



REPUBLIC OF KENYA



**Makaka & 3 others v Pamba & 8 others (Civil Appeal
65 of 2018) [2023] KECA 603 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 603 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 65 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 26, 2023**

BETWEEN

**ELIUD ODINGA MAKAKA 1ST APPELLANT
ROBERT MAKAKA 2ND APPELLANT
ROSE WERE 3RD APPELLANT
HESBORN MAKAKA 4TH APPELLANT**

AND

**NABWIRE PAMBA 1ST RESPONDENT
GEOFFREY JOHN PAMBA 2ND RESPONDENT
LUCILE NAMBO PAMBA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF HANNINGTON OUMA PAMBA) 3RD RESPONDENT
HUMPHREY MALOBA PAMBA 4TH RESPONDENT
WILBERFORCE ONYANGO PAMBA 5TH RESPONDENT
JOSPHAT WANYAMA PAMBA 6TH RESPONDENT
PATRICK OBOTE PAMBA 7TH RESPONDENT
JOSEPH OKOCHI PAMBA 8TH RESPONDENT
JUDITH NAKOCHI PAMBA 9TH RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court in Busia
(A.K. Kaniaru J.) dated 19th July, 2017 in Environment and Land Case No. 82 of 2014)*



JUDGMENT

JUDGMENT OF MUMBI NGUGI, JA

1. The appellants in this matter are aggrieved by the decision of the Environment and Land Court (ELC,) (Kaniaru J) dismissing their claim in respect of land parcel number Samia/Budonga/232 (the suit property) measuring 45 hectares. The appellants initially filed their claim in the plaint dated 4th April 2012 against Lucile Nambo Pamba, indicated, incorrectly, I believe, as ‘suing’ as the administrator of the estate of Hannington Ouma Pamba, Nabwire Pamba and Geoffrey John Pamba, the first three respondents in the present appeal.
2. Thereafter, the plaint was amended on 1st December 2014 to include Humphrey Maloba Pamba, Wilberforce Onyango Pamba, Josphat Wanyama Pamba, Patrick Obote Pamba, Joseph Okochi Pamba and Judith Nakochi Pamba as the 4th to 9th defendants. The proceedings before the trial court show that on 23rd January 2017, the court was informed that the 4th and 6th defendants, indicated in the present proceedings as Humphrey Maloba Pamba and Josphat Wanyama Pamba-the 4th and 6th respondents-were deceased, and the plaintiffs withdrew their claims against them. However, the title of the case was not amended to remove them as parties, and I note that the trial court made reference to them in its decision- observing, erroneously in view of the proceedings before him on 23rd January 2017- that there was no evidence that they were served and that their existence had been denied. I will therefore leave the title as it was carried over from the record of the trial court.
3. It was common ground that the deceased in whose name the property at issue was registered, Edward Pamba, was an uncle of the appellants, a brother of their deceased fathers, one Rasto Makaka, and Francis Opala Bwongi. The 1st respondent is a widow of the appellants’ cousin, Hannington Ouma Pamba, while the other respondents are the appellants’ cousins.
4. In their claim before the trial court set out in the plaint which was further amended on 10th February 2015 pursuant to orders issued by consent on 3rd February 2015, the appellants alleged that the said Edward Pamba was registered as the proprietor of the subject land for himself and in trust for his brothers. These were Rusto (also referred to in the documents as ‘Rasto’) Makaka, the father of the 1st, 2nd and 3rd appellants, who died in 1972, and Francis Opala Bwongi, the father of the 4th appellant, who died in 1971. They further claimed that upon the death of Edward Pamba on 28th February 2002, the respondents fraudulently subdivided the land and transferred it to themselves.
5. The appellants alleged that there was a constructive trust in their favour and prayed that the subdivisions and transfers be cancelled and the registration reverts back to Edward Pamba. They further prayed that they be registered as the proprietors of their respective portions of part of the suit land: with 20 hectares being awarded to the family of Rasto Makaka; 5 hectares to the family of Francis Opala Bwongi, and 20 hectares to the respondents as the family of Edward Pamba.
6. In opposing the appellants’ claim, the respondents averred that their late father, Edward Pamba, was the registered owner of the suit property; that the said land had some specific unequal portions belonging to the representatives of his step brothers, Rasto Makaka, Francis Opala Bwongi and Maiga Bwongi; and that as the registered owner, he held the said land in trust for those families. It was their averment further that upon advancing in age, their father had subdivided the suit land and set aside a portion for his nephews while transferring Samia/Budongo/2055 to David Omondi Makaka and Odinga Makaka, persons within the appellants’ family. He had transferred the rest of the land to his own children.



7. It was their claim further that even before land adjudication, the land had been subdivided on the ground into several portions according to the wives of the late Bwongi, the respondents' grandfather.
8. The respondents further opposed the appellants' claim on the basis that it was time barred having been caught up by the provisions of the Limitation of Actions Act. Additionally, they argued that the appellants had no capacity to bring the suit as they are not personal representatives of the original owner.
9. At the trial, the 3rd appellant, Hesborn Makaka (PW1) adopted his statement dated 10th July 2014 and filed in court on 11th July 2014. His testimony was that Samia/Budongo/232 was registered in the name of Edward Pamba who died on 28th February 2002. The land had been subdivided into various parcels after Edward Pamba's death and the land parcels, green cards in respect of which he produced, were registered in the names of the respondents, among them Hannington Pamba, Humphrey Maloba Pamba and Geoffrey John Pamba.
10. It was his testimony that his late father, Rasto Makaka who died in 1972, was one of three brothers, the other two being Edward Pamba and Francis Opala. The three brothers and their families lived on the suit land along with the families of one Edmond Oluma and Washington Abangi, both deceased. The suit land was registered in the name of Edward Pamba, the respondents' father, on behalf of the others as he was the eldest son. In the year 2000, the families of the late Oluma and Abangi sued one of the respondents' brothers at the Land Disputes Tribunal alleging an intention or attempt to evict them on the basis that they were strangers on the land. That claim attracted the curiosity of the appellants and in 2002, a search at the Lands Office revealed the subdivisions that they are now complaining of. The sub- divisions, said to have been done on 1st July 2002 after the death of the respondents' father (who died on 28th February 2002), had left out four (4) other families living on the land.
11. It was PW1's testimony that no succession proceedings had been undertaken in respect of the estate of Edward Pamba, nor had a physical survey been done on the ground, the subdivisions of the land being said to exist only on paper.
12. In cross-examination, PW1 conceded that he had not filed a succession cause in respect of his father's estate. He also confirmed that there were other beneficiaries of his father's estate who had not been included in the suit against the respondents. He further conceded that there was nothing to show that the 1st respondent was the administrator of the estate of Hannington Ouma Pamba (deceased); who the administrator of the estate of the respondents' father was, nor did he have the transfer documents that led to the entries in the copies of the green cards. He had also not explained why the Land Registrar, who had effected the transfers of the suit land, was not included as a party to the suit.
13. The 4th appellant, Rose Were Wanyama (PW2) adopted her statement dated 8th April 2013. Her testimony was that she is the only child of Francis Opala Bwongi (deceased). She did not live on the suit property, though she was aware that there were other families living on the land. It was her testimony that when her mother died in 2010, one of the respondents destroyed her homestead and was cultivating her late mother's land. PW2 testified that she wants to inherit the portion that her late father was entitled to.
14. Milton Manase Okumu (PW3), an area village elder, adopted his statement dated 8th April 2013. He confirms in the statement that he knew Edward pamba and his brothers, Opala Bwongi and Makaka Bwongi. Edward pamba, the eldest, had registered the family's ancestral land in his name. His siblings, Opala and makaka, had passed away in the early seventies, leaving behind their children. His testimony with respect to the suit land agreed in material respects with that of the appellants, and he asked the trial court to grant them what they were seeking. On cross- examination, he stated that Nandaveka and



Bukiri Primary School as well as a CPK Church had been given land by Edward Pamba, though he did not know from which land parcels.

15. In his evidence, Geoffrey John Pamba (DW1), the 3rd respondent and the only witness for the respondents, adopted his statement made on behalf also of the 1st and 2nd respondents dated 12th September 2013. It was his testimony that his late father, Edward Pamba, Rusto Makaka, Francis Opala, Maiga Bwongi, and Wanyama Bwongi were brothers. Each of the brothers had a specific portion on the suit land which the brothers and their respective mothers were cultivating. It was his evidence that his father, Edward Pamba, died on 28th February 2002, but that at the time he died, he had already subdivided the land into several portions, which included land parcel No. L. R Samia/Budongo/2055 for the appellants. The subdivision had been done in 1998 when Edward Pamba was alive. He asserted therefore that it was false to allege that the respondents had subdivided the land.
16. It was his testimony further that the land is subject to Abaluhya land inheritance customs which decree that in a polygamous set-up, land is inherited according to the portions which each wife has cultivated. Further, neither he nor the other respondents should be held liable for the actions or omissions of their late father.
17. In cross-examination, DW1 stated that the entire family of Edward Pamba and his sons, as well as the sons of his late brother, Rasto Makaka, were involved in the subdivision. Further, that it was only the family of Francis Opala that occupied part of Samia/Budonga/232. He further testified that though parcel No. 2055 earmarked for Makaka's family appears in the register to be owned by the Pamba family, those in the Pamba family whose names appear in the register have sworn affidavits in this suit renouncing such ownership.
18. He asserted that the error in the land register concerning ownership of parcel number 2055 was not committed by the respondents but by the Land's Office. He confirmed that the family of Pamba had not yet obtained letters of administration to the estate of the deceased. He stated in re-examination that the appellants reside in part of the original parcel number 232. He alleged that the documents on the subdivisions and transfers had been lodged in 1998, and it is only the Land registrar who could explain why the entries had not been made till 2002.
19. Upon hearing the respective cases of the parties, the trial court dismissed the appellants' case, for several reasons. The trial court held, first, that from a procedural perspective, their case was fundamentally and fatally flawed as crucial mandatory procedural requirements were not adhered to. The court noted that the appellants had not obtained letters of administration to their fathers' estates, nor had they demonstrated that the respondents were the legal representatives of their late father's estate, all indispensable pre-requisites.
20. The trial court further found that the 'foundational aspects of the case' were wrong as some people who were entitled to know about the pendency of the suit were left out. In the court's view, such people deserved to have their input considered before any action concerning the land was taken. The trial court further observed that the appellants had set out to prove fraud and constructive trust but had failed to do so.
21. Aggrieved by the decision of the ELC, the appellants filed the present appeal in which they raise eighteen (18) grounds of appeal in the memorandum of appeal dated 21st May, 2018. This Court has in the past expressed its view on prolix grounds of appeal which often tend to be repetitive and fail to capture the essence of the issues that a party seeks to raise before the appellate court. Summarising the grounds of appeal as best I can, they are that the trial court erred in law and fact in:



- i. failing to find that the appellants were pursuing their claim as beneficiaries in their own right which removed the need for letters of administration intestate to the estates of their respective deceased fathers;
 - ii. finding that a constructive trust had not been shown;
 - iii. letting an illegality of intermeddling in a deceased persons estate stand after it had been brought to the court's attention that the transfer of the suit property and subsequent subdivision was done after the death of Edward Pamba;
 - iv. finding that fraud is a process and that the green card produced in court did not prove fraud when the same was evidence of the fraud occasioned by the defendant;
 - v. finding that letters of administration were required by the appellants when the respondents were the registered owners of the suit land and were not sued as legal representatives of anyone;
 - vi. stating that a constructive trust was not proved yet the respondents had stated in their defence that each house cultivated its own area, which area formed part of the suit land;
 - vii. finding that fraud had not been proved to the required standard of proof when it had been shown and proved that transfer and subdivision was done after the death of Edward Pamba.
22. The appellants further impugn the decision of the ELC on the basis that it contradicted itself in finding that the transfer and subdivision of the suit land, done after the death of Edward Pamba, was legal when it was not in dispute that the said Edward Pamba died in February 2002 before the purported transfer and subsequent subdivision.
 23. In presenting the appellants' case before us, learned Counsel, Mr. Namatsi, relied on submissions dated 28th March 2022. It was the appellants' submission that the trial court had erred in insisting that the appellants ought to have obtained letters of administration to the estates of their fathers yet they had filed their claims in their own right. They submitted further that they had sued the respondents, not as representatives of the deceased, Edward Pamba, but in their own right as the current registered owners of the suit properties.
 24. With regard to the appellants' claim that the suit property had been fraudulently subdivided, it was submitted that the trial court had erred in finding that fraud had not been proved yet the appellants had established that the suit land was subdivided in July, 2002 when the registered proprietor died 6 months earlier in February, 2002. The parcels resulting from the subdivision of the suit land, Samia/ Budonga 2051, 2052, 2054, 2055, 2056 and 2057 were transferred to the respondents yet the original proprietor had died prior to the subdivisions.
 25. Regarding the trial court's dismissal of their claim for non-joinder of parties, the appellants submitted that a court is required to deal with the matters and the rights of the parties before it. It was their submission that nobody had complained that they had been left out, nor did any party apply to be enjoined as a party to the suit.
 26. While the respondents did not appear at the hearing of the appeal, their Advocates Balongo & Co. Advocates, filed submissions dated 28th April, 2022. It is submitted in these submissions that since the appellants' fathers were deceased, it was incumbent upon them to first obtain letters of administration intestate to his estate. Without the letters of administration, they could not lay a claim to his estate. They submit further that the appellants did not plead a trust, and they could not lay a claim to the estate of their father without proper representation as they were not claiming the land in their personal capacities but as descendants of the deceased.



27. The respondents submitted further that the appellants did not sufficiently prove that the registration of subdivisions from the suit property was fraudulent, their submission being that fraud has to be specifically proved. They submitted that the appellants' claim fails as it was 'proved that the subdivision of Samia/Budongo/232 to Samia /Budongo/2057-2058 was not done during the lifetime of Edward Pamba'. They contended that the documents in support of the consent for the subdivision were lodged during the deceased's lifetime but the Land Registry made entries after the demise of Edward Pamba.
28. Having considered the judgment of the trial court, the proceedings and documents produced before it and the submissions made before us, I believe that the main issue for determination in this matter is whether the trial court erred in failing to find that Edward Pamba, the deceased, was holding the suit property in trust for the appellants, the children of his deceased brothers. In considering this issue, I would also need to address the question whether the appellants were bound, in lodging their claim against the respondents, to have done so in a representative capacity on behalf of their deceased fathers, and were therefore required to produce before the trial court letters of administration intestate. A corollary to this issue is whether the appellants were required to show that the respondents were the personal representatives of the estate of Edward Pamba before filing the claim against them.
29. A third issue to consider is whether the appellants had established before the trial court that the subdivision of the suit property was obtained through fraud. Finally, I will need to consider whether the trial court erred in holding that the appellant's claim failed as there were persons entitled to the land who had not been joined as parties to the suit.
30. Under Rule 31(1)(a) of the *Court of Appeal Rules* 2022, this Court is empowered, on an appeal from a decision of the High Court or courts of equal status acting in their original jurisdiction, to re-appraise the evidence and draw inferences of fact. See also *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
31. I begin by observing that certain facts are not in contention and are, indeed, common ground. The fathers of the appellants and the respondents, Rusto Makaka, Francis Opala Bwongi and Edward Pamaba were brothers. The fathers of the appellants predeceased the father of the respondents, who was registered as the proprietor of the suit land, Samia Budongo/232, on 27th March 1980. Edward Pamba died on 28th February 2002.
32. The respondents have not denied that the appellants have an interest in the suit property. DW1, who testified on behalf of the respondents, stated in his testimony that the appellants reside on part of the original parcel number 232. This confirms the contention of the appellants that they are entitled to part of the suit land, and the subdivision of the land and registration in the names of the respondents denied them their right to the suit land.
33. In dismissing the appellants' claim on the basis that the appellants had not proved a constructive trust, the trial court observed at paragraph 33 of the judgment, an observation echoed in the respondents' submissions, that the appellants had not pleaded such trust, and that they had only raised the issue of constructive trust in their submissions.
34. This finding does not accord with the pleadings before the court. At paragraph 8 of their plaint amended on 10th February 2015, the appellants pleaded that:

“ 8. The plaintiffs avers (sic) that the said land Samia Budongo/232 was registered in the name of the said Edward Pamba in trust for the two family (sic).”



35. Regarding the particulars of the trust, the appellants pleaded that the family land was registered in Edward Pamba's name; that the family of Francis Opala was staying on the suit land; that the family of Rasto Makaka and Edward Makaka were born on the suit land; and that the children of the two had grown and build on the suit land. Further particulars of the trust were that the respondents had testified before the Chief and the Land Disputes Tribunal that the families of Rasto Makaka and Francis Opala were entitled to the land.
36. In light of the pleadings above, I am satisfied that the court erred in finding that no trust had been pleaded. The appellants were not specific, and were perhaps inelegant, about the nature of the trust that they claimed against the respondents. They were, however, clear in their contention that Edward Pamba had been registered as the proprietor of the land in trust for his siblings, the appellants' fathers.
37. The second question is whether the trial court was correct in finding that, even had a trust been pleaded, it had not been established. In dismissing the appellants' claim, the court observed as follows:
- “32. To prove a constructive trust, the Plaintiffs were duty-bound to show that there was some bargain, undertaking, understanding or promise between themselves and the Defendants which the Court should construe as giving rise to constructive trust. And this is so because the Court would have to look at such bargain, undertaking, understating or promise and establish whether it would be unconscionable for the Defendants as owners to assert their beneficial interest and deny the beneficial interests of Defendants. Even if therefore it is accepted that there is a constructive trust between the parties separate from their deceased parents, the Plaintiffs would still be found to have failed to show the necessary bargain, undertaking, promise or understanding. Such trust would therefore fail.”
38. From the pleadings and evidence of the parties, it is possible to deduce that the nature of the trust claimed by the appellants was a customary trust. The parties were in agreement that the registered proprietor of the suit land was a brother of the fathers of the appellants, who had predeceased him. He had been the registered proprietor of the land until his demise in 2002. Thereafter, on the basis, according to the respondents, of subdivisions allegedly done in 1998- a matter I shall revert to hereafter- the land was registered in the names of the respondents on 1st July and 19th September 2002. The appellants lodged their claim against the persons registered as the proprietors of the land at the time they filed suit.
39. The Supreme Court in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR held that in determining whether a customary trust has been established, a court must be satisfied that certain elements exist. These elements are that:
1. The land in question was, before registration, family, clan or group land;
 2. The claimant belongs to such family, clan, or group;
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”



40. The land at issue belonged to the grandfather of the appellants and the respondents. Their fathers were brothers. The appellants' fathers, Rasto Makaka- who died in 1972, and Francis Opala-who died in 1971, predeceased the father of the respondents, Edward Pamba, who was registered as the proprietor of the land in 1980. The evidence indicates that this was family land, and the appellants were entitled to a share in it. Edward Pamba, in my view, was registered as proprietor in trust for the entire family of Bwongi. Where the land was transferred to any other person without taking into account this trust, such other person, on the authority of the Supreme Court decision in Isack M'inanga Kiebia, held the said land subject to the customary trust in favour of the appellants.
41. The trial court further found that since the appellants did not obtain letters of administration to the estates of their respective fathers, and did not show that the respondents were the administrators of the estate of Edward Pamba, they had no locus standi for lodging their claim. In reaching this conclusion, the trial court agreed with the submissions of the respondents with regard to the need to obtain a grant of letters of administration in order to lodge a claim on behalf of the estate of a deceased person. While this is correct as a general principle of law, a distinction must be made with situations such as this where the appellants were claiming an interest, not on behalf of the estate of their deceased fathers, but as persons entitled in their own right as members of the family of Bwongi. I take the view that the appellants had the necessary locus to claim a customary trust against the respondents in whose name the property, that is conceded was family land and in which, as DW1 stated in evidence, they were entitled to and were occupying, was registered.
42. The trial court also dismissed the appellants' allegation of fraud against the respondents. It observed as follows:
37. There was then the issue of fraud. The Defendants were alleged to have been fraudulent and indeed the particulars of such fraud were given in the amended plaint. An allegation of fraud is taken seriously by our Courts and its standard of proof is normally higher than on a balance of probabilities. It was incumbent on the Defendants (sic) to prove it to this higher standard.
38. Fraud is essentially a knowing or intentional mis- representation of truth or peddling of falsehood by a party or parties with the aim that those to whom that is done will act on the mis-representation or falsehood to their detriment or to the detriment of others. By its very nature its execution involves several actors. The fraud alleged in this case involved forging or falsification of documents eventually leading to unlawful registration of the Defendants as owners. The documentation availed by the Plaintiffs are copies of green cards showing the ownership of land shifting from Edward Pamba to the Defendants. According to the Plaintiffs fraud is shown because the change of ownership took place after Edward Pamba's death."
43. The respondents presented before the trial court documents which they testified showed that Edward Pamba subdivided the suit land in 1998. Their case is that the consent for the subdivision and transfer was given on 4th June 1998, as the documents they placed before the trial court showed. The actual transfers, however, were done on 1st July and 19th September 2002. There is no dispute that by this time, the registered proprietor, Edward Pamba, was dead, some five months or so earlier. In dismissing the allegation of fraud, the trial court observed:
39. The Plaintiffs seemed not to appreciate that fraud normally is a process. It is rarely a single incident – like that of changing names in a green card. It is more often than not a process involving in case of land matters, a paper trail. The green cards availed by the Plaintiffs, alone without more, cannot prove fraud. After all, the card merely shows that on a given date, ownership changed from Edward Pamba to the Defendants. It does not tell for instance when the process of that change of ownership started and/or the stages it underwent.



39. Moreover, the change effected took place at the lands office and that office was never called to give evidence or enjoined in the suit as a party. Question is: because fraud involves misrepresentation or peddling of falsehood, to whom did the Plaintiffs (sic) do so?"
44. With the greatest respect to the trial court, I believe that this conclusion demonstrates a misapprehension of the facts before it. The respondents placed what appear to have been minutes of the Land Control Board, Funyula, which are unsigned and undated, purportedly as evidence that the deceased, Edward Pamba, appeared before the Board in 1998 to seek consent to transfer subdivisions of the suit land to the respondents. Also produced by the respondents were consents, purportedly issued on 4th June 1998, to transfer the land to the respondents by way of gift. The next documents produced by the respondents are the transfers and titles issued to the respondents dated 1st July and 19th September 2002.
45. Even assuming that the trial court was correct in its conclusion that fraud is 'a process', and is 'rarely a single incident', one is constrained to conclude that the documents presented before the trial court were more suggestive of fraud than otherwise. First, it is the respondents who would have lodged the purported transfers of the land to them with the Land Registry in 2002. The purported transfers were registered pursuant to consents issued some four years earlier, and the titles issued between five (5) and seven (7) months after the death of the registered owner.
46. While the respondents produced minutes purportedly showing the consents to transfer to them and applications for such transfers, no applications for consent to subdivide and transfer signed by the deceased, Edward Pamba, were placed before the trial court. The evidence before the trial court, in the form of a letter from the Land Registrar, Busia, dated 2nd April 2015 indicated that mutations in respect of the subdivisions were dated 1st July 2002.
47. On the evidence before the trial court, the appellants had established, on a balance of probabilities, that there was, at the very least, an attempt to put the suit land out of their reach by the transfers and issuance of titles to the respondents. That the transfers were registered and the titles issued four years after their alleged execution and between five and seven months after the death of the registered owner placed a burden on the respondents to explain the transfers. The finding of the trial court that it is only the Land Registrar who could explain this is without foundation.
48. It was incumbent on the respondents, once the appellants made the allegations of fraud and produced the documents that they did in support, to demonstrate that the registered owner lodged the documents for registration in 1998, and that the relevant Land Registry, for some incomprehensible reason, elected to hold onto them until several months after the death of the deceased. While no evidence of fraud that rises to the level of a criminal offence was placed before the trial court, and it need not rise that high though it has to be higher than the civil standard of "on a balance of probabilities," if one definition of fraud is a deceitful practice or willful device, resorted to with intent to deprive another of his right, then the conduct of the respondents was fraudulent. The subdivision of the land and the transfers to the respondents after the death of the registered owner, on the basis of documents purportedly obtained four years earlier, was akin to a fraudulent conveyance defined in Black's Law Dictionary, 10th Edition 777 as transferring an interest in land in order to hinder a creditor.
49. There are, also, other troubling aspects of the documents relied on by the respondents. A perusal of the transfers indicates that the certification of the documents is incomplete, and there is no date of registration indicated. The titles, however, were issued on 1st July and 19th September 2002. Then there are the affidavits on record sworn by Wilberforce Onyango Pamba, Patrick Obote Pamba, and Joseph Okochi Pamba expressly denying ever having participated in any land transaction involving



Samia/Budongo/2055, one of the land parcels created out of Samia/Budongo/232, yet a transfer was purportedly registered in their favour on 1st July 2002 and a title deed issued to them on 19th September 2002.

50. Finally, the trial court dismissed the appellants' claim on the basis that there were some people left out of the case who were entitled to know what was happening. This finding by the trial court, as the appellants submit, runs counter to the express provisions of Order 1 Rule 9 regarding joinder and misjoinder of parties, which provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

51. In light of the above provisions, the trial court fell into error in dismissing the appellants' claim on the basis that certain parties had not been joined in the suit. Its duty was to determine the issues in controversy between the parties before it.
52. In the result, I would allow the appeal as prayed by the appellants, set aside the orders of the trial court dismissing their claim, and grant the orders sought in the Amended Plaint dated 10th February 2015. I would also grant the costs of the suit in the ELC and for this appeal to the appellants.

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with her reasoning and conclusions, and have nothing useful to add.

As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Mumbi Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023

MUMBI NGUGI

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

