



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 44 OF 2015

FRANCIS TOBIAS AKELLO PLAINTIFF

(suing as administrator of MATAYI AKELO OLOO)

= VERSUS =

GABRIEL ONYANCHI SUNDIA DEFENDANT

J U D G M E N T

1. The Plaintiff herein – **FRANCIS TOBIAS AKELLO** – instituted this suit here on 12/5/2015 vide a plaint dated 8/5/2015. He filed the matter as the administrator of the estate of the late **MATAYI AKELO OLOO**. He pleaded that the Defendant – **GABRIEL ONYANCHI SUNDIA** – has illegally occupied part of land parcel No. SAMIA/LUANDA-MUDOMA/3452 (“disputed land” hereafter) thus impeding his plans to distribute the estate of the late MATAYI AKELO OLOO.
2. The Plaintiff is the registered owner of the disputed land but it’s clear that he holds it in trust for himself and others entitled to it. There has been previous litigation over the disputed land which included ELC NO. 24/2009, ELC 20/2013 and PMCC No. 106 of 2008, BUSIA.
3. The Plaintiff is asking for the following orders:
 - 1) Injunction restraining the Defendant, his family members, servants, agents, and those claiming through him from cultivating, developing, or otherwise dealing with land parcel No. SAMIA/LUANDA-MUDOMA/3752.
 - 2) Order of demolition and eviction.
 - 3) Damages.
 - 4) Costs
4. The Defendant filed his defence on 5/6/2015 and counter-claimed. He denied existence of the disputed land and denied that it was part of the estate of the late MATAYI AKELO OLOO. He pleaded that he resides on land parcel SAMIA/LUANDA-MUDOMA/1369 and has so resided for over 60 years.
5. In his counter-claim, the Defendant introduced a new party – **COUNTY LAND REGISTRAR** – who is said to be an “**INTERESTED PARTY**”. He then pleaded that the disputed land is a product of fraudulent merger by the Plaintiff of two pre-existing land parcels – **SAMIA/LUANDA-MUDOMA/1369** and **SAMIA/LUANDA-MUDOMA/693**. And the fraudulent nature of the merger allegedly consisted in execution of illegal order in BUSIA LAND DISPUTE TRIBUNAL Case No. 106/2008; presentation of forged documents to the land registry; purporting to be a registered owner and administrator at the same time; consolidating the estate of a deceased person without involving administrators; and, finally, concealing the existence of adjudication involving land parcels Nos SAMIA/LUANDA-MUDOMA/1369 and SAMIA/LUANDA-MUDOMA/693.
6. According to the Defendant the merger or amalgamation of the two parcels of land was illegal and was a product of concealment of material facts.
7. The Plaintiff responded to the defence and counter-claim on 19/6/2015 but the response was later amended, re-dated, and re-filed on 23/1/2017. According to the Plaintiff, the counter-claim filed is *RES-JUDICATA* as the issues raised were dealt with in the previous cases between the parties. The plaintiff denied that the Defendant represents the estates of LUKAS SUNDIA MUGA and OKOTH MUGA KHEDERA and averred that the Defendant’s occupation of parcel No. 1369 has never been peaceful. He further denied fraud in merger or

amalgamation of the two parcels of land. He pointed out that the merger was pursuant to a court order after the Defendant had exhausted all available court processes.

8. The prayers sought by the Plaintiff have already been stated. On his part, the Defendant is seeking the following prayers in his defence and counter-claim:

- 1) Dismissal of the Plaintiff's suit with costs.
- 2) A declaration that the consolidation of Land Parcels SAMIA/LUANDA-MUDOMA/693 was illegal and is hereby revoked.
- 3) Costs of the suit.

9. The court heard the matter on two dates – 27/9/2017 and 1/10/2018. The parties were the only ones to testify. They did not call other witnesses. The Plaintiff testified first and availed two exhibits: a grant (PEX No.1) to show he is the administrator of the disputed land and a title deed (PEX No.2) to show he is the registered owner.

10. He then said that the disputed land first belonged to his grandfather, then to his father, and now to him for himself and his siblings. The Defendant, whose place of origin is said to be a place called Marachi, is said to have come and asked to be allowed to cultivate before going back to Marachi. He was allowed but never went back to Marachi. The original parcel was SAMIA/LUANDA-MUDOMA/693 but the Defendant got a portion of it, which was registered as SAMIA/LUANDA-MUDOMA/1369. The Plaintiff later contested this ownership through a dispute filed at the then existing Land Dispute Tribunal of the area and succeeded. The events that followed after the decision of the land tribunal ultimately led to the merger or amalgamation of the parcel No. 1369 and 693 resulting in one parcel No. 3752.

11. Upon cross-examination by Jumba for the Defendant, the Plaintiff said, *inter alia*, that other people, not only the Defendant, live on the land but the Defendant brought them and are there because of him. The Plaintiff denied that parcel No. 1369 was registered in Defendant's relatives name right from the beginning. He denied knowledge of any appeal filed by his late father to the minister during adjudication contesting ownership of parcel No. 1369 by the Defendant. He also denied being fraudulent in the manner he acquired the disputed land.

12. When the Defendant's turn to testify came, he adopted his statements made on 15/7/2015 and 11/4/2017. He made the point that when the Plaintiff took him to the Land Dispute's tribunal, he was not the administrator of the deceased owners of parcel No. 1369. In the statements, the Defendant averred, *inter alia*, that he is the administrator of the estates of the deceased joint owners of Land parcel 1369. The deceased owners were LUCAS SUNDIA, ODUMA MUGA, and OKOCHI MUGA. Prior to registration of the three as owners, the Plaintiff's late father is said to have filed objection to such ownership. He lost the objection. From then on the families of the deceased owners have been living on the land.

13. According to the Defendant, the merger of parcel No. 693 and 1369 came as a consequence of an illegal order allegedly based on the outcome of the proceedings of the Land Dispute's Tribunal. It was said to be an imagination of the Plaintiff himself and the land Registrar. Further, he said that the decision of the Land Dispute Tribunal was one made without jurisdiction and any subsequent proceedings based or founded on it were irregular and could not defeat title to parcel No. 1369.

14. The Defendant also introduced another angle to the matter. According to him, neither the Plaintiff nor himself had the requisite probate letters when the Land Disputes Tribunal handled the matter yet those who owned the land were deceased. The proceedings, he said, were therefore a nullity and the subsequent adoption of the tribunal's decision by the court was also equally so.

15. And noting that the Plaintiff alleged that the counter-claim filed is *RES-JUDICATA*, the Defendant stated that the court cases he had filed before the counter claim, both being Judicial Review Application No. 24 of 2009 and Busia ELC No. 20/2013, were not decided on merit and the principle of *RES JUDICATA* therefore cannot apply.

16. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed on 13/11/2018. The Plaintiff submitted, *inter alia*, that it is an established position that parcel No. 1369 is not part of the disputed land. He submitted too that the Defendant alleged fraud in his counter-claim but failed to prove it. Further, the Plaintiff said that ownership of parcel No. 1369 is a closed issue, a competent court of law having resolved it. It was pointed out that there was first the dispute at the Land Dispute Tribunal where the Defendant lost. He appealed to the Provisional Land Appeals tribunal and lost also. He then filed a Judicial Review matter at the High Court and also lost. In addition, he had also filed ELC No. 20/2013, which he withdrew. In all these court matters, the firm of advocates now representing him also acted for him.

17. The Plaintiff submitted that the Defendant has reached the end of the road and it is now time to vacate the disputed land. As regards the issues raised in this case by the Defendant, the Plaintiff submitted that the issues should have been raised in the cases that preceded this one. It was pointed out too that the issues raised were never pleaded.

18. The Defendant's submissions were filed on 22/10/2018. He gave a summation of the case. The issues arising were then itemised thus: Can the minister's decision under the Land Adjudication Act be challenged by the land tribunal? Did the parties herein have *Locus Standi* to participate in the Land Dispute Tribunal's proceedings? Was the Land Dispute Tribunal decision capable of being executed? And finally, did the decision of the Land Dispute Tribunal provide for amalgamation?

19. Concise answers were then given to the issues, with the Defendant pointing out that the minister's decision is still in force and could not be challenged or overturned by the tribunal. It was further pointed that as the parties did not have probate letters, they lacked *Locus Standi* to participate in the tribunal's proceedings. The merger of both parcels of land was said to be illegal since the court order did not authorise or provide for it.

20. I have considered the material laid before me by way of pleadings, oral and documentary evidence, and submissions. It is not the first time that the disputants are engaging each other over the disputed land. There have been several other disputes.

21. It appears to me that the parcel No. 3752 is a merger or amalgamation traceable to the decision made by the Land Dispute's Tribunal. The Defendant tried to challenge that decision. He filed an appeal at the then Provincial Appeals Committee. He does not seem to have succeeded. He then filed a Judicial Review. Again he was not successful. The consequence of all this is that the decision of the Land Dispute's Tribunal remained and parcel No. 3752 is the ultimate result of its implementation. The Defendant calls the order illegal. His counter-claim however is not a challenge to that order. The declaration sought merely challenges the consolidation without asking the court to do anything about the order. And that is where, in my view, the weakness of the counter-claim is.

22. When orders are made by a court of law, there is always a rebuttable presumption that they are legal and/or have the force of law. The decision of the Land Disputes Tribunal was adopted as a judgement of court. From that judgement must have arisen the order that ultimately led to the creation of the disputed land. Anyone wishing to reverse the situation needs first to seek to set aside, overturn or nullify that order. This court is not asked to do so and it appears clear that the Defendant's attempts to do so via other suits were not successful.

23. The position then is clear that the order still stands. Without first doing something to rebut and/or displace it, you cannot successfully ask for a declaration that a merger, consolidation, or amalgamation resulting from it is illegal. And it is obvious that if a court order is successfully challenged, all things done as a consequence of such order can be easily nullified or neutered. But what the Defendant seems to seek in his counter-claim is a disregard of, rather than a displacement or nullification of, the order. It simply cannot work. The order needs to be displaced first.

24. The Defendant is said to have filed a Judicial Review, which was dismissed. He did not avail the proceedings but it's easy to guess it was challenging the decision of the land tribunal. Such proceedings were common then and some of them are still pending in our courts. It is not clear to me why the Judicial Review matter was dismissed but the Defendant needs to realise that the order he sought to challenge still stands and the presumption that it is legal must still guide this court. I am therefore unable to allow the Defendant's counter-claim. It is not proved and I dismiss it with costs.

25. This now leaves me with the Plaintiff's suit. He showed that he is the registered owner of the disputed land. The rights and privileges that go with such ownership must be construed in his favour. I say this knowing that had the Defendant correctly given the right approach to his matter, he seems to have rather cogent reasons for being on the portion of the disputed land that he occupies. It seems to me that the Defendant has been blundering in the court proceedings he has been engaged in. In this matter itself, his approach was obviously incorrect. He wants to bypass an order that he failed to remove in past proceedings.

26. The position then still stands that what the Defendant alleged against the Plaintiff was not demonstrated. Allegations of fraud were for instance made. But such allegations remain only on paper, with the Defendant having availed no evidence to prove them. Given all this, I find it necessary to allow the Plaintiff's suit to the extent of prayers (i), (ii), and (iv). I hereby grant the said prayers. Prayer (iii) which is for damages, is not granted as nothing was availed to prove it.

Dated, signed and delivered at Busia this 20th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Present

Defendant: Present

Counsel of Plaintiff: Present

Counsel of Defendant: Present

Court Assistant: Nelson Odame