Co. Ltd. (1961) 3 AII E.R. 1169, Lord Denning at page 1172 states as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

The 2nd 5th 11th 12th and 13th defendants have nothing. I am unable to grant their counterclaim under the circumstances and the same is dismissed.

The orders.

[23]. What orders should be made?

I find that the plaintiff herein never purchased the suit land as he alleges. There was absolutely no reason for him to pay Kshs.2,600/= to Kaptein Wetesi who had been unable to pay the purchase price for the 4½ acres. The land was being returned to the owner Isiah Masaba Khauka because Four cows part of the purchase price, valued at Kshs.2,000/= had not been paid by the purchaser Kaptein Wetesi. The only thing Kaptein Wetesi was entitled on his returning the 4½ acres was Kshs.600/= for the coffee he planted and the bananas on the land.

I find that the Kshs.600/= was refunded by Isiah Masaba Khauka. The land was returned, after subdivision of Bokoli/Chwele/253 through the Plaintiff who had the resultant parcel Bokoli/Chwele/1092 fraudulently registered in his name instead of registering the same in trust of the sons of Isiah Masaba Khauka as per agreement made and produced in court. His allegation that Land control consent was given by Munyokoli Mutolo is a red herring.

I find that Bokoli/Chwele/1092 is registered in the name of Wepukhulu Khauka in trust for the 1st, 3rd, 6th, 8th and 10th defendant respectively. That trust shall now be determined and the said land shall be registered in the names of the 1st 3rd 6th 8th and 10th defendants.

I further find that the 2nd 5th 11th 12th and 13th defendants titles were cancelled by the High court and the court of Appeal. Their *bona fides* in the purchase of the same is therefore not an issue anymore. Their counterclaim is dismissed with no order as to costs.

I also find that any other defendants claim herein claiming through purchase, is dismissed.

I finally find that if the plaintiff is in occupation on any part of the land, he will move out and vacate together with all his developments and move on to his land Bokoli/Chwele/250 aforesaid or any other land within fourty five days from this Judgement failing which he will be removed by the 1st 3rd 6th 8th and 10th defendant with the help of the Court bailiff assisted by Policemen from Chwele Police Station.

The Plaintiff and the 1st 3rd 6th 8th and 10th defendant are close family members. I shall therefore make no orders as to costs. Each party shall bear their own costs.

Judgment read in open court.

Dated, signed and delivered on 6th October, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant - Gladys

Mr. Sichangi for the Plaintiff

Mr. Anwar holding brief for Masinde

Madam Wakoli holding brief 12th and 13th defendants.