



**Khaseke & 3 others v Maurice & another (Civil Appeal  
E270 of 2023) [2024] KECA 649 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KECA 649 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E270 OF 2023  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
JUNE 7, 2024**

**BETWEEN**

**ALFRED EDWIN DIDYMUS KHASEKE ..... 1<sup>ST</sup> APPELLANT  
OUMA ONYANGO ..... 2<sup>ND</sup> APPELLANT  
JUDITH BWIRE KHASEKE ..... 3<sup>RD</sup> APPELLANT  
JOSEPH OKUKU NAMBOKA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**NYONGESA WANDERA MAURICE ..... 1<sup>ST</sup> RESPONDENT  
AFRIKANUS ABRAHAM ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment/Decree of the High Court of Kenya at  
Busia (Oloa, J) delivered on 19<sup>th</sup> day of September 2023 in ELC No. 58 of 2016)*

**JUDGMENT**

1. In this appeal, Alfred Edwin Didymus Khaseke, Ouma Onyango, Judith Bwire Khaseke and Joseph Okuku Namboka (the appellants) seek to overturn the judgment and decree of the Environment and Land Court delivered on 19<sup>th</sup> September 2023 (Oloa, J.) in two consolidated suits, i.e. Busia ELC No. 58 of 2016 and Busia ELC No. 19 of 2016.
2. A concise description of the dispute before the High Court is necessary to put this appeal into a proper perspective. In Busia ELC No. 58 of 2016, vide plaint dated 23<sup>rd</sup> June 2016 and subsequently amended on 30<sup>th</sup> June 2016 and further amended on 4<sup>th</sup> October 2017, the 1<sup>st</sup> respondent sued the appellants herein for vacant and peaceful possession claiming that he was the absolute registered owner of all that parcel of land known as L.R. No. Bukhayo/Matayos/1880 (“the suit land”) which he claimed he lawfully purchased from one Colomitina Juma Namboka and Afrikanus Abraham Egesa (the 2<sup>nd</sup>



respondent), the administrators of the estate of the late Juma Odundo Khaseke. The gravamen of the 1<sup>st</sup> respondent's grievance was that the appellants had resolved to bury the late Jackson Okoth Khaseke (a grandson to the late Juma Odundo Khaseke) who died on 21<sup>st</sup> June 2016 on the said land. He also complained that the 2<sup>nd</sup> appellant had begun building illegal structures on the suit land without his consent thus interfering with his quiet possession.

3. It was the 1<sup>st</sup> respondent's case that the late Jackson Okoth Khaseke ought to have been buried on L.R. No. Bukhayo/Matayos/1882 which parcel of land was allocated to him from estate of his grandfather, the late Juma Odundo Khaseke, and the title for the said land was held in trust for him by Colomitina Namboko Juma and Africanus Abraham Egesa, (the 2<sup>nd</sup> respondent), the administrators of his late grandfather's estate. It was also the 2<sup>nd</sup> respondents' case that the 4<sup>th</sup> appellant who is the village elder of Bwicha Village has continuously encouraged the 1<sup>st</sup> and 2<sup>nd</sup> appellants to occupy and erect illegal structures on the aforesaid two land parcels. He contended that following the death of his cousin one Francis Bwire Khaseke, (father to Jackson Okoth Khaseke - deceased and Judith Bwire Khaseke - the 3<sup>rd</sup> appellant), he took care of Jackson Okoth Khaseke and Judith Bwire Khaseke who were then minors. Further, even during the life-time, Francis Bwire Khaseke, never took care of his children.
4. The 2<sup>nd</sup> respondent also claimed that if the appellants are not permanently restrained by the Court, they would suffer an injustice and substantial loss and that the 1<sup>st</sup> appellant was illegally detaining the 3<sup>rd</sup> appellant at his home and should be ordered to release her to him as her closest relative and also one of the trustees holding the said title in trust for her and Jackson Okoth Khaseke- deceased.
5. Linus Egesa Wanjala and Francis Khaseke (PW3) & (PW4) respectively filed a statement in Busia ELC Case No. 19 of 2016 [the case No. is wrongly captured as No.18 of 2016]. They maintained that the suit land did not belong to the 1<sup>st</sup> appellant but rather the same belonged to the deceased and the 3<sup>rd</sup> appellant as children of the original owner, and that the respondents were given the right to pursue succession proceedings and they hold the property in trust for the deceased, and the 3<sup>rd</sup> appellant which would later be released to them.
6. The 1<sup>st</sup> respondent sought the following reliefs:
  - a. A permanent injunction restraining the defendants, their servants, agents and/or employees from interring the remains of the late Jackson Okoth Khaseke (deceased) on the 1<sup>st</sup> plaintiff's land parcel No. Bukhayo/Matayos/1880 or in any way interfering with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff's quiet possession/occupation of land parcels No. Bukhayo/Matayos/1880 and 1882 respectively.
  - b. The 2<sup>nd</sup> plaintiff and his co-trustee one Colomitina Namboka Juma be allowed to inter the deceased as his closest relatives on his inheritance being land parcel No. Bukhayo / Matayos/1882 which they hold in trust for the deceased and his sister Judith Bwire Khaseke the 3<sup>rd</sup> defendant.
  - c. Eviction of the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the land parcels Bukhayo/matayos/1880 and Bukhayo/matayos/1886 respectively.
  - d. The 1<sup>st</sup> defendant to release the 3<sup>rd</sup> defendant who is illegally detained in his home to the 2<sup>nd</sup> plaintiff who is the closest relative to her and one of the trustees holding land parcel No. Bukhayo/Matayos/1882 in trust for her and his late brother.
  - e. Costs of the suit.



7. In their statement of defence filed in Court on 16<sup>th</sup> July 2016, the appellants denied the respondents' claim, but admitted they intended to inter the remains of the deceased on L.R. No. Bukhayo/Matayos/1880 because it is the deceased's and the 3<sup>rd</sup> appellant's rightful land. They claimed that the registration of the 2<sup>nd</sup> respondent and Colomitina Juma Namboka as proprietors of the said land and the registration of the 1<sup>st</sup> respondent as the proprietor of L.R. No. Bukhayo/Matayos/1880 were done fraudulently and in order to pervert the cause of justice. Further, the said registration was being challenged in High Court Succession Cause No. 336 of 2013 which was scheduled for hearing on 12<sup>th</sup> September 2016.
8. The appellants also denied that the 1<sup>st</sup> respondent lawfully purchased L.R. No Bukhayo/Matayos/1880 and maintained that the said land was not available for sale and whoever sold it to him had no capacity to do so. They contended that the 1<sup>st</sup> respondent's claim was part of the scheme to dispossess the deceased and the 3<sup>rd</sup> appellant of their land. The 2<sup>nd</sup> appellant contended that in 2007, he purchased ¾ acre of land from the deceased's father out of L.R. No. Bukhayo/Matayos/1880 and that the deceased's father retained the other portion where he was eventually buried. Therefore, the deceased should also be buried on the L.R. Bukhayo/Matayos/1880.
9. Regarding L.R. No. Bukhayo/Matayos/1882, they claimed that it belonged to the 1<sup>st</sup> appellant having bought the same from John Opiyo who was a brother to the deceased. Therefore, the deceased cannot be buried on it when his (deceased's) father had his own land where he should be buried.
10. Hearing commenced before Omollo, J. on 20<sup>th</sup> April 2021 who heard the respondents' evidence and their witnesses. Thereafter, Olao, J. heard the appellant's evidence and their witnesses from 19<sup>th</sup> January 2023 up to 14<sup>th</sup> February 2023. In the impugned judgment dated 19<sup>th</sup> September 2023, the learned Judge isolated the following issues for determination:
  - a. Whether the defendants or their servants, agents, employees or any person acting through them should be permanently enjoined from interring the remains of the deceased Jackson Okoth Khaseke on the land parcel No. Bukhayo/Matayos/1880.
  - b. Whether the plaintiffs are entitled to quiet possession and occupation of the land parcel No. Bukhayo/ Matayos/1882.
  - c. Whether the 2<sup>nd</sup> plaintiff and his co-trustee Colomitina Juma Namboka should be allowed to inter the remains of the deceased Jackson Okoth Khaseke on the land parcel No. Bukhayo/Matayos/1882.
  - d. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants should be evicted from the land parcels no. Bukhayo/Matayos/1880 and 1882.
  - e. Who bears the costs of this suit?
11. Regarding the first issue, the learned Judge held that as the registered proprietor of L.R. No. Bukhayo/Matayos/1880, the 1<sup>st</sup> respondent enjoys the rights protected under Article 40 (1) of *the Constitution*. That includes the right to obtain orders enjoining the appellants by themselves, their agents, servants or any other persons acting through them from interring the remains of the deceased Jackson Okoth Khaseke on L.R. No. Bukhayo/Matayos/1880.
12. Regarding the second and third issues, the learned Judge held that it was clear from the title deed that the 2<sup>nd</sup> respondent and Colomitina Namboko Juma held the said title in trust for the deceased and the 3<sup>rd</sup> appellant, Judith Bwire Khaseke until they attain 18 years of age which they had as confirmed by John Opiyo Owino (DW5) at paragraph 8 of his affidavit dated 22<sup>nd</sup> October 2017. Therefore,



- Colomitina Namboko Juma and the 2<sup>nd</sup> respondent cannot continue being trustees holding the title to L.R. No. Bukhayo/Matayos/1882 in trust for the deceased and the 3<sup>rd</sup> appellant in perpetuity. That trust must now be brought to an end.
13. The learned Judge also directed that the title deed to L.R. No. Bukhayo/Matayos/1882 in the names of Colomitina Namboko Juma and the 2<sup>nd</sup> respondent be cancelled forthwith and the same be registered in the names of the 3<sup>rd</sup> appellant and the legal representative of the deceased. Thereafter, Colomitina Namboko Juma, the 1<sup>st</sup> and 2<sup>nd</sup> respondent their agents, servants or any other persons acting through them shall be permanently enjoined from interfering with the said parcel of land. The 3<sup>rd</sup> appellant and those acting through her shall be at liberty to inter the remains of the deceased on L.R. No. Bukhayo/Matayos/1882 or any other land of their choice other than L.R. No. Bukhayo/Matayos/1880.
  14. Regarding the fourth issue, the learned Judge found that in 2007, the suit land was still registered in the name of John Odundo Khaseke and a restriction had been registered on the same pending the succession proceedings. Francis Bwire Khaseke had no interest in the said parcel of land which he could transfer to the 2<sup>nd</sup> defendant or indeed to any other person. Both the 1<sup>st</sup> and 2<sup>nd</sup> defendants must therefore vacate L.R. No. Bukhayo/Matayos/1880 and 1882, and in any event they never filed a counter-claim in the said suit.
  15. Regarding costs, the learned Judge held that this was a sad case where the relatives of the deceased will have to meet mortuary charges and other funeral expenses which must now be enormous. Therefore, the Court held that the most prudent order to make in the circumstances was that each party shall meet their own costs.
  16. Aggrieved by the said verdict, the appellants are now before this Court vide Memorandum of Appeal dated 14<sup>th</sup> November 2023 seeking orders that the superior court's decision be set-aside, and the instant appeal be allowed with costs.
  17. In their grounds of appeal, the appellants fault the learned judge for: failing to consider that by dint of section 62 of the Land Registration Act, the 1<sup>st</sup> respondent's L.R. No. Bukhayo/Matayos/1880 was subject to the deceased's 2<sup>nd</sup> and 3<sup>rd</sup> appellant's respective enforceable interests by virtue of their lawful and actual possession and occupation of the land; failing to consider that the 3<sup>rd</sup> appellant's father, Francis Bwire Khaseke had been allocated L.R. No. Bukhayo/Matayos/1880 by his father, the late Juma Odundo Khaseka, the registered owner, pursuant to which he took possession and settled on the said parcel of land with his family including the 3<sup>rd</sup> appellant; failing to consider that Francis Bwire Khaseke being the beneficiary of L.R. No. Bukhayo/Matayos 1880 allowed the 2<sup>nd</sup> appellant to take possession and occupation of a portion of the said land pursuant to a sale agreement entered into between him and 2<sup>nd</sup> appellant in 2007; failing to consider the 1<sup>st</sup> respondent's admission that when he purportedly purchased L.R. No. Bukhayo/Matayos/1880 he failed to carry out due diligence by not visiting the said parcel of land to establish its status on the ground; failing to appreciate that by virtue of the 1<sup>st</sup> respondent's admission that he did not visit L.R. No. Bukhayo/Matayos/1880, he was not bona fide purchaser for value without notice and thus his interest could not override those of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants; failing to consider that the registration of the 2<sup>nd</sup> respondent and Colomitina Namboka Juma as trustees for the 3<sup>rd</sup> appellant and the late Jackson Okoth over title for L.R. Bukhayo/Matayos/1880 was subject to the 1<sup>st</sup> appellant's enforceable interests by virtue of his lawful and actual possession and occupation vide sale agreement between himself and John Opiyo, the 2<sup>nd</sup> son of the late Juma Odundo Khaseke, the registered owner of the said parcel of land; failing to consider that all the appellants, (except the 4<sup>th</sup> appellant), were in actual possession and occupation of the two parcels of land way before the succession proceedings were clandestinely initiated by the 2<sup>nd</sup> respondent, and in



- the circumstances, the appellants have their respective enforceable interests under the law in the parcels of land; and by making his judgment and decree against the weight of the evidence adduced at the trial.
18. During the virtual hearing of this appeal before this Court on 13<sup>th</sup> May 2014, Mr. J.V. Juma appeared for the appellants. However, the respondents did not attend court despite having been served; nor were they represented. The appellants' submissions although filed in Court are undated.
  19. In support of the appeal, learned counsel Mr. Juma faulted the trial judge for failing to consider the competing interests argued by the parties regarding the two subject properties. Instead, the learned judge framed the issues for determination from the prayers sought. Consequently, the 1<sup>st</sup> to 3<sup>rd</sup> appellants were robbed of the opportunity to have their respective cases considered, and in the process, the Court arrived at an erroneous conclusion which was that a title acquired through judicial process and through transmission is absolute and not subject to any overriding interests that existed over that property prior to transmission as envisaged under section 62 of the [Land Registration Act](#).
  20. Mr. Juma combined grounds i, ii, iii & vii of the Memorandum of Appeal and submitted that the deceased's father was in occupation and possession of Bukhayo/Matayos/1880 where he lived with his family, the deceased and the 3<sup>rd</sup> appellant way before the succession proceedings were commenced and he was buried on the said land. However, in his life time Mr. Francis Bwire Khaseke sold part of his land to the 2<sup>nd</sup> appellant who established a permanent home thereon, while Bwire remained on the remaining portion in which he was buried. Therefore, Mr. Juma argued, the trial court failed to interrogate how 2<sup>nd</sup> and 3<sup>rd</sup> appellants took possession and occupation of the parcels of land.
  21. Learned counsel argued that section 25 as read with section 28 and section 62 of the [Land Registration Act](#) recognizes overriding interests which, though not noted on the register, the registration is subject to. In support of his argument Mr. Juma cited the Supreme Court's interpretation of section 28 (b) of the Land Registration Act in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR that a person can prove existence of a specific category of customary trust, one of which can arise although not exclusively, from the fact of rightful possession or actual occupation of the land.
  22. Mr. Juma submitted that the learned Judge erred in holding that recognizing the interests of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent would be tantamount to sitting on appeal in the succession proceedings, yet the appellant never asked the superior court to impeach the grant. All they wanted was for their rights and interests as recognized by section 62 of the [Land Registration Act](#) to be recognized despite the 1<sup>st</sup> respondent's ownership. As such, the Court ought to have allowed the deceased to be buried where his father lived and was buried and the possession by virtue of purchase from Bwire, ought not to have been interfered with.
  23. Regarding the transfer of the suit property to the 1<sup>st</sup> respondent, Mr. Juma maintained that the grant was irregularly confirmed since the 1<sup>st</sup> respondent was described as a beneficiary of the late Juma yet he was not, that he bought the land from the daughters of the late Juma before the succession proceedings and by then the land was never vested in the administrators prior to being transmitted to the 1<sup>st</sup> respondent. Furthermore, the daughter never testified in the superior court and the appellant did not deny the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' occupation and possession of the land. Therefore, the 1<sup>st</sup> respondent is not a bona fide purchaser for value.
  24. It is the appellant's case that the learned Judge of the superior court contradicted himself by holding that Bwire had no right over the land and could not sell the same and in the same breadth he upheld the sale by Bwire's sister yet they had no right to sell that piece of land before succession proceedings.



25. Regarding L.R. Bukhayo/Matayos/1882, Mr. Juma submitted that like the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, the 1<sup>st</sup> appellant had been in occupation since the year 2004 when he purchased it from John Opiyo, the second son to the late Juma and that he has been in possession without interruption as envisaged under section 62 of the [Land Registration Act](#). Therefore, by issuing eviction orders, the court failed to interrogate how the 1<sup>st</sup> appellant came into possession and occupation of the land. Further, the orders were made, notwithstanding the evidence of DW5 who sold the land to the appellant and moved elsewhere. Lastly, counsel urged this Court to set aside the eviction orders and allow the burial of the late Jackson Okoth Khaseke on his father's land where he lived and was buried.
26. We have considered the record of appeal, the oral and written submissions by counsel for the appellant and the judicial decisions cited. We have also considered the judgment by the trial judge. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own independent conclusions. (See *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Abdul Hameed Saif v Ali Mohamed Sholan* [1955] 22 E. A. C. A. 270).
27. The issue for determination is whether the 1<sup>st</sup> to 3<sup>rd</sup> appellants had any overriding interests that existed over L.R. No. Bukhayo/Matayos/1880 by virtue of their alleged possession and occupation as envisaged under section 62 of the [Land Registration Act](#) prior to transmission of the property to the 1<sup>st</sup> respondent; and whether the 1<sup>st</sup> respondent obtained registration of L.R. No. Bukhayo/Matayos/1880 through fraud. The said issues are intertwined and they will be analysed together.
28. From the evidence on record, it is clear that L.R. No. Bukhayo/Matayos/1880 was registered in the names of Juma Odundo Khaseke-deceased on 18<sup>th</sup> November 1991 following the sub-division of the original land parcel No. Bukhayo/Matayos/1595. It is common ground that a certificate of confirmed Grant was issued to Colomitina Namboka and Africanus Abraham Khaseke by Tuiyott J. (as he then was) in Busia High Court Succession Cause No. 336 of 2013 on 18<sup>th</sup> February 2015 in respect to the Estate of Juma Odundo Khaseke, the grandfather to Jackson Okoth Khaseke-deceased and the 3<sup>rd</sup> appellant.
29. Pursuant to the said grant, the administrators distributed to the 1<sup>st</sup> respondent Bukhayo/Matayos/1880-0.066HA and Colomitina Namboka Juma & the 2<sup>nd</sup> respondent, Bukhayo Matayos /1882 - 0.11HA which they were to hold in trust for the minors Jackson Okoth Khaseke and Judith Bwire Khaseke until they attained the age of 18 years.
30. However, Jackson Okoth Khaseke (whose remains are the subject of the burial dispute) died on 21<sup>st</sup> June 2016. The appellants admit that they intend to inter his remains on L.R. No. Bukhayo/Matayos/1880 which currently belongs to the 1<sup>st</sup> respondent having obtained the same vide the confirmed Grant dated 18<sup>th</sup> February 2015.
31. The 1<sup>st</sup> to 3<sup>rd</sup> appellants' case is that they are the ones in occupation and possession of the land, that they have overriding interests on the and that the registration of Colomitina Namboka Juma and the 2<sup>nd</sup> respondent as proprietors of the land parcel No. Bukhayo/Matayos/1880 was procured through a fraudulent process and that the Grant of Letters of Administration issued to administrators in the said succession cause was being challenged and at the time of filing their defence, an application seeking the annulment/revocation of the said Grant was coming up on 12<sup>th</sup> September 2016. Dismissing the appellant's contestation that L.R. No. Bukhayo/Matayos/1880 procured pursuant to the said grant was obtained fraudulently, the learned Judge stated:

“The fact, however, is that the 1<sup>st</sup> defendant obtained registration of the land parcel No. Bukhayo/Matayos/1880 following a judicial process which was done by a competent Court



and whose decision has not been reviewed or set aside on appeal. And although the defendants allege fraud, the law is that allegations of fraud must be specifically pleaded and proved – see R.G. Peter v Lalji Makanji 1957 E.A 314, Kinyanjui Kamau -v- George Kamau 2015 eKLR and Ndolo v Ndolo 2008 1 KLR (G & F) 742. The defendants neither pleaded nor proved fraud as against the plaintiffs in the manner in which the 1<sup>st</sup> plaintiff obtained registration of the land parcel No. Mukhayo/Matayos/1880 in his names. And it would have been an almost insurmountable task to impeach the 1<sup>st</sup> plaintiff's title to the land parcel No. Bukhayo/Matayos/1880 given the chronology of events above. Indeed, the defendants had no counter-claim.”

32. The appellants’ counsel urged this Court to return a finding that the learned judge erred by not appreciating that transfer pursuant to a grant of letters of administration is subject to overriding interests which are expressly recognized in sections 25, 28 and 62 of the *Land Registration Act*. The said sections reads:

Rights of a proprietor.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

33. Section 28 of the *Land Registration Act* provides as follows:

Overriding interests.

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) spousal rights over matrimonial property; (b) trusts including customary trusts ; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies; (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or



laid in pursuance or by virtue of any power conferred by any written law; and (j) any other rights provided under any written law.

34. Section 62 of the *Land Registration Act* provides on the effects of transmission on death as follows:
1. Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.
  2. The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.
35. Overriding interests are unregistered interests which affect registered land even though they are not shown on the register. They bind both the registered proprietor and any person who acquires an interest in the property. However, a reading of the above provisions and particularly section 62 leaves no doubt that a person seeking to successfully mount a claim premised on overriding interests, must satisfy the prerequisites set out in the said section. In particular, he must not only prove at least one of the interests listed in the said section, but also he must satisfy the court by way of evidence that his claim is unregistered and enforceable and subject to which the deceased proprietor held the land, lease or charge.
36. Under section 28 of the *Land Registration Act*, a person seeking recognition of a claim premised on overriding interests must bring his claim within the ambit of the interests listed in the said section. The relevant provision within which the appellants could sustain such a claim was to bring their case under section 26 (f) which provides - any other rights provided under any written law. As we shall demonstrate shortly, the appellants never brought their alleged claim within the provisions of any law. For example, their claim was that the 1<sup>st</sup> respondent acquired the title fraudulently. The said argument is attractive. But, that is how far it goes. The issue of fraud was not specifically pleaded and proved by way of evidence. No counter-claim was filed specifically pleading fraud and particularizing the elements of the alleged fraud. The law is that a party alleging fraud must not only specifically plead the same, but also must adduce evidence to that effect. (See the Court of Appeal decision in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR).
37. As was held by this Court in *Embakasi Properties Limited & Anor. v Commissioner of Lands & Anor* [2019] eKLR, ownership of land can only be challenged on the grounds of fraud or misrepresentation to which the proprietor named is proved to be a party. (Also see this Court's decision in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR).
38. The other ground urged by the appellants was that the 1<sup>st</sup> appellant did not participate in the succession proceedings because he was not aware of the same, since he bought L.R. No. Bukhayo/Matayos/1882 from John Opiyo even before the succession proceedings were commenced. Our understanding is that the 1<sup>st</sup> appellant is claiming purchaser's interest to the said land. However, the validity of the alleged sale (if there was any) is questionable. This is because the property belonged to a deceased person. The 1<sup>st</sup> appellant admitted that John Opiyo was not an administrator of the estate of the late Juma Odundo Khaseke. DW2 on the other hand stated that he bought  $\frac{3}{4}$  of Bukhayo/Matayos/1880 in 2007 from Francis Bwire Khaseke who although not the administrator died and was buried on the part of



Bukhayo/Matayos/1880 that remained. Therefore, his son Jackson Okoth should also be buried where his father was buried.

39. The admission that persons who did not have letters of administration sold parcels of land renders the appellants' claim legally untenable and brings it outside the ambit of section 26 (f). Section 45 of the Law of Succession Act prohibits intermeddling with the property of a deceased person except as expressly authorized by the Act or by other written law or grant of representation issued under the Act. Consequently, we find that John Opiyo and Francis Bwire Khaseke had no legal capacity to enter into any agreement of sale in relation to the estate of late Juma Odundo Khaseke. Accordingly, the purported sale (if any) was a nullity, and the purported claim under such a transaction cannot be said to be lawful within the meaning of section 26 (f) of the Land Registration Act.
40. The other ground that defeats the appellants' claims is that the two parcels of land were transferred pursuant to a grant of letters of administration issued by a competent Court in the succession proceedings. The learned judge correctly held that the issue of ownership of the subject land parcels had already been litigated and decided in Busia High Court Succession Cause No 336 of 2013. It is a fact that the said decision has not been reviewed or set aside on appeal. The appellant is now in this appeal mischievously inviting this Court to overturn the said decision. We decline the invitation to do so.
41. In conclusion, we find that the trial court correctly applied the provisions of Section 26 of the Land Registration Act in finding that the 1<sup>st</sup> respondent is the absolute and indefeasible owner of Title Bukhayo/Matayos/1880 and in relation to Bukhayo/Matayos/1882, the names of the 2<sup>nd</sup> respondent and Colomitina Juma Namboka shall be cancelled from the register of the land parcel No. Bukhayo/Matayos/1882 as trustees and a new title deed issued in the names of the 3<sup>rd</sup> appellant and the legal representative of the deceased Jackson Okoth Khaseke. Therefore, the appellants have failed to demonstrate that they have lawful interests over the suit lands overriding those of the 1<sup>st</sup> respondent in L.R. No. Bukhayo/Matayos/1880 and those of the 3<sup>rd</sup> appellant in L.R. No. Bukhayo/Matayos/1882. Whereas section 26 of the Land Registration Act contains the proviso that a Certificate of Title is not conclusive evidence of ownership where fraud in obtaining the same is proved, the appellants in this case failed to marshal any evidence to bring themselves within the proviso.
42. In conclusion and for the reasons set out herein above, we find that this appeal lacks merit and the same is hereby dismissed. There shall be no orders as to costs since the respondents did not participate in the appeal.

**DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.



Signed

**DEPUTY REGISTRAR**

