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REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 87 OF 2013

DISMAS MUNIALO KALAMU..... PLAINTIFF

VERSUS

MARTIN JUMA KWATA 1ST DEFENDANT

CHRISPINUS RAJAMI..... 2ND DEFENDANT

SHEM WANYAMA MAKHAKHA..... 3RD DEFENDANT

PETER WANDILI.....4TH DEFENDANT

JOSEPH KULOBA WANDILI5TH DEFENDANT

J U D G M E N T

In **PROVERBS 19:9** it is written: -

“A false witness shall be punished and a liar shall be caught.”

And in **PROVERBS 12:22** the verse reads: -

“The Lord detests lying lips, but he delights in people who are trustworthy.”

Lying is not easy and a good liar must also remember to remain consistent. I vividly recall in one of the Tribunals to investigate the conduct of a Judge of the Court of Appeal in 2003, one false witness who had been poorly coached told the Tribunal on oath that he had given a bribe of Kshs. 4,000 to a Judge in a club in Kiambu on 27th May 2000 to pass on to a Magistrate. It turned out that on that day, the Judge was infact playing golf in another club in Mombasa some 500 kilometres away from the scene of crime. The Judge of Appeal was subsequently cleared of all the allegations levelled against him in a report prepared by the Tribunal and dated 27th August 2004 and retired Honourably a few years ago.

As will shortly become clear in this Judgment, **DISMAS MUNIALO KALAMU** (the plaintiff herein) has demonstrated in these proceedings that he is a *“false witness”* and has finally been *“caught”* because *“the Lord detests lying lips.”*

By his amended plaint dated 14th May 2013 and filed herein on the same day, the plaintiff sought against **MARTIN JUMA KWATA, CHRISPINUS RAJAMI, SHEM WANYAMA, and JOSEPH KULOBA WANDILI** (the 1st to 4th defendants respectively), Judgment in the following terms: -

(a) An eviction order against the 1st, 2nd, 3rd and 4th defendants from the land parcel NO EAST BUKUSU/NORTH SANG’ALO/77.

(b) Costs of the suit and interest at Court rates.

(c) Any other relief or order that this Honourable Court may deem fit to grant.

The basis of his claim is that on 2nd November 2007, he purchased the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/77** (the suit land) from the previous owner **JOSEPH SAKWA KWEYU** and obtained title thereto on 20th June 2008. However, the 1st defendant who is the Assistant Chief of **NORTH SANG'ALO SUB LOCATION** placed a restriction on the suit land on 7th July 2008 without justifiable cause. And despite demand and notice of intention to sue, the 1st defendant has refused to remove the restriction hence this suit.

Together with the plaint, the plaintiff filed his statement dated 11th March 2013 and those of his witnesses **PATRICK NDALA MAKOKHA** (PW 2) and one **JOSEPH BUYUNI MWAYAFU** who was however not called as a witness. He also produced during the trial the following documents: -

- 1. Sale agreement dated 2nd November 2007.**
- 2. Certificate of Official Search in respect of the suit land.**
- 3. Title deed for the suit land issued on 20th June 2008 in plaintiff's names.**

In his statement which was corroborated by his witness **PATRICK NDALA MAKOKHA (PW 3)**, the plaintiff states how on 2nd November 2007 he bought the suit land from one **JOSEPH SAKWA KWEYU** at a consideration of Kshs. 95,000/= . That they went to the Land Control Board for the necessary consent to transfer and was issued with the title deed dated 20th June 2008. However, the 1st defendant who is the area **ASSISTANT CHIEF** went to the suit land in the company of elders and started partitioning it so he went to complain to the **CHIEF** one **KENNEDY BUNYASI** who however ignored him and instead chased him away. He was forced to seek the intervention of the **DISTRICT OFFICER KANDUYI** who instructed the **CHIEF** and his **ASSISTANT** to return the title deed to the plaintiff. It took the intervention of the Police to get back his Identity Card which had been snatched by the 1st defendant. He then sought legal assistance from **ATEYA & COMPANY ADVOCATES** and paid them Kshs. 40,000/= but they never filed any case and later, refunded him Kshs. 15,000/=

In his statement **PATRICK NDALA MAKOKHA (PW 2)** confirms that he was a witness when the plaintiff purchased the suit land from one **JOSEPH SAKWA KWEYU** for Kshs. 95,000/= and the relevant transfer form were prepared. Later, the plaintiff complained to him that the 1st defendant was sub – dividing and selling the suit land and so he advised him to report to the **CHIEF**.

In a joint statement of defence dated 31st October 2013, the defendants denied the plaintiff's averments particularly the claim that the plaintiff purchased the suit land. They claimed that the suit land is infact family land which the plaintiff acquired fraudulently. The particulars of fraud are pleaded in paragraph 4 of the defence as follows: -

- 1. Acquiring title to the suit land without considering that his father had already purchased it.**
- 2. Acquiring title to the suit land without considering the interest of other family members.**
- 3. Acquiring title without any or valid consent of the Land Control Board.**
- 4. Using forged documents to acquire title.**
- 5. Acquiring land using consideration paid by a third party.**

That the plaintiff is a son to one **KALAMU WANAMU MATUKUTUKU (MATUKUTUKU)** now deceased and who was the proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/78** which is adjacent to the suit land. That prior to his death **MATUKUTUKU** purchased the suit land, removed the boundary between the two parcels and merged them into one parcel. He then brought up his family which include the plaintiff and his three (3) sisters namely **DAMINA NAFULA, JERIDA NAMAROME** and **BILHA NAMAROME KALAMU** on the land. However, although **MATUKUTUKU** purchased the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/77**, it still remained in the names of the previous owner **SAKWA KWEYU** and the plaintiff took advantage of this lapse to transfer the suit land into his names without informing his family members who

have in fact already transferred their shares to third parties and that none of the defendants live on the suit land.

Together with the defence, the 1st, 2nd and 3rd defendants filed their witness statements dated 13th June 2014. They also filed the statements of their witnesses **DIMINA NAFUNA KALAMU** and **JERIDA NAMAROME KALAMU**. However, only **JERIDA NAMAROME KALAMU (DW 5)** was called as a witness. Meanwhile, although **PATRICK MULONGO WANDILI** testified and described himself as the 4th defendant, he was merely a witness for the defendants. The 4th defendant is in fact one **JOSEPH KULOBA WANDILI** as per the amended plaint and he did not testify in this case.

In his statement, the 1st defendant denied that he lives on the suit land or that he sold any portion thereof to the 2nd, 3rd and 4th defendants. He added that **MATUKUTUKU** purchased the suit land from **SAKWA KWEYU** in the 1970's. That **SAKWA KWEYU** moved to another District and **MATUKUTUKU** removed the boundary between the suit land and parcel **NO EAST BUKUSU /NORTH SANG'ALO/78** and later transferred the suit land to the plaintiff to administer it on behalf of his family who included the plaintiff's sisters **BILHA KALAMU**, **JERIDA KALAMU** and **TIMINA KALAMU**. It is those sisters who sold portions of the suit land to the 2nd defendant's wife, the 3rd defendant's son and the 4th defendant's cousin. That the plaintiff has sold the whole of his portion and has now resorted to selling his sisters' portions.

CHRISPINUS RAJAMI (DW 2) is the 2nd defendant herein. In his statement dated 13th June 2014 he denies having bought any portion of the suit land from the 1st defendant. Instead, he states that it is his wife who bought a portion of parcel **NO EAST BUKUSU/NORTH SANG'ALO/78** from the plaintiff's sisters.

SHEM WANYAMA MAKHAKHA (DW 3) and the 3rd defendant herein similarly denied having bought any portion of the suit land from the 1st defendant or living thereon. He stated that it is his 35-year-old son who bought ½ an acre from the plaintiff's sisters.

PATRICK MULONGO WANDILI (DW 4) though describing himself as the 4th defendant when he testified before me on 12th November 2018 is actually only a witness. The 4th defendant as per the amended plaint is in fact one **JOSEPH KULOBA WANDILI** who however did not testify. In his statement dated 13th June 2014, **PATRICK MULONGO WANDILI** denied having bought any land from the 1st defendant. He stated that he bought a portion of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/78** from **DIMINA NAFULA SITATI** a sister to the plaintiff in June 2008 when it was registered in the names of the plaintiff's father. That the 4th defendant **PETER WANDILI** (sic) who is his cousin and is now deceased never bought any land from the 1st defendant.

JERIDA NAMAROME KALAMU (DW 5) is a step – sister to the plaintiff. In her statement dated 14th March 2014, she states that their father **MATUKUTUKU** bought the suit land in 1968 from **SAKWA KWEYU** and removed the boundary between it and his parcel **NO EAST BUKUSU/NORTH SANG'ALO/78**. Since their mother had no sons, the clan gave her and her sisters **DIMINA KALAMU** and **BILHA KALAMU** part of the suit land. That the suit land measures 3 acres while the parcel **NO EAST BUKUSU/NORTH SANG'ALO/78** measures 19 acres. That the suit land was fraudulently transferred to the plaintiff but she and her sisters had sold their respective portions to **PATRICK WANDILI**, **DICKSON WANYAMA** and **EDITH MUNGALITSI**.

In a reply to the defence, the plaintiff reiterated the contents of his plaint. He denied the allegations of fraud levelled against him adding that he lawfully purchased the suit land and obtained title thereto. He pleaded further that his sisters have no legal rights over the suit land and the 1st defendant had no right to place any restrictions on the same purporting to protect interests of persons who are of sound mind.

The trial commenced before **MUKUNYA J** on 4th May 2015 when the plaintiff told the Court that he bought the suit land on 2nd November 2007 from **JOSEPH SAKWA**. He stated that at that time, the 1st defendant had already placed a restriction thereon. He added however that he has never lived on the suit land since he first need the title deed. After he obtained the title deed however, the 1st defendant started sub – dividing the suit land. He confirmed that **BILHA KALAMU**, **JERIDA KALAMU** and **DAMINA KALAMU** are his sisters but he asked that the Court evicts the persons who are living on the suit land. He asked the Court to also adopt his statement and he produced as his documentary exhibits the sale agreement, a copy of the title deed and a copy of the Certificate of Search – Plaintiff's exhibits 1, 2, and 3 respectively.

His witness **PATRICK NGALA MAKOKHA (PW 2)** testified on 14th June 2017. He told the Court that the plaintiff is his neighbour and that he was a witness when the sale agreement dated 2nd November 2017 was executed.

The 1st defendant confirmed that he had been the **ASSISTANT CHIEF OF SANG'ALO SUB – LOCATION** for 17 years and knows the parties herein. He added that the plaintiff's father was called **KALAMU WANAMU MATUKUTUKU**. He told the Court that the plaintiff bought the suit land from **SAKWA KWEYU** although both he and his sisters have been using it since 1999 but the plaintiff's sisters have sold their portions to the 2nd, 3rd and 4th defendants. He denied having any interest on the suit land but confirmed that he wrote to the Land Registrar to put a caution on the suit land after the plaintiff's sisters complained to him that the plaintiff had acquired a title to the land without their consent. He stated that he cannot be evicted since he does not live on the suit land.

CHRISPINUS RAJAMI (DW 2), SHEM WANYAMA MAKHAKHA (DW 3), PATRICK MULONGO WANDILI and JERIDA NAMAROME KALAMU (DW 5) testified before me and adopted as their evidence their statements contents of which I have already summarized above.

Submissions were thereafter filed both by **MR KUNDU** instructed by the firm of **SITUMA & COMPANY ADVOCATES** for the plaintiff and by **MR WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the defendants.

I have considered the evidence by both parties and their witnesses, the documents produced as well as the submissions by Counsel.

It is not in dispute that the plaintiff has since 20th June 2008 been the registered proprietor of the suit land. He holds the title thereto issued on the same day. His evidence is that he obtained title to the suit land from the previous owner **JOSEPH SAKWA KWEYU** following a sale agreement dated 2nd November 2007 to which **PATRICK NDALA MAKOKHA (PW 2)** was among the witnesses. The Certificate of Search to the suit land shows that on 7th July 2008 (barely 3 weeks after the plaintiff had obtained the title to the suit land), a restriction was placed thereon following the instructions of the **ASSISTANT CHIEF** vide a letter of the same date. That **ASSISTANT CHIEF** happens to be the 1st defendant herein.

As the registered proprietor of the suit land, the plaintiff is entitled to all the rights and privileges under **Section 24(a) of the Land Registration Act**. That provision reads: -

24 "Subject to this Act –

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

and"

Under **Section 26(1) of the same Act**, however, although the Certificate of title issued by the Registrar to a purchaser of land shall be taken as "***prima facie evidence***" that the person named therein "***is the absolute and indefeasible owner,***" such title can be challenged if: -

(a) it was obtained through fraud or misrepresentation to which that person is proved to be a party; or

(b) where the Certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

Therefore, as the registered proprietor of the suit land, the plaintiff is perfectly entitled to the main prayer which he seeks and that is an order for the eviction of the defendants from the suit land. However, as is clear from **Section 26(1) of the Land Registration Act**, the Certificate of title is only "***prima facie evidence***" that the plaintiff "***is the absolute and indefeasible owner***" of the suit land. The title can be impugned if obtained through fraud which is what the defendants have pleaded. It is also clear from **Section 28 of the same Act** that among the overriding interests to which registered land is subject to are trusts including customary trusts.

In attempting to impugn the plaintiff's title to the suit land, the defendants have pleaded in paragraph 4 of the their defence, the particulars of fraud on the part of the plaintiff. One of those particulars of fraud is pleaded in paragraph 4(iii) as follows: -

"Acquiring title without any or valid consent of the Land Control Board."

I have perused the sale agreement dated 2nd November 2007 through which the plaintiff confirms he acquired title to the suit land from **JOSEPH SAKWA KWEYU**. The agreement is in Swahili language but it is clear that the transaction was subject to the consent of the Land Control Board. No such consent was obtained and when he was cross – examined by **MR WERE** he admitted as much and said: -

“I agree I have no consent of the Land Control Board.”

That therefore means that pursuant to the provisions of **Section 6(1) of the Land Control Act**, the sale agreement dated 2nd November 2007 was *“void for all purposes.”* The term void is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** to include: -

“of no legal effect; to null”

It is also defined as: -

“To render of no validity or effect; to null.”

In **MACFOY .V. UNITED AFRICA LTD 1961 3 ALL E.R 1169, LORD DENNING** stated that: -

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

Clearly therefore, no interest in the suit land passed to the plaintiff on 2nd November 2007 as he would like this Court to believe.

The plaintiff appears to place a lot of premium on the fact that he holds the title to the suit land. However, as the Court of Appeal stated in **MUMU MAINA .V. HIRAM GATHIHA MAINA C.A CIVIL APPEAL No 239 of 2009 [2013 eKLR]: -**

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any incumbrances including any and all interests which need not be noted on the register.”

The fact that no consent of the Land Control Board was obtained is proof of fraud. In any event, how the plaintiff obtained the suit land was, under **Section 112 of the Evidence Act** a matter, within his knowledge. That provision reads: -

112 “In civil proceedings, where any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

That moment the defendants led evidence that the sale agreement was void, the evidential burden shifted to the plaintiff to dislodge that testimony.

It is clear from statement of the 1st defendant that infact the plaintiff’s father **MUTUKUTUKU** who was the proprietor of the suit land purchased the adjacent parcel being **EAST BUKUSU/NORTH SANG’ALO/78** from **SAKWA KWEYU** and settled his family on the two parcels. This is how the 1st defendant has put it in his statement dated 13th June 2014 and which he adopted as his evidence: -

“DISMAS MUNIALO KALAMU has stayed on plot NO 77 and 78 since 1980 to – date. He was given both portions by his late father KALAMU WANAMU MUTUKUTUKU. MR KALAMU the late bought plot NO 77 in the 70’s from SAKWA KWEYU but the transfer was not affected. The boundaries between 77 and 78 were removed by the late father because he owned both and SAKWA moved to another District.”

In 2008 SAKWA transferred plot 77 to DISMAS MUNIALO KALAMU for the purpose of administering the portion on behalf of KALAMU family instead he took ownership and chased his sisters”

One of those sisters is **JERIDA NAMAROME KALAMU (DW 5)** and in her statement dated 14th March 2019 which she also adopted as her evidence; she states as follows: -

“Our father was the late KALAMU WANAMU MATUKUTU had 3 daughters namely: -

1. DIMINA NAFUNA KALAMU

2. JERIDA NAMAROME KALAMU

3. BILHA NANJALA KALAMU

His land was E. BUKUSU/N. SANG’ALO/78. Our said father bought the land from SAKWA KWEYU land parcel NO E. BUKUSU/N. SANG’ALO/77 in the 1968. At that time, KALAMU had land parcel NO 77 which was adjacent and he decided to remove the boundary between the 2 plots for the parcels to merge on the ground.”

The witness goes on to add as follows in the same statement.

“Later SAKWA KWEYU fraudulently transferred land to the plaintiff i.e. land 77”

She then states as follows in the penultimate paragraph of her statement: -

“What we were selling was our land since we were given by our clan. The plaintiff only had title in trust for us.”

It is clear from the statement of **JERIDA NAMAROME KALAMU (DW 5)** that since their mother (and step mother to the plaintiff) had no son, the clan gave them a portion of both the suit land and the adjacent parcel. This is what she states: -

“The girls were given 2 acres near their mother’s grave which they shared 77/78.”

In his evidence in chief, the plaintiff stated as follows: -

“SAKWA KWEYU I know him because his land neighbours mine. He has a family. He sold and moved to the scheme.”

It is not therefore difficult to appreciate why both the plaintiff and **JOSEPH SAKWA KWEYU** gave the Land Control Board a wide berth. The simple answer is because, as stated both by the 1st defendant and **JERIDA NAMAROME KALAMU (DW 5)**, **MUTUKUTUKU** had purchased the land parcel **NO EAST BUKUSU/WEST SANG’ALO/77** (the suit land) from **JOSEPH SAKWA KWEYU** in the 1970 and taken possession although the transaction had not been effected. **JOSEPH SAKWA KWEYU**, as confirmed by the plaintiff, then moved to another District. It must have been obvious to both the plaintiff and **JOSEPH SAKWA KWEYU** that they would have run into serious headwinds had they approached the Land Control Board as their fraudulent schemes would have been exposed.

Unfortunately for the plaintiff, that was not his only dalliance with deceit. At the beginning of this Judgment, I quoted the Bible verse that a liar shall be caught and that even in cheating, one should at least maintain some consistency. In paragraph 4 of his witness statement, the plaintiff makes the following categorical assertion: -

“That on 2nd November 2007, I entered into a land sale agreement with one JOSEPH SAKWA KWEYU for the sale of land parcel EAST BUKUSU/NORTH SANG’ALO/77 at a consideration of Kshs. 95,000 of which I paid the whole amount. The land parcel was 3 acres.”

The figure “*Sh 95,000*” in the sale agreement appeared to have been doctored as **MR WERE** rightly points out in his submissions.

A perusal of the sale agreement shows that the purchase price was infact Kshs. 25,000 paid in the following instalments: -

1. Kshs. 7,000/= on 2nd November 2007
2. Kshs. 8,000/= on 28th November 2007
3. Kshs. 5,000/= on 11th February 2008

On 11th February 2008, the agreement states that the remaining last instalment was Kshs. 5,000/= although it is not clear when that last instalment was paid, if at all. When he was cross – examined on that issue of the purchase price, the plaintiff stated: -

“This land cost Kshs. 25,000.”

This is further evidence that all the transactions involving the suit land between the plaintiff and **JOSEPH SAKWA KWEYU** were fraudulent. And although counsel for the plaintiff **MR KUNDU** has submitted that the defendants did not prove the allegations of fraud to the required standard, the truth of the matter is that it is infact the plaintiff himself who aided the defendants in proving the fraud by both his oral and documentary evidence. He set out on a mission to give false testimony but ended up doing a miserable job. I have no doubt in my mind that the plaintiff was registered as the proprietor of the suit land through a fraudulent scheme. His title to the suit land cannot therefore be protected by **Section 24 (c) of the Land Registration Act** and contrary to the bad name tags that some **CHIEFS** in this country carry, **ASSISTANT CHIEF MARTIN JUMA KWATA** who is sued as the 1st defendant in this case must be commenced for acting fast and placing a restriction on the suit land when he became aware of the fraud.

It is also worth noting that the 1st defendant confirmed that the plaintiff has been living on a portion of the suit land since 1980. The plaintiff himself denied that. This is what he said when he testified on 4th May 2015: -

“I have never lived on that land. I did not live on the land because I needed a title deed to live there. Later I got a title deed from JOSEPH SAKWA.”

That would mean that by the time he testified before **MUKUNYA J** on 4th May 2015, he had been the registered proprietor of the suit land for 7 years yet he had not taken possession of the same. If he was waiting for the title to the suit land before he could *“live there”*, what stopped him from moving onto the suit land as far back as 2008” The truth of the matter can only be that he and his siblings had all along lived on the suit land and the adjacent land parcel **NO EAST BUKUSU /NORTH SANG’ALO/78** as far back as the 1970’s when their father purchased it from **JOSEPH SAKWA KWEYU** though the transfer was not formally effected. And knowing very well that their father **MATUKUTUKU** had acquired interest in the suit land though the title was still in the names of **JOSEPH SAKWA KWEYU**, the two of them devised a plot to have it transferred into his names perhaps trying to take advantage of the fact that his siblings were ladies. That scheme, as it must now be clear, has fallen flat on it’s face. This Court must therefore make it clear to the plaintiff that his title to the suit land is null and void and there can be no basis upon which he can evict the defendants or his siblings therefrom as sought in his plaint.

Having found that the plaintiff obtained registration of the suit land through a fraudulent scheme, and although the defendants have not asked me to do so, it would amount to a serious dereliction of duty if I do not exercise the powers reposed in me by **Section 80 of the Land Registration Act** by cancelling that title. To leave that registration in place will only open avenues for more mischief by the plaintiff. This Court must abide by the dicta of the Court of Appeal in **CHEMEY INVESTMENT LTD .V. A – G & OTHERS 2018 eKLR** where it said after citing several other cases that: -

“Decisions abound where Courts in this land have consistently declined to recognize and protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

While a restriction on the suit land has been in place since 2008, it is not unusual for persons to collude with the Land Registry and stealthily remove such restrictions.

I must therefore seal that loophole and I shall make appropriate orders in that regard.

Before I do so however, there is one important issue that I need to address. In the course of the trial, the issue of whether or not the plaintiff holds the suit land in trust for his sisters arose. In her statement dated 14th March 2019 and which I have already referred to in this Judgment, **JERIDA NAMAROME KALAMU (DW 5)** who is one of three sisters to the plaintiff stated that he holds the title to the suit land *“in trust for us.”* The 1st defendant on his part stated that the suit land was transferred to the plaintiff *“for the purpose of administering the portion on behalf of KALAMU family instead he took ownership and chased his sisters.”* In paragraph 11 of the defence, the defendants pleaded that the plaintiff’s three sisters had a *“legal interest in the land and heirs and beneficial users thereof.”* That was denied by the plaintiff in paragraph 8 of his reply to the statement of defence where he pleaded that *“the plaintiff wishes to state that his sister did not have any legal rights over the above parcel of land.”* In his submissions, Counsel for the defendant has stated as follows: -

“We reiterate that the suit land is not the plaintiff’s but his fathers hence family land. He obtained titled in 2008 but he was only meant to hold it in trust for himself and his sisters including DW 5. His title was not absolute but subject to the provisions of Section 25 of the land Registration Act.”

That provision provides that the registration of land in the name of a person does not relieve him of *“any duty or obligation to which the person is subject to as a trustee.”*

It is clear from the above that the issue of trust runs through the proceedings and was raised by the parties though it was not pleaded. The jurisprudence available is that a Court can base its decision on an unpleaded issue. In **ODD JOBS .V. MUBIA 1970 E.A 476, LAW J A** made the following observation: -

“On the point that a Court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa, the position is that a Court may allow evidence to be called, and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the Court for decision.”

In this case, the issue as to whether the suit land was the absolute property of the plaintiff following a purchase from **JOSEPH SAKWA KWEYU** or whether it was infact family land previously purchased by his father **MUTUKUTUKU** was clearly palpable during the trial. And as I have already found above, the suit land was infact family land in which the plaintiff’s father **MATUKUTUKU** had a beneficial interest having taken possession thereof since the 1970’s from **JOSEPH SAKWA KWEYU**. **MATUKUTUKU** lived thereon with his family which included the plaintiff and his sisters who also acquired beneficial interests therein. The said sisters even went ahead to sell portions of the suit land to third parties whom the plaintiff now wants to evict many years down the line. Those facts are sufficient evidence upon which this Court can conclude, which I hereby do, that even as the plaintiff fraudulently transferred the suit land in his sole names, he remained for all practical purposes, a trustee holding the same in trust for himself and his sisters. The trust herein is a constructive trust which, as was held in **TWALIB HATAYAN TWALIB HATAYAN .V. SAID SAGGAR AHMED AL HELDY & OTHERS 2015 eKLR**,

“..... Is an equitable remedy imposed by the Court against one who has acquired property by wrong doing Imposition of a constructive trust is thus meant to guard against unjust enrichment”

Therefore, the plaintiff’s claim that he is the absolute and indefeasible proprietor of the suit land is not only hollow following the proof that the said registration was obtained fraudulently but is also subject to a trust in favour of his siblings. And that explains why the plaintiff did not enjoin his sisters in this case. This is because he was well aware that any such suit against them would be defended on the basis of a trust since the suit land was family property. And although the plaintiff’s sisters are not parties to this case, I find that the orders which I am about to make are justified bearing in mind that the said sisters have infact already disposed off their respective portions to third parties. It is important therefore that I bring this matter to a closure by giving those third parties a foundation upon which they can now formalize their ownership of the respective portions. In doing so, I am cognizant of the fact that in her statement, **JERIDA NAMAROME KALAMU (DW 5)** stated as followed: -

“We sold their (sic) land parcels as follows: -

1. DIMINA sold to PATRICK M. WANDILI 1 acre.

2. JERIDA sold to DICKSON M. WANYAMA son to SHEM MAKHAKHA the 3rd defendant 1/2 an acre.

3. BILHA sold to EDITH CHABAYA MUNGALITSI ½ an acre. She is the wife to 2nd defendant”

That evidence was not rebutted by the plaintiff. Of course, whether or not the plaintiff’s sisters passed any title to the said third parties is not for this Court to decide. However, the orders that I propose to make will assist them in addressing that issue.

Ultimately therefore and having considered all the evidence herein, this Court makes the following orders: -

- 1. The plaintiff’s claim is dismissed.**
- 2. An order is directed to the Land Registrar BUNGOMA to rectify the register to the land parcel NO EAST BUKUSU/NORTH SANG’ALO/77 so that it reflects that the plaintiff holds the same in trust for his sisters DIMINA NAFUNA KALAMU, JERIDA NAMAROME KALAMU and BILHA NANJALA KALAMU.**
- 3. The plaintiff shall within 14 days of this Judgment surrender the title to the land parcel NO EAST BUKUSU/NORTH SANG’ALO/77 to the Land Registrar BUNGOMA for that purpose.**
- 4. In default of (3), the Land Registrar BUNGOMA shall be at liberty to cancel the title held by the plaintiff and issue another title reflecting (2) above.**
- 5. The plaintiff shall meet the defendant’s costs.**

Boaz N. Olao.

J U D G E

12th November 2020.

Judgment dated, signed and delivered at **BUNGOMA** this 12th day of November 2020 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

12th November 2020.



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