



**Wafula (Suing as a legal rep of the Estate of Wasike Sibia) v Machoki & 2 others (Environment & Land Case E036 of 2021) [2024] KEELC 13437 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E036 OF 2021**

**BN OLAO, J  
NOVEMBER 19, 2024**

**BETWEEN**

**GEORGE OUMA WAFULA (SUING AS A LEGAL REP OF THE ESTATE OF WASIKE SIBIA) ..... PLAINTIFF**

**AND**

**NASHON WESONGA MACHOKI ..... 1<sup>ST</sup> DEFENDANT  
VALARY NAMAYUI ..... 2<sup>ND</sup> DEFENDANT  
JOSEPHINE ANYANGO MUSUMBA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 2<sup>nd</sup> July 2021 and later amended on 30<sup>th</sup> November 2022, George Ouma Wafula the plaintiff herein and suing as the legal representative of the Estate of Wasike Sibia (deceased), impleaded Nahashon Wesonga Machoki, Valary Namuyui And Josephine Anyango Musumba (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively) and sought judgment against them jointly in the following terms in relation to the land parcels No Bukhayo/Ebusibwabo/245 now subdivided to create land parcels NO Bukhayo/Ebusibwabo/4120, 5931, 5467 and 5465 (the suit properties):

1. An order for the cancellation of the defendants names and registration of the land parcels NO Bukhayo/Ebusibwabo/4120, 5930, 5931 and the same to revert back to the original land parcel NO Bukhayo/Ebusibwabo/245.
2. An order directing the County Land Registrar Busia to cancel the registration of the defendants' names on the title numbers Bukhayo/Ebusibwabo/4121, 5930, 5931, 5466 and 5467 and that same to revert back to the original land parcel number Bukhayo/Ebusibwabo/245 for fair and just administration.

Costs of this suit.



Any other further relief that this court deems just and fit to grant.

2. It is the plaintiff's case that at all material times relevant to this suit, he was the grandson of the late Susan Apanye also now deceased and who was the original owner of the land parcel NO Bukhayo/Ebusibwabo/245 but which she had relinquished to Wasike Sibia because she had no identity card.
3. However, the defendants colluded with one Henry Musumba Wasike a foster son of Wasike Sibia and sub-divided the original land parcel NO Bukhayo/Ebusibwabo/245 into the parcels NO Bukhayo/Ebusibwabo/5465, 5466 and 5467 which were registered in the name of Henry Musumba Wasike, land parcels NO Bukhayo/Ebusibwabo/5930 and 4121 were registered in the names of the 1<sup>st</sup> defendant while parcel NO Bukhayo/Ebusibwabo/5931 was registered in the name of the 2<sup>nd</sup> defendant. The plaintiff being the rightful owner of the suit property has been disinherited of his rightful share herein due to the defendants' fraudulent acts of transmission. The particulars of fraud on the part of the defendants have been pleaded in paragraphs 6 of the amended plaint as follows:
  - a. Filing Succession Cause NO 29 of 2003 secretly without the involvement of the rightful beneficiaries.
  - b. Causing transmission of the land parcel NO Bukhayo/Ebusibwabo/245 and subdividing the same into several parts to wit Bukhayo/Ebusibwabo/4120, 5930, 5931, 5467 and 5465 while knowing very well that they were not the rightful beneficiaries of the Estate.
  - bb) Causing transmission of the land parcels NO Bukhayo/Ebusibwabo/245 and sub-dividing the same into several other parcels to wit Bukhayo/Ebusibwabo/4121, 5930, 5931, 5467, 5466 and 5465 while knowing very well that they are not the rightful beneficiaries of the Estate. Parcels NO Bukhayo/Ebusibwabo/5465, 5466 and 5467 were transferred after the death of Henry Musumba and without following the due process of succession.
  - c. Not involving family members upon transmission and hence distribution of the suit parcel.The plaintiff has therefore suffered psychologically, been tortured and intimidated by the defendants and their classmen while trying to pursue his inheritance over the suit properties. He is now living as a squatter and has been rendered homeless as his land has been grabbed by the defendants.
4. In support of his case, the plaintiff who is acting in person filed his statement dated 2<sup>nd</sup> July 2021 and an amended statement dated 30<sup>th</sup> November 2022.
5. The totality of the two statements and which he adopted as his evidence during the trial is that he is the grandson of the late Susan Apanye who was the original owner of the land parcel NO Bukhayo/Ebusibwabo/245 which she relinquished to her "inherited" husband Wasike Sibia because she did not possess an identity card. That the defendants have colluded with one Henry Musumba Wasike the foster son to Wasike Sibia and caused the transmission of the parent land parcel NO Bukhayo/Ebusibwabo/245 and which has been sub-divided into land parcels NO Bukhayo/Ebusibwabo/5465, 5467, 5930, 5931 which have been registered in the names of the said Henry Musumba Wasike and the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That the said transmission and sub-divisions were done through malice, indolence, fraud with the sole intention of denying the plaintiff from inheriting his grandmother's Estate. The plaintiff therefore prays for the cancellation of the titles NO Bukhayo/Ebusibwabo/4120, 5930, 5931, 5467, 5465 and 5466 and the same to revert to the original land parcel NO Bukhayo/Ebusibwabo/245. He then goes on to cite the particulars of fraud on the part of the defendants adding that he has been rendered a squatter following the fraudulent transmissions.
6. He also recorded an un-dated statement of his witness Jacton Obwaku Wabwire (PW2) in which he states that he is a neighbor of the plaintiff and lives on his father's land parcel NO Bukhayo/



Ebusibwabo/246 which neighbours the land parcel NO Bukhayo/Ebusibwabo/245. He states that the 1<sup>st</sup> defendant is not a grandson to Wasike Sibia who had only one wife namely Susan Apanye, a daughter namely Ester Ajuma and a son namely Buluma Wasike. That Wasike Sibia is a brother-in-law to his father one Obwaku Opili and that he lived on the ancestral land before it was sub-divided to create land parcel NO Bukhayo/Ebusibwabo/245 which was given to Wasike Sibia and land parcel NO Bukhayo/Ebusibwabo/246 which was given to Obwaku Opili the witness's father. That following the death of Wasike Sibia and his wife, the 1<sup>st</sup> defendant and Henry Musumba filed for succession without involving the family members.

7. The plaintiff filed two lists of documents one dated 2<sup>nd</sup> July 2021 and a further list of documents dated 16<sup>th</sup> December 2022.
8. Vide the list of documents dated 2<sup>nd</sup> July 2021, the plaintiff filed the following documents:
  1. Copies of Official Searches for the land parcels NO Bukhayo/Ebusibwabo/4120, 5930, 5931, 5467 and 5465.
  2. Copies of Green Cards for the land parcels NO Bukhayo/Ebusibwabo/4120, 5930, 5931, 5467 and 5465.
  3. Copy of the plaintiff's Identity Card.
  4. Copies of documents filed in Busia High Court Succession Cause No 29 of 2003.
  5. Copy of minutes of meeting held on 27<sup>th</sup> December 2020 at the home of the late Musumba.
  6. Copy of Limited Grant of Letters of Administration issued to Josephat Anyango Musumba with respect to the Estate of Henry Musumba Wasike In Busia Chief Magistrate Court P & A CAUSE NO E594 of 2022.
  7. Copy of Limited Grant of Letter of Administration Ad Litem issued to George Ouma Wafula with respect to the Estate of Wasike Siba In Busia Chief Magistrate's Court P & A Cause No 10 of 2020.
  8. Copy of confirmed Grant issued to Henry Wasike in respect to the Estate of Wasike Sibia In Busia High Court Succession Cause No 29 of 2003 (the Form reads Nairobi but the Grant was actually issued in Busia).

By a further list of documents dated 16<sup>th</sup> December 2022, the plaintiff filed a copy of a Limited Grant of Letters of Administration Ad Litem issued in Busia Chief Magistrates Court Succession Cause No E594 of 2022. This is actually a receipt of NO 6 above.

9. The 1<sup>st</sup> Defendant filed a defence to the amended plaint on 25<sup>th</sup> January 2023 in which he denied, in toto all the averments in paragraphs 3, 4, 5, 6, 7 and 8 of the amended plaint and put the plaintiff to strict proof thereof. He averred that on 15<sup>th</sup> January 1971, the land parcel NO Bukhayo/Ebusibwabo/245 was registered in the name of Wasike Sibia being a first registration. That the late Wasike Sibia was blessed with a son namely Henry Musumba Wasike who filed Busia High Court Succession Cause No 29 of 2003 and succeeded the Estate. The said Henry Musumba Wasike gave him a portion out of the said land which became parcel NO Bukhayo/Ebusibwabo/3531 measuring 2.43 hectares. The 1<sup>st</sup> defendant added that it was only after the demise of Musumba Wasike that the plaintiff started creating a disturbance and at no time did the land parcel NO Bukhayo/Ebusibwabo/245 belong to Susan Apanye as alleged by the plaintiff who is put to strict proof thereof. The 1<sup>st</sup> defendant further denied that the land parcel



NO Bukhayo/Ebusibwabo/245 was fraudulently transferred from the name of Wasike Sibia to Henry Musumba Wasike and put the plaintiff to strict proof thereof.

10. The 1<sup>st</sup> defendant filed his statement dated 20<sup>th</sup> January 2022 in which he stated that the late Wasike Sibia who was the registered proprietor of the land parcel NO Bukhayo/Ebusibwabo/245 was his grandfather and during his life time, he had two wives namely Susan Apanye who was the first wife had one son called Buluma who passed on without a family and a daughter called Ajuma Wanajala who was the grandmother to the plaintiff. Nakhayo was the second wife and her children were Henry Musumba Wasike and a daughter called Ajuma. That the said Henry Musumba Wasike was the biological son of Wasike Sibia.
11. Following the confirmation of the Grant in Busia High Court Succession Cause No 29 of 2013 (it is actually 29 of 2003) the 1<sup>st</sup> defendant got a share of 6 acres out of the land parcel NO Bukhayo/Ebusibwabo/245 and thereafter he became the bonafide proprietor of a portion being parcel NO Bukhayo/Ebusibwabo/5930 which he later sub-divided and parcel NO Bukhayo/Ebusibwabo/5931 is registered in the name of Kennedy Wanjala while parcel NO Bukhayo/Ebusibwabo/5465 is registered in the name of Valary Namayui the 2<sup>nd</sup> defendant. That the plaintiff has made it difficult for him to access and fully develop his land and has continually violated his right by issuing threats to him. That the plaintiff should pursue his interest in the land parcel NO Bukhayo/Ebusibwabo/244 and not 245. The allegation of fraud was denied.
12. The 1<sup>st</sup> defendant filed the following documents vide the list dated 27<sup>th</sup> January 2023:
  1. Certified copy of the register to the land parcel NO Bukhayo/Ebusibwabo/245.
  2. Copy of Grant of Letters of Administration issued in Busia High Court Succession Cause No 29 of 2003.
  3. Confirmed Grant issued in Busia High Court Succession Cause No 29 of 2003 to Henry Musumba Wasike in respect to Estate of Wasike Sibia.
  4. Certified copy of register to the land parcel NO Bukhayo/Ebusibwabo/3531.
  5. Letter dated 15<sup>th</sup> January 2021 from the Assistant Chief Nasira Sub Location.
  6. Letter dated 29<sup>th</sup> January 2021 by the plaintiff undertaking not to threaten the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any defence. On 29<sup>th</sup> April 2024, the plaintiff withdrew the suit against them.
13. The hearing commenced on 12<sup>th</sup> March 2024 when the plaintiff testified and called his witness Jackson Obwaku (PW2). They both adopted as their evidence the contents of their respective statements. The plaintiff also produced as his documentary evidence the documents filed vide his lists of documents dated 2<sup>nd</sup> July 2021 and 16<sup>th</sup> December 2022. The 1<sup>st</sup> defendant was the only witness who testified in support of his case. He prosecuted his case on 29<sup>th</sup> April 2024 in which he adopted as his evidence the contents of his statement dated 20<sup>th</sup> January 2022 and also produced as his documentary evidence the list of documents filed herein.
14. Submissions were thereafter filed by the plaintiff who is acting in person and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for the 1<sup>st</sup> defendant.
15. I have considered the evidence by the parties and the submissions filed.



16. The plaintiff is acting in person and as would be expected of a lay litigant, his pleadings are rather convoluted. His claim against the defendants is based on fraud. He has pleaded in paragraphs 1 and 4 of his amended plaint that the original land parcel NO Bukhayo/Ebusibwabo/245 which originally belonged to his grandmother Susan Apanye was relinquished to her “inherited” husband Wasike Sibia. The defendants however fraudulently sub-divided it to create parcels NO Bukhayo/Ebusibwabo/4120, 5930, 5931, 5465, 5466 and 5467. In paragraph 9(a) of his plaint however, the main remedy which he seeks is:

- a. “An order directing the County Land Registrar Busia to cancel the registration of the defendants’ names on title number Bukhayo/Ebusibwabo/4121, 5930, 5931 and the same to revert back to the original parcel number Bukhayo/Ebusibwabo/245 for fair and just administration.”

The allegation of fraudulent transfer of the sub-divisions arising out of the land parcel NO Bukhayo/Ebusibwabo/245, which was the original land, have been denied by the 1<sup>st</sup> defendant who has put the plaintiff to strict proof thereof. The fulcrum of the fraud on the part of the defendants is to be found in paragraph 4(a) of the amended plaint wherein the plaintiff has pleaded thus:

- a. “Filing a succession cause NO 29 of 2003 secretly without the involvement of the rightful beneficiaries.”

Since the case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was withdrawn on 29<sup>th</sup> April 2024, the claim of the plaintiff is now entirely against the 1<sup>st</sup> defendant.

17. I have identified the only issues for my determination in this dispute as follows:

1. Whether the transmission of the land parcel NO Bukhayo/Ebusibwabo/245 from the original owner Wasike Sibia to Henry Musumba Wasike and Nahashon Wesonga Machoki the 1<sup>st</sup> Defendant was fraudulent.
2. Who meets the costs of the suit.

18. The Plaintiff having alleged fraud as against the defendants in the manner in which the original land parcel NO Bukhayo/Ebusibwabo/245 was acquired by Henry Musumba Wasike and thereafter sub-divided to create several other parcels of land, the onus was on him to prove that allegation. That is clear from the provisions of Sections 107, 108 and 109 of the Evidence. They read as follows:

107

- (1) “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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

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



As regards the standard of proof, the Court of Appeal expressed it in the following terms in the case of Kinyanjui Kamau -v- George Kamau 2015 eKLR.

“... it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo - V- Ndolo 2008 IKLR (G&F) 742 wherein the Court stated that ...” we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

19. It is common ground that the transmission of the original land parcel NO Bukhayo/Ebusibwabo/245 passed from Wasike Sibia to Henry Musumba Wasike and the 1<sup>st</sup> defendant was through a succession process. The confirmed Grant issued by Justice J. K. Sergon on 5<sup>th</sup> July 2004 in Busia High Court Succession Cause No 29 of 2003 distributed the Estate of Wasike Sibia as follows:

“Schedule

Name	Description of Property	Share of Heirs
Henry Musumba Wasike	Bukhayo/ Ebusibwabo/245	13.225Acres
Nahashon Wesonga Machoki		6 Acres”

There is no evidence to suggest that any appeal was filed against that order or that the grant was revoked. In his submissions at paragraphs J, K, L, M, the plaintiff attempts to pour cold water on that distribution and submits thus:

- J) “Your Honour, it is the plaintiff’s evidence that after the death of the plaintiff’s grandmother and the death of Wasike Sibia, Henry Musumba who is not related to the plaintiff’s grandmother at all secretly filed Succession Cause in BUSIA HC P & A CAUSE NO 20 of 2003 (sic) without invoking the off springs of the plaintiff’s grandmother who are related to her by blood and who are in actual occupation of the suit land.
- k) Your Honour, it is the plaintiff’s evidence that the said Henry Musumba colluded with the 1<sup>st</sup> defendant herein to inherit the plaintiff’s grandmother’s land yet that (sic) are not related by blood to the ancestors of the plaintiff’s grandmother.
- l) Your Honour, it is the plaintiff’s evidence that the plaintiff witness statements filed in this suit confirms that the 1<sup>st</sup> defendant herein and the late Henry Musumba are not related by blood to the plaintiff’s grandmother’s ancestral land amounts to miscarriage of justice and total infringement of the plaintiff’s inheritance rights.
- M) Your Honour it is the plaintiff’s further evidence that the late Henry Musumba ceased to be Administrator of the Estate of the late Wasike Sibia following his death, the grant and certificate of confirmation of grant became automatically null and void and especially after a fresh grant of Letters of Administration. Ad Litem was issued, to the plaintiff herein in regard to the Estate



of the late Wasike Sibia as far as the inheritance of the plaintiff's grandmother's ancestral land which is the suit land herein is concerned.”

If the basis of the plaintiff's allegations of fraud in the manner in which the land parcel NO Bukhayo/Ebusibwabo/245 was transmitted to the 1<sup>st</sup> defendant and others is that the succession process was fraudulent, then this court must inform him that he is raising that issue too late and in the wrong forum. As counsel for the 1<sup>st</sup> defendant has submitted on that issue:

“It is our humble submission that none of the enumerated particulars of fraud have been proved to the required standard or at all.

If the plaintiff was truly a beneficiary to the Estate of Wasike Sibia and Henry Musumba Wasike had failed to make provisions for him, he had the liberty to move the succession court for revocation of the grant.

The plaintiff cannot challenge a valid certificate of confirmation of grant issued by a properly constituted succession cause in the manner that he is doing.

We submit that the registration of the 1<sup>st</sup> defendant as proprietor of L.R NO Bukhayo/Ebusibwabo/3531 was lawful and procedural and no fraud can be inferred.”

That is the correct position. No fraud can be proved where the property in dispute was transferred pursuant to a valid order issued by a competent court. The plaintiff's suggestion is that following the issuance to him of the Limited Grant of Letters of Administration Ad Litem in Busia Chief Magistrate's Court Succession Cause No 10 of 2020 allowing him to file a suit in respect of the Estate of Wasike Ndombi on 7<sup>th</sup> November 2020, then the confirmed Grant issued to Henry Musumba Wasike on 5<sup>th</sup> July 2024 in Busia High Court Succession Cause No 29 of 2003 in respect to the Estate of Wasike Sibia “became automatically null and void especially after a fresh grant of Letters of Administration. Ad Litem was issued to the plaintiff herein in regard to the Estate of the late Wasike Sibia.” Nothing can be further from the truth. A Limited Grant Ad Litem issued on 20<sup>th</sup> November 2020 cannot take precedence over a grant which was confirmed 16-years earlier on 5<sup>th</sup> July 2004. It must be clear that the plaintiff has been unable to prove the particulars of fraud as pleaded.

20. A certificate of title, as provided under Section 26(1) of the *Land Registration Act*, can only be cancelled if obtained through fraud, misrepresentation, illegally, unprocedurally or corruptly. Neither fraud nor the other grounds have been proved. There would be no basis upon which this court can grant the plaintiff the remedies sought.
21. The up-shot of all the above is that having heard the evidence herein and considered the submissions, this court makes the following disposal orders:
  1. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is marked as withdrawn with no order as to costs.
  2. The plaintiff's suit against the 1<sup>st</sup> defendant is dismissed with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

**BOAZ N. OLAO**

**JUDGE**

**19<sup>TH</sup> NOVEMBER 2024**

**Right of Appeal**

