



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO 49 OF 2008**

**GABRIEL WAMALWA BARASA ..... PLAINTIFF**

**VERSUS**

**CHARLES BARASA LUSOPIO.....1<sup>ST</sup> DEFENDANT**

**CLEOPHAS OLUKUNE ASSANGA .....2<sup>ND</sup> DEFENDANT**

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

Court files do not have legs or wings to enable them to walk or fly out of the registries through the doors or windows. Therefore, when they disappear from the registry shelves without a trace, that can only be at the instigation of the parties involved in the litigation. Only they can tell us who their accomplices are. I will leave it at that.

Suffice it to say that **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997** was a victim of that disappearing act. As a result of that disappearance, this Court is not in a position to know what became of the application by **GABRIEL WAMALWA BARASA** (the plaintiff herein) in which he sought orders to revoke the grant of Letters of Administration issued to his brother **CHARLES BARASA LUSOPIO** (the 1<sup>st</sup> defendant herein) in respect to the Estate of their father **EUSEBIO BARASA SAKONYI** (the deceased herein). In order to forestall a similar occurrence where this file might follow its brother **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997** into oblivion, I hereby direct the Deputy Registrar to keep this file under lock and key preferably in a room without doors or windows.

The plaintiff and 1<sup>st</sup> defendant are siblings both being the only sons of the deceased who, during his life time, was the registered proprietor of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844** since 25<sup>th</sup> July 1979. It was subsequently registered in the names of the 1<sup>st</sup> defendant on 5<sup>th</sup> January 1995 before the plaintiff placed a caution on the title on 4<sup>th</sup> April 1995. On 27<sup>th</sup> March 1996, that caution was removed by the Land Registrar and on the same day, the title was closed upon sub – division to give rise to parcels **NO WEST BUKUSU/SOUTH MATEKA/2848, 2849 and 2850** which were all registered in the names of the 1<sup>st</sup> defendant. Parcel **NO WEST BUKUSU/SOUTH MATEKA/2850** was subsequently sub – divided to give rise to parcels **NO WEST BUKUSU/SOUTH MATEKA/2855 and 2856** which are currently registered in the names of **CLEOPHAS OLUKUNE ASSANGA** (the 2<sup>nd</sup> defendant herein).

By a plaint dated 26<sup>th</sup> August 2008 and filed herein on 8<sup>th</sup> September 2008, the plaintiff sought Judgment against the defendants jointly and severally in the following terms in paragraph 18: -

**(a) A declaration that the sub – division and transfer of the deceased's Estate originally SOUTH MATEKA/WEST BUKUSU/1844 now SOUTH MATEKA/WEST BUKUSU/2848, 2849, 2855 and 2856 is unlawful and the same ought to be curtailed and/or removed (sic).**

**(b) An order restraining the defendants by themselves, their servants and /or agents or otherwise (sic) whatsoever from selling, disposing off, constructing or doing any developments on the SOUTH MATEKA/ WEST BUKUSU/2848, 2849, 2855 and 2856 pending the hearing and determination of the SUCCESSION CAUSE NO 99 OF 1997 HIGH COURT BUNGOMA.**

**(c) Costs**

**(d) Interest**

**(e) Further or other relief.**

Prayer (b) is obviously now mere surplusage in view of what I have stated above about the fate of **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997**. I should at this stage however point out that it is not clear what exactly the plaintiff meant when he pleaded that the: -

***“transfer of the deceased’s Estate originally SOUTH MATEKA/ WEST BUKUSU/1844 now SOUTH MATEKA/WEST BUKUSU NOS 2848, 2849, 2855 & 2856 is unlawful and the same ought to be curtailed and or removed.”***

However, a wholesome reading of the plaint, as will become clear shortly, leads to the conclusion that what the plaintiff seeks is the cancellation of the titles in respect of the land parcels **NO SOUTH MATEKA/WEST BUKUSU/2848, 2849, 2855 and 2856.**

The basis of the plaintiff’s claim is that following the demise of the deceased on 9<sup>th</sup> February 1987, the defendant applied for Letters of Administration originally in the Subordinate Court before the cause was transferred to the High Court as **SUCCESSION CAUSE NO 99 OF 1997** after which the land parcel **NO SOUTH MATEKA/WEST BUKUSU/1844** which belonged to the deceased was registered in his name and was sub – divided to give rise to parcels **NO SOUTH MATEKA/WEST BUKUSU/2848, 2849 and 2850** which were all registered in his names. The 1<sup>st</sup> defendant then sub – divided the land parcel **NO SOUTH MATEKA/WEST BUKUSU/2850** into two parcels **NO SOUTH MATEKA/ WEST BUKUSU/2855 and 2856** which he sold to the 2<sup>nd</sup> defendant yet the plaintiff had all along been residing on those two parcels even before the demise of the deceased. The plaintiff placed cautions on those parcels and pleads that the 1<sup>st</sup> defendant secretly and fraudulently applied to administer the deceased’s Estate in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997** in order to dis – inherit him. The particulars of fraud and illegality on the part of the 1<sup>st</sup> defendant are pleaded in paragraph 13 of the plaint as follows: -

- (a) Totally dis – inheriting the plaintiff.**
- (b) Selling their father’s Estate before distribution.**
- (c) Fraudulently obtaining Letters of Administration with the sole purpose of enriching himself to the detriment of the plaintiff.**
- (d) Attempting to remove the caution placed on the above parcels.**

On the part of the 2<sup>nd</sup> defendant, the allegation of fraud and illegality are also pleaded in paragraph 13 as follows: -

- (a) Colluding with the 1<sup>st</sup> defendant to dis – inherit the plaintiff.**
- (b) Attempting to remove the cautions placed on the above parcels.**

In resisting the plaintiff’s suit, the defendants filed a joint statement of defence and Counter – Claim dated 8<sup>th</sup> January 2009 denying that the Probate and Administration Cause was filed fraudulently. The 2<sup>nd</sup> defendant added that he would prove during the trial that he was a bona fide purchaser for value and the cautions placed on the land parcel **NO WEST BUKUSU/SOUTH MATEKA 2856** should be lifted forthwith as he is a total stranger to the proceedings in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997**. The 2<sup>nd</sup> defendant also pleaded that he is the registered proprietor of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855 and 2856**. The defendants therefore sought the dismissal of the plaintiff’s suit with costs.

By way of Counter – Claim, the 2<sup>nd</sup> defendant sought the following order in paragraph 10: -

***“That the 2<sup>nd</sup> defendant shall seek orders from this Honourable Court to evict the plaintiff from parcel NO WEST BUKUSU/SOUTH MATEKA/2855 and 2856 and that the caution placed on these parcels by the plaintiff be removed.”***

Together with those pleadings, the parties filed their statements and those of their witnesses and the list of documents to be relied upon at the trial.

In support of his case, the plaintiff filed two statements one dated 28<sup>th</sup> August 2011 together with a list of documents bearing the same date and a further statement dated 20<sup>th</sup> April 2018. The statement dated 28<sup>th</sup> August 2011 is a recap of what is in his plaint which I have summarized above while the statement dated 20<sup>th</sup> April 2018 adds that due to the conduct of the defendants, he has been rendered homeless and has been made to stay in rental houses between 1997 and 2010 when the Court helped him to return to the land in dispute until this case is settled. He also accuses the Land Registrar **BUNGOMA** one **MR AKELLO** for illegally processing the titles herein and the 1<sup>st</sup> defendant for misleading the **SUCCESSION COURT** that he had only two sisters **WILMINA NAFULA OCHUNE** and **MARY NASWA TOKOI** but no brother.

In his witness statement dated 11<sup>th</sup> November 2013, the 1<sup>st</sup> defendant confirms that the plaintiff is his younger brother and that both are the children of the deceased who owned the land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844**. That before his death, the deceased sub – divided the said land among his two sons and their mother **TERESA NAMAROME BARASA** as follows: -

- 1. Plaintiff - 7 acres**
- 2. 1<sup>st</sup> defendant - 8 acres**
- 3. TERESA NAMAROME BARASA - 5 acres for and on behalf of the five daughters.**

That after the deceased's death in 1987, their mother sub – divided the 5 acres among the five daughters as directed. That to reduce costs of sub – division, the 5 acres were sub – divided into 2½ acres each in the names of **WILMINA NAFULA OCHUNE** and **MARY NASWA TOKOI**.

That in 1995, the 1<sup>st</sup> defendant having done the Probate and Administrations process sub – divided their fathers land as follows: -

1. **Plaintiff – WEST BUKUSU/SOUTH MATEKA/2849**
2. **1<sup>st</sup> defendant – WEST BUKUSU/SOUTH MATEKA/2848**
3. **WILMINA OCHUNE – WEST BUKUSU/SOUTH MATEKA/2855**
4. **MARY TOKOI – WEST BUKUSU/SOUTH MATEKA/2856**

That upon obtaining his title deeds, the plaintiff disposed off his land to **MRS BUKIYA NAMBUDIYE MAKOYA, THEOPHILUS MASIKA NAMUSONGE, WANJALA MULONGO** and **ANTHONY WANJALA SICHANGI**. In 1998, their five sisters sold their land to the 2<sup>nd</sup> defendant as they were encountering hostility from the plaintiff. The 1<sup>st</sup> defendant therefore prays that the caution placed by the plaintiff on the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** be removed and he be evicted therefrom to pave way for the 2<sup>nd</sup> defendant to occupy and utilize the same.

The 2<sup>nd</sup> defendant also adopted as his evidence his statement dated 11<sup>th</sup> November 2013. In that statement, he confirms that he purchased the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** from **WILMINA OCHUNE** and **MARY TOKOI** in 1998 at a consideration of Kshs. 280,000/= . That before doing so, he had investigated and found that the titles were clean. However, when he went to the said land parcels for purposes of developing them, the plaintiff chased him away claiming that the land was his. The matter was therefore reported to the police and the plaintiff was arrested, charged and fined Kshs. 5,000/= which he paid and went back to the land where he constructed his dwelling house. The 2<sup>nd</sup> defendant states that he has been unable to develop the said parcels since 1998 and asks that the Court orders that the cautions placed thereon by the plaintiff be removed and he be evicted therefrom.

The defendants called as their witness **MARY NASWA TOKOI (DW 3)** who is a sister to the 1<sup>st</sup> defendant. She too adopted as her evidence the statement dated 11<sup>th</sup> November 2013 in which she confirms that she received as her share of their father's land, 2½ acres which she sold to the 2<sup>nd</sup> defendant due to the plaintiff's hostility. That the plaintiff disposed off his share to various persons and is now only intent on disturbing the 2<sup>nd</sup> defendant. That eviction orders should therefore issue against the plaintiff and his case be dismissed.

Submissions were thereafter filed both by **MR WAMALWA** counsel for the plaintiff and **MS NANZUSHI** counsel for the defendants.

At this point, I must clarify that although both in his plaint and during trial the plaintiff referred to the land in dispute as **SOUTH MATEKA/WEST BUKUSU**, the official Search shows that it is infact **WEST BUKUSU/SOUTH MATEKA**.

I have considered the evidence by both parties, the documents filed and the submissions by counsel.

It is clear that the following are not disputed: -

1. **That the plaintiff and 1<sup>st</sup> defendant are the only two sons of the deceased. 1<sup>st</sup> defendant is the eldest.**
2. **That the deceased was the proprietor of the land parcel NO WEST BUKUSU/SOUTH MATEKA/1844 prior to his death on 9<sup>th</sup> February 1987.**
3. **Following his death, the 1<sup>st</sup> defendant obtained a Grant of Letter of Administration in respect of the deceased's Estate in the Subordinate Court at BUNGOMA.**
4. **That Succession Cause was later moved to the HIGH COURT BUNGOMA where it was registered as BUNGOMA HIGH COURT SUCCESSION CAUSE NO 99 OF 1997 but disappeared while an application to revoke the grant was pending.**
5. **That the land parcel NO WEST BUKUSU/SOUTH MATEKA/1844 was later sub – divided by the 1<sup>st</sup> defendant to give rise to parcels NO 2848, 2849 and 2850.**
6. **That land parcels NO WEST BUKUSU/SOUTH MATEKA 2848 and 2849 are registered in the names of the 1<sup>st</sup> defendant.**
7. **That land parcel NO WEST BUKUSU/SOUTH MATEKA/2850 was later sub – divided to give rise to two parcels being WEST BUKUSU/SOUTH MATEKA/2855 and 2856 both of which are currently registered in the names of the 2<sup>nd</sup> defendant.**

The plaintiff's claim is that the sub – division of the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844** to give rise to parcels **NO WEST BUKUSU/SOUTH MATEKA/2848, 2849, 2855** and **2856** was fraudulent as it was done without involving him as a

beneficiary to the deceased's Estate. On the other hand, the defendants claim that everything was done above board and that the plaintiff should be ordered to remove the cautions placed on land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** and be evicted therefrom.

As the registered proprietors of the land parcels **NO WEST BUKUSU/ SOUTH MATEKA/2848, 2849, 2855** and **2856**, the defendants enjoy the protection provided by **Section 24 of the Land Registration Act**. Those are the rights of absolute ownership of the said land together with all the rights and privileges belonging or appurtenant thereto. They include the rights to evict the plaintiff from the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** registered in the names of the 2<sup>nd</sup> defendant and occupied by the plaintiff. However, the titles of the defendants can be challenged if it is proved that they were obtained fraudulently or illegally. **Section 26(1) of the Land Registration Act** provides as follows: -

***“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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 that proprietor shall not be subject to challenge, except –***

***(a) On the ground 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.”***

The plaintiff's case is that the sub – division of the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844** to give rise to land parcels **NO WEST BUKUSU/SOUTH MATEKA/2848, 2849, 2855** and **2856** was fraudulent and illegal. That is what I need to interrogate.

In paragraph two of her submissions, counsel for the defendants has stated that this Court cannot question the manner in which the defendants obtained their titles to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2848, 2849, 2855** and **2859**. Counsel's argument is that only the Succession Court can do so. This is how she has put it: -

***“The particulars of illegality on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants can only be adduced before the Succession Court. Paragraph 14 and 15 can't be applied in this Court since confirmation of grant is still in existence.”***

While this Court cannot question what transpired in the Succession Court, it cannot be a correct submission for counsel for the defendants to state that the allegation of illegality in the manner in which the defendants obtained their titles can only be determined by the Succession Court. It is clear from **Section 13(2)(e) of the Environment and Land Court Act** that the jurisdiction of this Court includes the power to hear and determine disputes relating to the Environment and Land. The definition of Court in both the Land Registration Act and the Land Act include this Court. The jurisdiction of the Probate and Succession Court is primarily to determine the assets of the deceased, the survivors and beneficiaries and thereafter to distribute the Estate among them. Where disputes arise which may not be determined by the Probate and Succession Court prior to Confirmation of the Grant, **Section 82 of the Law of Succession Act** allows the Court to set aside that share to abide by the determination of this Court. **Article 162(2)(b) of the Constitution** also makes it clear that the jurisdiction to determine a dispute relating to ***“the environment and the use and occupation of and title to land”*** is the preserve of this Court. Therefore, whereas this Court cannot question how the 1<sup>st</sup> defendant obtained the Grant of Letters of Administration and subsequent Confirmation of the Grant, it has the jurisdiction to determine any disputes that may subsequently arise with regard to the ownership of land and more so where third parties who are not beneficiaries of the Estate, such as the 2<sup>nd</sup> defendant herein, are involved.

In paragraph 4 of his statement dated 11<sup>th</sup> November 2013, the 1<sup>st</sup> defendant has shown how the deceased had distributed his land. He states: -

**4 “That I do recall in the year 1979, my father EUSOBIO BARASA now deceased sub – divided his land registered NO WEST BUKUSU/SOUTH MATEKA/1844 into three portions as follows: -**

**(a) CHARLES BARASA - 8 acres**

**(b) GABRIEL BARASA - 7 acres**

**(c) TERESA NAMAROME BARASA - 5 acres for and on Behalf of the five daughters.”**

The 1<sup>st</sup> defendant then goes on to add in paragraph 7 and 9 of the same statement that in 1995, he carried out the Probate and Administration process and thereafter distributed the Estate as follows in paragraph 9:

**9 “That the parcel of land were registered as follows: -**

**i. CHARLES BARASA LUSOPIO – W. BUKUSU/S. MATEKA/2848.**

**ii. GABRIEL WAMALWA BARASA – W. BUKUSU/S. MATEKA/2849.**

**iii. WILMINA NAFULA OCHUNE - W. BUKUSU/S. MATEKA/2855.**

According to the Certificate of Search in respect of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844**, that land measured 9.65 Hectares in area which works out as 23.8 acres (using the formula 1 Hectare = 2.47 Acres). Going by the 1<sup>st</sup> defendant's own statement at paragraph 4, the total acreage of the land distributed to the beneficiaries who include the plaintiff is only 20 acres (8 + 7 + 5 acres). There is no explanation from the 1<sup>st</sup> defendant as to what happened to the other 3.8 acres which formed part of the deceased's Estate.

In paragraph 8 of his statement, the 1<sup>st</sup> defendant has stated as follows: -

**8 “After issuing and/or obtaining of title deed, the plaintiff proceeded and disposed off his land to MRS BUKIYA NAMBUDIE MUKOYA, THEOPHILUS MASIKA NAMUSONGE, WANJALA MULONGO and ANTHONY WANJALA SICHANGI.”**

It is clear from the 1<sup>st</sup> defendant's own statement at paragraph 4 that the plaintiff's share was the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849**. According to the Green Card to that parcel of land dated 14<sup>th</sup> September 2000 and which is part of the 1<sup>st</sup> defendant's list of documents dated 26<sup>th</sup> August 2011, the plaintiff lodged a caution on that land on 27<sup>th</sup> March 1996 which is still in place. Yet there is a sale agreement dated 29<sup>th</sup> January 2002 and which is also part of the 1<sup>st</sup> defendant's list of documents showing that the plaintiff sold a portion thereof measuring 1½ acres to one **ANTHONY WANJALA SICHANGI**. There is yet another agreement dated 8<sup>th</sup> March 2001 to the effect that the plaintiff sold 2 acres out of that parcel of land to one **THEOPHILUS MASIKA NAMUSONGE**. There is a further sale agreement dated 15<sup>th</sup> November 1999 by which the plaintiff is shown to have sold a portion of land whose size is not indicated to one **RUKIYA NAMBUDIE MUKOYA** to be sub – divided from the land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844**. All those sale agreements were purportedly entered into between the plaintiff and other parties yet it is clear from the Green Card to land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** that the said parcel of land has always been and is till registered in the names of the 1<sup>st</sup> defendant and there is a caution subsisting thereon since 27<sup>th</sup> March 1996. The question that begs an answer is how could the plaintiff sell land registered in the names of another person and with a caution in place? During cross – examination by **MS NANZUSHI**, the plaintiff denied having been given his share of the land which he then sold to other parties. This is what he said: -

**“I was not aware that the 1<sup>st</sup> defendant filed for succession. It is not true that the 1<sup>st</sup> defendant gave me parcel NO SOUTH MATEKA/WEST BUKUSU/2849 and I sold it to other persons before an advocate called Wasilwa. It is not true that I sold the parcel NO SOUTH MATEKA/ WEST BUKUSU/1844 even before it was sub – divided to give rise to the parcels in dispute.”**

What comes out clearly from all the above is that whereas the plaintiff's share of the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844** was parcel **NO WEST BUKUSU/SOUTH MATEKA/2849**, that parcel was, and still is, registered in the names of the 1<sup>st</sup> defendant. That registration was obtained fraudulently and, as the plaintiff has pleaded in his plaint, with the sole intention of dis – inheriting him of his rightful share in the Estate of the deceased. And in an illegal scheme orchestrated by the 1<sup>st</sup> defendant in collusion with officers in the Land Registry and other parties, transactions were perpetrated to appear as if the plaintiff had voluntarily sold his inheritance. Plaintiff had no share to sell to third parties because the Green Cards show that after the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844** was sub – divided into **WEST BUKUSU/ SOUTH MATEKA/2848, 2849 and 2850**, all those resultant sub – divisions were registered in the names of the 1<sup>st</sup> defendant. He then further sub – divided land parcel **NO WEST BUKUSU/SOUTH MATEKA/2850** into two portions being **WEST BUKUSU/SOUTH MATEKA/2855 and 2856** both of which were transferred to his two sisters **WILMINA NAFULA OCHUNE and MARY NASWA TOKOI (DW 3)**. The two sisters in turn sold the two parcels to the 2<sup>nd</sup> defendant herein. Among the documents filed by the defendants herein is a sale agreement dated 16<sup>th</sup> May 2008 showing that the 2<sup>nd</sup> defendant sold the parcel **NO WEST BUKUSU/SOUTH MATEKA/2856** to one **JESCA PHYLLIS APONDI**. However, both land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855 and 2856** are still registered in the names of the 2<sup>nd</sup> defendant with cautions lodged thereon in favour of the plaintiff since 15<sup>th</sup> May 2008. Clearly, **JESCA PHYLLIS APONDI** did not carry out due diligence before paying the consideration of Kshs. 256,250/= for that parcel of land.

What is clear from all the above is that although the 1<sup>st</sup> defendant by his own statement confirms that the plaintiff was entitled to a portion measuring 7 acres out of the deceased's parcel of land **WEST BUKUSU/SOUTH MATEKA/1844** and which portion was registered as parcel **NO WEST BUKUSU/SOUTH MATEKA /2849** following the succession process, the said portion which as per the Certificate of Search measures 3.0 Hectares (equivalent to 7.41 acres), was and is still registered in the names of the 1<sup>st</sup> defendant. One wonders why the 1<sup>st</sup> defendant was able to transfer the parcel **NO WEST BUKUSU/SOUTH MATEKA/2850** to his two sisters after sub – dividing it yet he could not transfer the parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** into the names of the plaintiff. It is also strange that in the sale agreement dated 29<sup>th</sup> January 2002 by which the plaintiff is alleged to have sold 1½ acres out of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** to one **ANTHONY WANJALA SICHANGI**, it is stated as follows in paragraph 2: -

**“WHEREAS:**

***The vendor is the owner of the land parcel number W. BUKUSU/S. MATEKA/2849 still registered in the names of CHARLES BARASA LUSOPIO as a trustee to the vendor.***” Emphasis added.

The vendor in the said sale agreement is of course indicated as the plaintiff. What strikes this Court as strange is why the 1<sup>st</sup> defendant would still be describing himself as the plaintiff's “trustee” in 2002 long after he had completed the succession process and distributed the Estate to all the beneficiaries other than the plaintiff. As a trustee, which indeed the 1<sup>st</sup> defendant became following the succession process, his duties included acting honestly, impartially and in good faith while ensuring that the beneficiaries received what they were entitled to. His duties did not include unjustly enriching himself which is exactly what the 1<sup>st</sup> defendant did with respect to the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** which, by his own statement, was the plaintiff's share out of the deceased's land parcel **NO WEST BUKUSU/SOUTH MATEKA/1844**. The plaintiff denied having sold his share of the land and since it was the defendants' claim that the

plaintiff did so, the burden was on them, pursuant to the provisions of **Section 109 of the Evidence Act**, to lead evidence to prove that allegation. **Section 109 of the Evidence Act** reads: -

*“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.”*

The plaintiff having denied appearing before an advocate called **WASILWA** and executing sale agreements with respect to the land parcel **NO WEST BUKUSU/ SOUTH MATEKA/2849**, what was so difficult in calling the said advocate or better still, the purchasers to confirm that indeed they bought land from the plaintiff? This Court can only conclude that if the said advocate and purchasers were called to testify, their evidence would not support the 1<sup>st</sup> defendant’s claim that the plaintiff sold his inheritance. If anything their evidence would be that it was the 1<sup>st</sup> defendant who sold the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849**.

It is also instructive to note that during cross – examination by **MR WAMALWA**, the 1<sup>st</sup> defendant admitted having sold his land. This is what he said: -

*“It is true that I sold six (6) acres out of my eight (8) acres. I was left with two (2) acres.”*

He did not tell the Court who purchased those 6 acres nor avail any sale agreements. The plaintiff’s parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** is 3.0 Hectares which translates to 7.4 acres. The 1<sup>st</sup> defendant’s parcel **NO WEST BUKUSU/SOUTH MATEKA/2848** is 4.71 Hectares which translates to 11.6 acres. The only irresistible conclusion that this Court can arrive at is that if the 1<sup>st</sup> defendant sold 6 acres and remained with two (2) acres, he could only have sold the plaintiff’s share and still retained 2 acres while keeping his rightful share. That explains why the plaintiff ended up occupying the parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** which were the rightful shares of their sisters. Otherwise, if the 1<sup>st</sup> defendant indeed sold 6 acres out of his share which in fact measures 11.6 acres, then he should have remained with another 5 acres and not 2 acres.

It is clear from the above that the registration of land parcel **NO WEST BUKUSU/SOUTH MATEKA 2849** in the names of the 1<sup>st</sup> defendant was done fraudulently. Fraud is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

*“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”*

In the same dictionary, a fraudulent act is defined as: -

*“Conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.”*

By registering the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** in his names when he knew that the said parcel was the plaintiff’s rightful inheritance, the 1<sup>st</sup> defendant acted fraudulently. His intention was to deprive the plaintiff of his share. It amounted to a fraudulent alienation of property which is defined in the same dictionary as: -

*“The transfer of an interest in property with an intent to defraud others.”*

It was immoral, dishonest and in bad faith for the 1<sup>st</sup> defendant to register the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** in his names yet at the same time holding himself as the plaintiff’s trustee. Then he further compounded the fraud by disposing of the said land to third parties while masquerading to be the plaintiff. This Court must therefore intervene by cancelling the registration of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2849** in the names of the 1<sup>st</sup> defendant.

The plaintiff has also sought the cancellation of the titles in respect to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/ 2848, 2855** and **2856**. I don’t think there is any basis for doing so. This is because, the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2848** is the rightful share of the 1<sup>st</sup> defendant. Similarly, the land parcels **NO WEST BUKUSU/SOUTH MATEKA/ 2855** and **2856** which are now registered in the names of the 2<sup>nd</sup> defendant are a sub – division of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/2850** which was the rightful share of the **WILMINA NAFULA OCHUNE** and **MARY NASWA TOKOI (DW 2)**. They sold the said land parcels to the 2<sup>nd</sup> defendant. They were entitled to do so. The only unfortunate thing is that those are the parcels which the plaintiff is currently occupying. However, he cannot be blamed for doing so because having been deprived of his rightful share by the fraudulent acts of the 1<sup>st</sup> defendant, he ran the risk of being rendered destitute. Indeed, in his further statement dated 20<sup>th</sup> April 2018, the plaintiff has stated that between 1997 and 2010, he was landless and homeless and had to live in rental houses. In the circumstances it is not surprising that he was charged and convicted for the offence of forcible detainer with respect to the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** in **BUNGOMA CHIEF MAGISTRATE’S COURT CRIMINAL CASE NO 1807 OF 2008**.

With regard to the defendants’ Counter – Claim, it is clear from the evidence that although the plaintiff is currently in occupation of the land parcels **NO WEST BUKUSU/SOUTH MATEKA/2855** and **2856** which are registered in the names of the 2<sup>nd</sup> defendant, his rightful share is in fact land parcel **NO WEST BUKUSU/ SOUTH MATEKA/2849**. Those parcels were properly transferred to the 2<sup>nd</sup> defendant by the registered proprietors and although the plaintiff is in occupation of the same, the prayers for his eviction therefrom and for the removal of the cautions on both those parcels and the parcel **NO WEST BUKUSU/ SOUTH MATEKA/2848** are well merited. But even as the Court grants the prayers in the defendant’s Counter – Claim, I must also ensure that the plaintiff is not rendered destitute. I shall therefore be making appropriate orders shortly.

Ultimately therefore and having considered the evidence by all the parties, this Court's Judgment shall be as follows: -

1. The 1<sup>st</sup> defendant's registration as proprietor of the land parcel NO WEST BUKUSU/SOUTH MATEKA/2849 is hereby cancelled.
2. The 1<sup>st</sup> defendant shall within 30 days of this Judgment execute all the relevant documents to facilitate the registration of land parcel NO WEST BUKUSU/SOUTH MATEKA/2849 in the names of the plaintiff.
3. In default of (2) above, the Deputy Registrar shall be at liberty to execute the same on behalf of the 1<sup>st</sup> defendant.
4. The 1<sup>st</sup> defendant shall within 6 months of this Judgment give vacant possession of the land parcel NO WEST BUKUSU/SOUTH MATEKA/ 2849 to the plaintiff or be evicted therefrom. Thereafter, the 1<sup>st</sup> defendant, his servants, agents or any other person acting under him are restrained from interfering with the plaintiff's occupation and use of the said land parcel.
5. Upon compliance with (4) above, the plaintiff shall within 30 days of such compliance remove the cautions lodged on the land parcels NO WEST BUKUSU/SOUTH MATEKA/2848, 2855 and 2856 and give vacant possession of the land parcels NO WEST BUKUSU/SOUTH MATEKA/2855 and 2856 to the 2<sup>nd</sup> defendant or be evicted therefrom.
6. In default of (5) above, the cautions lodged on the land parcels NO WEST BUKUSU/SOUTH MATEKA/2848, 2855 and 2856 shall stand as withdrawn by this Court pursuant to the provisions of Section 73(1) of the Land Registration Act.
7. Any evictions shall be carried out in compliance with the relevant provisions of Section 152 of the Land Act.
8. In the circumstances of this case where two of the parties are siblings and each has partly succeeded, I direct that each meets their own costs.

**Boaz N. Olao.**

**J U D G E**

27<sup>th</sup> May 2020.

Judgment dated, delivered and signed at Bungoma this 27<sup>th</sup> day of May 2020.

**Boaz N. Olao.**

**J U D G E**

27<sup>th</sup> May 2020.

This Judgment was due on 11<sup>th</sup> June 2020. However, in view of the measures restricting Court operations following the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23<sup>rd</sup> April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

**Boaz N. Olao.**

**J U D G E**

27<sup>th</sup> May 2020.