



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 116 OF 2016

M W O PLAINTIFF

VERSUS

E O (being sued as next friend and guardian to

L A, D O P & M O – MINORS).....DEFENDANT

J U D G E M E N T

1. By a plaint dated 14/9/2016 and filed in court on 15/9/2016, the Plaintiff at the time – **M W O** – complained that the Defendant – **E O**, who is sued as guardian and next friend to her minor children, **L A, D O** and **M O**, had caused fraudulent registration of her said children as owners of Land parcel No. BUKHAYO/MUNDIKA/[particulars withheld] (“suit land” hereafter). The suit land initially belonged to one **O O O**, who was the father to the minor children and husband to both the Plaintiff and the Defendant. **O O O** is now deceased and the Plaintiff avers that she is the administratrix of his estate.

2. Fraud in the process of registration of the minor children as owners was said to consist in submitting falsified documents to Land Control Board and Land Registrar; concealing the fact of ownership of the suit land by **O O O**; and failing to disclose to Land Control Board and Land Registrar that the registered owner was deceased. The fraudulent registration of the minor children as owners was said to be illegal as it had deprived other legitimate beneficiaries of their lawful entitlement.

3. The prayers sought in the plaint are as follows:

(a) An order for cancellation of title and transfer of L.R. No. BUKHAYO/MUNDIKA/[particulars withheld] by the Defendant into the names of her three (3) children – **L A, D O** and **M O** – and that the title to revert to the names of **O O O** now deceased to ensure proper, full and conclusive administration of the deceased’s estate.

(b) Costs of the suit and interest.

(c) Any other relief this honourable court may deem just and fit to grant.

4. The Defendant’s response came vide a defence filed on 15/11/2016 and dated 26/10/2016. The Defendant pleaded, *inter alia*, that the transfer of the land to her minor children was procedural, proper and lawful. She also took issue with the issuance of a grant to the Plaintiff without the consent of other beneficiaries to the estate of the late **O O O**.

5. At some point in the proceedings, the Plaintiff donated a power of attorney to her son – **L O O** – to handle this case for her. At the time of hearing therefore, it is the said **L O O** who testified in lieu of the Plaintiff. The hearing itself started on 30/1/2018, with **L O O** testifying as PW1.

6. **L** adopted the Plaintiff’s written statement dated 18/5/2017 as evidence. The written statement itself is simple. It asserts the Plaintiff’s right to bring the suit relating to the suit land. The Plaintiff pointed out that she had letters of administration. It was then averred in the same statement that the Defendant transferred the suit land to her children in a fraudulent manner. Such transfer was said to have been done when succession relating to the registered owner’s estate had not been done.

7. **L** further said that his mother was the 5th wife of the then registered owner. That registered owner died on 4/6/2008. The suit land was transferred to the Defendant’s three children on 6/8/2008, some two months after the death of the registered owner.

8. In the course of hearing, PW1 availed the following exhibits:

(i) PEX No. 1 - Copy of green card for the suit land.

(ii) PEX No. 2 - Copy of Certificate of Death of Plaintiff's and Defendant's husband, who was also PW1's father.

(iii) PEX No. 3 -copy of grant in Succession Cause No. 136/2012, Busia.

(iv) PEX No. 4 - Power of Attorney granted to PW1 to step in for the Plaintiff in this case.

(v) PEX No. 5 - Copy of receipt showing payment for registration of the power of attorney at the Land's office.

9. During cross-examination by Jumba for Defendant, PW1 admitted that the grant in the succession case was granted to his mother only, leaving out other beneficiaries like the Defendant. He insisted too that it is the Defendant who caused the transfer of the suit land to her three minor children but was unable to avail anything when challenged to show something to prove that the Defendant caused the transfer.

10. The Defendant testified on 9/4/2018 as DW1. Her defence was simple: it was her late husband, not herself, who transferred the land to the children. In the course of hearing, DW1 availed the following exhibits

(i) DEX No. 1 - Application for consent made to Land Control Board.

(ii) DEX No. 2 - Consent to transfer the suit land.

(iii) DEX No. 3(a) & (b) - Two receipts showing payment for transactions at the land's office.

(iv) DEX No. 4 - Transfer form.

(v) DEX No. 5 - Copy of the green card for the suit land.

11. During cross-examination by Ashioya for the Plaintiff, the Defendant said, *interalia*, that some of her children are now adults although they were all minors when the suit land was transferred to them. She also said that it is their father who went to Land Control Board. She denied being involved in the transfer.

12. Both sides filed written submissions. The Plaintiff's submissions were filed on 10/5/2018. Counsel for the Plaintiff emphasized the fact of registration of the Defendant's children as owners when their father had already passed on. He pointed out that the Defendant had already admitted this fact and had also admitted that the children were minors when they were registered as owners. To the Plaintiff, what happened was irregular and unlawful.

13. The Defendant's submission were filed on 23/4/2018. The submissions gave an overview of the presentation made by both sides in the case. It was then submitted, *interalia*, that the transfer was effected by the Defendant's late husband. The Plaintiff was faulted for not enjoining the Land Registrar in this case yet the Land Registrar would have been pivotal in enlightening the court how the transfer was done after the death of the Defendant's husband. The court was asked to dismiss the Plaintiff's case with costs. I have carefully considered this case.

14. When the case was initiated, the Plaintiff alleged that there was fraudulent transfer of the suit land by the Plaintiff to her children after the death of the original owner of the land. The fraud alleged was said to consist in submitting forged documents to Land Control Board; Concealment of the fact of registration of O O O as owner; and concealment of the death of the said O O O.

15. During hearing, the court expected that evidence would be led showing evidence of presentation of forged documents to Land Control Board. This evidence was not availed. It was also expected that evidence of alleged concealment would be tendered. It was not. Instead, what was availed can only lead to assumptions or inferences. And while the desired inferences or assumptions would be that the defendant was fraudulent and/or less than honest, the evidence presented does not rule out other inferences or assumptions that do not implicate the Defendant.

16. Fraud is a serious allegation. The law requires that it be demonstrated or proved on a scale higher than a balance of probabilities. In this regard, the court needed to be shown better that the Defendant conceived and executed the process of transfer of the suit land to her children. But the documentation availed does not implicate the Defendant. Instead, the said documentation speak to us not of a process started by the Defendant herself but by her late husband. This is what the Defendant herself alleged in her defence.

17. It needs to be borne in mind that the Defendant carried no duty to prove herself in the case. To the contrary, it was the Plaintiff's duty to prove her case to a degree higher than on a balance of probabilities. The Plaintiff made heavy weather of the alleged fact transfer was done after the death of the owner of the suit land. But the letter of consent to transfer presented as DEX No. 2 by the Defendant is dated 8/2/2006. That letter of consent is authority to lands office to effect transfer when presented.

18. As to when the lands office should effect such transfer after the consent is presented, nothing shows that there was a given time – frame to do it. Nothing also shows that the lands office required further prompting or application to do the transfer once the consent was presented. The name of the Defendant does not appear anywhere in the consent. The transferor is shown as O O O, who was the owner, while the transferees are the three minor children. And the consent was given when the transferor was still alive. That is why I am saying that apart from the inferences or assumptions that the Plaintiff would wish the court to make, there are other more reasonable and well-founded assumptions or inferences that can be made.

19. I agree with the Defendant that the Plaintiff should have made effort to bring the land office on board either as a party or as a witness. I say so because the transfer document and green card availed do not show fraud on the part of the Defendant. Some explanation from the lands office would have been necessary. It behoved the Plaintiff to appreciate that cases in a court of law do not rest on assumptions or inferences, much as these two may be invoked at times, but on sound evidence leading to adequate proof.

20. It is my finding that when all is considered, the evidence tendered by the Plaintiff is inadequate. The defence tendered by the Defendant is an adequate rebuttal to that evidence. The Plaintiff's case cannot therefore stand. It is not proved on a balance of probabilities and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 23rd day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....