



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

HIGH COURT CIVIL SUIT NUMBER 63 OF 2007 TRANSFERRED FROM KISUMU

CHARLES ANTHONY ONDIEK.....1ST PLAINTIFF

ESAYA OYOO WARIERO.....2ND PLAINTIFF

WILLIAM ODHIAMBO WARIERO.....3RD PLAINTIFF

VITALIS OTIENO WARIERO.....4TH PLAINTIFF

VERSUS

THOMAS ODIAMBO NYONJE.....1ST DEFENDANT

GIDEON OKECH RAYOLA.....2ND DEFENDANT

STEPHEN NYANJWA AGAL.....3RD DEFENDANT

JACINTA M. AKINYI KWAME.....4TH DEFENDANT

(Joint as the legal representative of the estate of William Kwame Otieno – Deceased)

EVALYNE ACHIENG OKOTH.....5TH DEFENDANT

(Joint as the legal representative of the estate of Charles Okoth Wariero – Deceased)

EMANUEL OTIENO ONYANGO.....6TH DEFENDANT

REGISTRAR OF LANDS KISUMU (A.G).....7TH DEFENDANT

J U D G M E N T

1. By their further amended plaint the plaintiffs prayed for the following prayers and orders.

a) **AN ORDER** of the Court does issue directing the cancellation and or transfer of all the parcel of land known as KISUMU/KANYAKWAR “B” 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 10120, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 10128 and to order rectification of the register reinstating the parcel of land known as KISUMU/KANYAKAWAR “B” 893 and or ordering the same transferred back to the Plaintiffs.

aa) **A DECLARATION** that the purported sale, transfer and or alienation and deleting from the register of the parcel of land known as KISUMU/KANYAKWAR “B” 893 and creation there from of all the parcels of land known as KISUMU/KANYAKWAR “B” 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1017 and 1028 is irregular, illegal and therefore null and void.

Aai) **A DECLARATION** that the parcel of land known as KISUMU/KANYAKWAR “B” /'893 was trust/ancestral, cultural land and was not capable of being transferred or alianated or sold by the trust holder CHARLES OKOTH WARIERO to the Defendants or any other party and that the said parcel known as KISUMU/KANYAKWAR “B”/893 beneficently devolved upon the 1st plaintiff CHARLES ANTHONY WARIERO ONDIEK and ought to be registered as such in his name.

aa) **A DECLARATION** that the purported mutation, transfer and or alienation and deleting from the register of

the parcel of land known as KISUMU/KANYAKWAR "B" / 893 and creation of all the parcels of land known as KISUMU/KANYAKWAR "B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 10121, 1022, 1023, 1024, 1025, 1026, 1027 and 1028 by the Commissioner of Lands through the Registrar of Lands Kisumu is irregular, illegal and therefore null and void.

Aaⁱⁱⁱ) AN ORDER for the transfer of all the parcels of land known as KISUMU/KANYAKWAR "B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 1028 created through the mutation/deletion of the plaintiff's parcel of land known as KISUMU/KANYAKWAR "B" 893, back into the name of the 1st plaintiff.

b) A permanent injunction be issued restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants by themselves, agents, servants, employees or otherwise howsoever from encroaching into, carrying out any construction works, erecting on, dealing with, transferring, alienating or in any way interfering with the proprietary rights, interests and possession enjoyed by the plaintiffs over all the parcel of land formerly created therefrom known as KISUMU/KANYAKWAR "B"/893 and all title created therefrom known as KISUMU/KANYAKWAR "B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 10121, 1022, 1023, 1024, 1025, 1026, 1027 and 1028.

C) General damages

d) Costs

e) Interests on (c) and (b) above.

2. This matter began wayback in the year 2007 and for reasons contributed by all sides including the judicial officers transfers has taken a considerable long time.

3. The parties essentially agreed to rely on the statements filed by their respective witnesses and at the conclusion of the case all the exhibits were produced by consent especially those by the 7th Defendant.

4. Those who testified on behalf of the plaintiffs were **Charles Anthony Ondiek, (PW1)** who apparently passed on in the continuity of this suit, **PW2 Inspector John Muinde** who was a document examiner.

PW3 Vitalis Otieno Wariero and PW4 Jeremiah Opiyo.

5. On behalf of the defence **Stephen Agai DW1, Thomas O. Nyonje DW2 and DW3 Emmanuel O. Onyango.**

6. The bundles of exhibit 1 by the plaintiff were then at the tail end of the proceedings produced by consent and they relate too the affidavit of George Nyangweso in respect to the 7th defendant's evidence.

7. Having gone through both evidence by the plaintiffs and the defence as well as perusing the exhibits produced, the background to this long and protracted suit is as hereunder.

8. The plaintiffs claim that the suit land originally known as **Kisumu/Kanyakwar/299** belonged to their patriarch the late **Raphael Wariero**. The same was ancestral land where he lived with his family. During adjudication exercisethe said parcel was registered in the names of **Peterlis Otieno Wariero and Charles Okoth Wariero**.

9. The same was later subdivided into land parcels numbers 894, 895, 896, 897, 898, 899, 900 and 901. The beneficiaries of the resultant titles were several members of the families as per their family tree. These facts are not disputed.

10. While the plaintiff and their sibblings were awaiting the transfer of the above parcels of lands to themselves, they discovered that the same had been fraudulently transferred to other strangers who were not genuine beneficiaries. They wrote to the District land Registrar vide letter dated 12/7/1997 and 23/3/1997. The land Registrar found this to be true and cancelled and placed caution on the register. The caution was placed on 18/2/1997.

11. On 31/7/1998 the land Registrar wrote to the 2nd defendant Geideon Okech Rayole and 6 others demanding that they surrender the fraudulently obtained titles for cancellation.

The 2nd defendant however failed to surrender the same.

12. The plaintiffs took out a complaint with the Land Registrar and vide proceedings dated 22/4/1999 the land Registrar restricted all the titles till the matter was resolved through a court process.

13. The plaintiff then filed a Land Dispute Tribunal number WIN/LDT/20/99 In which its findings were adopted vide case No. Misc 32/2003 at Kisumu. The tribunal found that the plaintiffs were legitimate owners of the titles and that the Land Registrar do proceed to gazette the same. A decree adopting the tribunals award was issued to that effect.

14. The Land Registrar then proceeded to gazette the said titles but for some reason omitted parcel number Kisumu/Kanyakwar 'B' 893. The

1st plaintiff then wrote to the Land Registrar seeking an explanation as to why Plot No 893 was omitted from the gazette. While the Registrar's answer was being awaited the plaintiffs discovered that the said parcel of land Kisumu/Kanyakwar B 893 had been transferred to the 3rd defendant through a power of attorney by the 2nd defendant. The said land had been further subdivided to create land parcels number Kisumu/Kanyakwar 'B' 1005 – 1028 and had them registered in the names of 1st to 6th defendants herein.

15. Apparently on 22/5/2006 the Chief Land registrar through the advise of the District land registrar, lifted the restriction placed on the said parcels of land.

16. From the exhibits produced it appears that there was a sale agreement dated 11/8/1995 which indicates that the 2nd defendant purchased the suit land from the 1st plaintiff (now deceased). That agreement according to the plaintiffs was a forgery.

17. The defendants on their part jointly and severally have averred that the sale and transfer was above board. They did produce copies of the sale agreements as well as consent from the relevant Land Control Board. They testified that as at the time of transfer there was no restriction on the Register and that there was no fraud at all.

18. The 1st defendant testified that he purchased parcels number 1005, 1006, 1007 and 1008 from Gideon Rayola and Stephen Agai Rayola after conducting due diligence and the search showed that the same were free from any encumbrances. According to him he sought and obtained consent from the Land Control Board and did not receive any notice to surrender the titles.

19. The 6th defendant on his part claimed that he was an innocent purchaser for value without notice. That after conducting a search he proceeded to enter into a Sale agreement with the 3rd defendant and purchased land parcel No. Kisumu/Kanyakwar/B/1077 and obtained the relevant consent from the land Control Board. He said that he has taken over occupation of the Land and that he did not inquire about the history of the land as it was unencumbered after all.

20. Having summarised the facts herein and essentially that being the line of evidence adduced during trial it is worthwhile at this juncture to carry out the analysis of the same.

Analysis and Determination

21. I have read extensively the pleadings herein as well as the relevant exhibits produced by the parties. It appears clearly that as regards the exhibits no major objection was raised by the parties except the document examiners report PW2, which he at any rate testified and produced in court. All the other exhibits be it minutes, correspondences, proceedings of the Land Disputes Tribunal as well as its adoption, the green cards of the suit parcels, sale agreements as well as the transfers and the consents from the Land Control Board are not disputed. They all cut across the parties and they have made references to them. The majority of the exhibits which were relied on were those by the 7th defendant.

22. The court has equally perused the submissions made by both the plaintiffs as well as the defendants. The 7th defendant apparently did not file any submissions.

23. The central issue framed up by the parties for determination is whether there was fraud as alleged by the plaintiffs in the sub-division and subsequent transfer of the suit parcel of land from Kisumu/Kanyakwar B/ 299 to 893 and thereafter to 1005 – 1028. There is no doubt that as things stand as at the time of filing this suit there existed the above titles.

24. Whatever answer will be arrived at, namely whether there was fraud or not, then the other issue raised by the plaintiffs concerning whether the plaintiffs held the land in trust or not and the question of adverse possession may not be very material. In any case, the history of the land clearly suggested that it devolved from the late Raphael Wariero. The defendants in one way or another seem to have obtained title by virtue of the purchase of their respective parcels.

25. Black Law Dictionary 10th Edition has defined fraud as;

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

26. To answer this issue of whether and how fraud was perpetrated I think its appropriate to follow step by step the correspondences and proceedings exchanged between the various parties as well as other court proceedings.

27. By the letter undated letter the 1st plaintiff then a chairman of Atieno Self Help Group wrote to the District surveyor on “Redetermination of Boundaries of acquired Kanyakwar B Land – Kisumu Municipality” Exhibit P1.

28. The District surveyor a Mr Isaya Mboya Adude by his letter dated 20/2/1992 replied

“ As indicated in your letter (paragraph one), the main purpose of the current exercise is to redetermine the boundaries of government acquired land as accurately as possible. Once this is done, permanent marks (beacons) will be built along this boundary so that the present and any future complaints may be laid to rest. Please be rest assured that it is not our intention nor the government's intention to encroach on anybody's land -----”

29. On 5/7/94, the plaintiff wrote to the District Land Registrar Kisumu that;

“ RE: Rectification of parcel Kanyakwar 'B'/299”

We are registered proprietors of the above parcel of land. We wish to request your good office to rectify the manner our parcel has been shown on the map. The area shown on our title deed is much smaller than that is on the ground.”

30. From there the process of rectification was done and a mutation drawn. Exhibit P5.

31. Subsequently by a mutation dated 13/9/1994 land parcel number Kisumu/Kanyakwar 'B'/299 was subdivided into 10 portions which gave rise to parcel number Kisumu/Kanyakwar/ 892 – 901.

32. By a letter dated 28/1/1997 (Exhibit P7) the plaintiffs confirmed that the above 10 parcels of lands were to go to various persons as enumerated in the said letter. The said letter went on to state

“ In two months later we went to see Mr Mboya for the progress and he just verbally brushed us off that our application for rectification of the acreage was rejected by the provincial Surveyor Mr James Oduol and forms were destroyed so we should forget about it. Then we decided to play it cool while arranging how we can see the higher authority to assist us. Before we went for higher authorities assistance we revised our mind to start it afresh with the current officers in the survey department. With the help of the officers we were shocked to find funny names which we do not know as owners of plots as Gideon Okech Rayola of P.O. Box 90202 Mombasa – Plots 893-895, Albert Odhiambo Owiti a teacher at Dago primary school plots numbers 896, 897 and 900, Shadrack Ochieng Ogwany Plot no. 898 and 901, Edward Onyango Ogwany Plot No. 899.

Now we are requesting you to recall these people with title deeds and also let us know when we were invited and attended the board in which the transfers were passed and given to these unknown people”.

33. He proceeded on 3/2/1992 to write to the 2nd defendant and he pleaded with him to return the titles 894 and 895.

He carbon copied the said letter to Isaya Mboya then District surveyor Siaya and stated;

“ I urgently need your formal account of the matter including where you took the official mutation sub division forms/the official receipt of parcel No. 229 which M/S Koyo Agayi/Odhiambo Owi passed to you for processing some time back . Treat the matter as important to us and all who could be affected.”

34. After several correspondences and actions on 31/7/1995 Exhibit P 16, the land Registrar wrote among others to the 2nd defendant to return all the titles stating that;

“ ----- the parcels numbers 893 to 901 were transferred to you. The transfers were done fraudulently without the consent of the registered owners. They came to the office complaining bitterly about the transfers. All the documents presented to the Land Registrar for registration purporting to be genuine have now been proved wrong.”

35. He went on to state; **“Indeed this is a very disturbing issue especially where there is an element of fraud surrounding the execution of transfers documents without the knowledge of the registered owners and none of them appeared before the Land Control Board for transaction to be approved.”**

36. They were ordered to surrender the title deed within 30 days for cancellation.

37. Subsequently proceedings were taken up under the chairmanship of the District Land Registrar on 11/12/1998 and an order was given that

“ All titles (registers) to be restricted forthwith and to remain restricted until the prevailing misunderstandings among the original owners and purchasers/sellers settle their disputes either mutually or through the court of law”.

38. A dispute Number WIN/LDT/CASE/20/99 was then instituted and a verdict reached where it was ordered that title deeds including parcel NO. 893 be cancelled. The same was adopted by the decree of the court dated 17/3/2005 – Exhibit P31 and 32(a) 32(b).

39. What followed thereafter was the gazetting of loss of titles by the District Land Registrar a Mr A.O. Akello. By the letter and notices sent to the Government Printer on 1/7/2005 he sent advertisement for parcels No. 895, 896, 897, 898, 899, 894, 900 and 901 leaving behind 893. Indeed there are exhibits produced which showed the said gazetting (Exhibit P42).

40. By a letter dated 10/8/2005 Exhibits P43 the plaintiffs wrote to the Land Registrar concerning the said omission of gazetting parcel No. 893. In the strongly worded letter he accused the 2nd defendant of having gone ahead to sub divide the said parcel into various portions. He stated in part that;

“ I deduced that your decision to leave my land parcel was based on the 2nd fraudulent activity a Mr Steven Juma Agai and Steven Nyanya Agai who purportedly acted on behalf of Mr Gideon Okech Rayola culminating in resurveying of my land parcel No. Kanyakwar B/893 to change that parcel number to No 1005 which was sub divided into parcel 1005 to 1028

without due regard to the fact well known to you and the District Survey Office that this parcel number Kanyakwar B 989 was still under dispute in court of law. It did not require more than common sense for your office or the District Survey office to restrain Mr Gideon Rayola from sub dividing the parcel since he was also aware of the pending court case -----”

41. Exhibit P45, a letter dated 18/5/2006 from the 3rd Respondent to the District Land Registrar advises that there was no longer any restriction on parcels number 1005-1028 and that he should proceed to lift the restriction on the above parcels of land.

42. The District Commissioner vide letter dated 18/5/2006 wrote to the District Land Registrar that indeed there was no land disputes at the tribunal pertaining to land parcels Nos 1005 – 1028.

43. The Land Registrar on 18/5/2006 wrote to the Chief Land Registrar Exhibit P47 attaching the letter for the 3rd Defendant as well as the District Commissioner and asked that he be allowed to remove the restriction.

44. On 22/5/2006, the Chief Land Registrar wrote to the District Land Registrar (Exhibit P48) stating that;

“Authority is hereby granted for you to remove the restriction on the above mentioned property i.e Nos Kanyakwar 'B' 1005 – 1028.”

45. The plaintiffs were livid when they learned of what had taken place. They wrote on 14/7/2006 to the Chief Land Registrar a lengthy letter concerning the removal of the restrictions and implored him to thus;

“ The cohort Stephen Nyanywa Agai, William Amwani Otieno, and Tom Nyonje of KK Security Kisumu Co. are aggressively planing with the help of the District Land Registrar office to process another fraudulent acquisition of parcel No. KSM/KANYAKWAR 'B' 1005 – 1016 our parcels of land. Please kindly act without delay to prevent this imminent 3rd criminal act against us by instructing the current District Land Registrar to restore the restrictions on parcels No. KSM/KANYAKWAR 'B' 893 Into 1005 to 1028 until the court or Registrar Kisumu will have facilitated restoration of parcel No 893 and cancellation of parcels No 1015 and 1016 which are portions of the Wariero's family Land.”

46. On 24/7/2006, the chief Land Registrar vide his letter dated 24/7/2006 wrote to the District Land Registrar Kisumu authorising restriction to be placed on the parcels of Land and cancelling the earlier letter which had removed restriction. He went on to state;

“ It is apparent from the correspondence received from Lumumba Mumma and Kaluma Advocates that your recommendation to this office that the restrictions be removed because they were serving no purpose was a misrepresentation and distortion of the real position. Any titles issued on the basis of the misrepresentations distortions mention above should be recalled for cancellation within 21 days of the date hereof and a report given to this office.”

47. On 28/7/2006 the District Land Registrar wrote to the 4th respondent to surrender title numbers 1015 and 1023 but it appeared that they were not surrendered.

48. Having summarised the details and or contents of the correspondences germane to this proceedings, the big question now is whether according to them and the evidence thus produced in court, can this court conclude that there was fraud perpetrated jointly and severally by the defendants? The empathic answer is a resounding “Yes”.

49. After listening to the evidence in court as well as reading the various proceedings and correspondences I am persuaded beyond any shadow of doubt that the 7th defendant heavily contributed to the mess in respect to the sub divisions of parcel number Kisumu/Kanyakwar/299 and the resultant titles.

50. Its clear that the whole fraud was perpetrated by the Survey office in collusion with the 3rd defendant who purportedly acted for the 1st defendant vide a power of attorney. The letter dated 28/1/1997 (Exhibit P7) speaks volume . It appears that a Mr Mboya for some strange reasons had the parcels registered in the names of other strangers including the 1st defendant. He took advantage of the surrendered mutation forms with names given by the plaintiffs and inserted the names of other persons.

51. Be is as it may, the whole process was challenged and there was an order that the resultant titles be cancelled. The Land Registrar a Mr Akello indeed forwarded the details for gazettment and left out parcel no 893. No reason at all was given by the said Land Registrar. The terse letter by the plaintiff did not help much.

52. If indeed it was a normal error, why would he leave behind the same yet it had been paid for?

53. One J.A. Mudimba vide a letter dated 17/7/2003 Exhibits P28 wrote to the District Land Registrar ordering restrictions be placed on the said parcels namely 892 – 901 as according to him there was a dispute pending before the tribunal.

54. More importantly, after failing to gazette parcel number 893 he went ahead to have the restrictions removed. There is no doubt in my mind that the 3rd defendant as well as the 7th defendant in particular were aware of the dispute at the tribunal. If the Chief Land Registrar was aware in Nairobi as per the correspondences from that office, why did he find it necessary to remove the restrictions.

55. What I find more baffling is the letter from the 3rd respondent to the District Land Registrar Kisumu dated 18/5/2006 stating that;

“ ----- the certificate of official search issued on 3/5/2006 revealed that restriction was put on 30/7/2005 barring any dealing on the said parcels until a tribunal case is finalised. The alleged tribunal case has now taken almost 3 years.”

The letter requested for the restriction to be removed.

56. Without informing the plaintiffs who had placed the restriction the District Land Registrar proceeded to notify the Chief Land Registrar to remove the restriction. Apparently none of the letters even by the 3rd defendant was copied to the plaintiffs. The letter by D.M. Mullili on behalf of the Chief Land Registrar dated 22/5/2006 was not copied to the plaintiffs.

57. One wonders why they did not copy to them. If they are the ones who had brought the restriction and the matter at the Land Tribunal, for whatever its worth, they should have copied to him. Infact the Land Registrar A.O. Akello cannot plead ignorance. His name had appeared all along as it is evidence by the various correspondences.

58. To sum it all and to credit C.W. Ngatia the Chief Land Registrar clearly by his letter dated 24/7/2006 admitted that there was fraud by the department and by extension his officers at Kisumu lands Office when they removed the restriction.

59. Even if one was to say that there was no knowledge on the part of the defendants that the suit parcels had no issues, where are the minutes of the Land Control Board that granted them consent they obtained. The plaintiffs stated that they did not attend any board, or at all. In my view its not enough to produce the consent, the application and the payment receipts. There ought to be minutes showing that the board sat and the owner of the land did attend and granted the consent to sub divide or to transfer. In the absence of such, I am not persuaded that the plaintiffs and specifically the 1st plaintiff attended the alleged Land Control Board.

60. Looking at the green card in respect to parcels NO 893 it appears from the entry No. 1 that Charles O. Wariero and Vitalis Otieno Wariero are registered proprietors of the said parcel of land as at 6/3/1995. By 11/1/1996 the 2nd defendant became the registered proprietor. The big question is was the said transfer effected? Where are the Land board minutes? Even if Charles Wariero signed the transfer where is the signature of Vitalis Otieno Wariero. According to the exhibits, both had ½ acre each. In my view even if the 1st plaintiff signed the transfer then the 4th plaintiff ought to have granted his consent as well as execute the transfer documents.

61. This issue of the Land Control Board consent cannot be ignored. Section 6 of the Land control Act provides that a consent ought to be obtained in respect to;

6(1) (b) “ The division of any such agricultural land into two or more parcels to be held under separate titles -----”

62. There was also the evidence of PW2 Inspector Muinde that the 1st plaintiffs signature was a forgery. The same was never challenged. In my view therefore the purported sale of parcels No. 893, 894 and 895 allegedly by the 1st plaintiff to the 2nd plaintiff was a forgery. There was no rebuttal at all.

63. Needless to say it would be spurious to belief that the 1st plaintiff would have sold the land to the 2nd defendant in the absence of the 4th plaintiff who was a joint co-owner. Again in the absence of the land control Board consent the same is void. **(See Hirani Nganthe Githire Vs Wanjiku Muge (1979) KLR 50.**

64. What is the way forward for the department and especially the 6th defendant? I think having found that the entire transaction between the defendants was shrouded in fraud, the only recourse for them is to follow whosoever received their purchase consideration. It even speaks volume to know that they did not even attempt to return the titles for cancellation as requested by the Chief Land Registrar.

65. Counsel for the plaintiffs has faulted the various sale agreements entered between the defendant herein. In my view that is moot issue for now. Having found that there was fraudulent acquisition of the said titles by the 2nd defendant in particular, the resultant sales for all intent and purposes are illegal and the only recourse for the purchasers including the 6th purchaser who alleged that he was an innocent purchaser for value without notice is to demand his money back from the alleged “vendor”.

66. The entire transactions and gymnastics played by the defendant were illegal *abinitio*. The letters from the 1st to 4th plaintiffs were passionate enough. They in my view expressed the frustrations they were going through. Their desire was to have the boundaries regarding their ancestral land parcel No. 299 corrected. Subsequently they decided to sub divide among themselves. The survey office as well as the District Land Registrar in cohorts with the 2nd and 3rd plaintiffs took over thereafter. Had the 7th defendant gazetted all the parcels including 893 the same would have saved the parties especially the plaintiffs the troubles they have gone through. It would have by extension saved the “purchases” much trouble. Be is as it may the whole deal was annullity and void.

67. The court in **Omega Enterprises (Kenya) Ltd Vs Kenya Tourist Development Corporation Ltd and 2 others (1998) eKLR** stated as follows;

“ If an act is void, then in law it is a null. 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 much ado, though it is sometimes convenient to have the court declare it 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.”

68. I think I have said enough to show that the fraudulent transactions by the defendants jointly and severally ought to collapse. The question

of whether the plaintiffs were holding the land in trust for the other family members or clan members is not relevant for discussion at the moment. This is for the simple reason that the 1st and 4th plaintiffs did not sale the land to the 2nd defendant. Should there be any filial relationships between the plaintiffs and the defendant in pursuance to their family trees, then that ought to be discussed in another forum.

69. I shall also decline to discuss an invitation by the plaintiff to determine whether the plaintiffs can be said that they are entitled to the orders of adverse possession. Again pursuant to my findings above, the same could be argued elsewhere.

Conclusion

70. This suit shall succeed on the grounds that the plaintiffs have proved on a balance of probability that the defendants fraudulently had themselves proprietors of the suit parcel of land without due regard to the dictates of the law specifically the Land Court Act Cap 302 Laws of Kenya.

71. In short there was no sufficient evidence that being agricultural land, the board consent was obtained in the absence of the minutes. It is not sufficient to wave the consent only.

72. More importantly, the 7th defendant lifted the restrictions placed on the register without due regard to the pending disputes at the land tribunal. The land officers including the District Commissioner officer failed to copy their correspondences advising the lifting of the restriction upon the plaintiffs. Looking across other correspondences generally, they all indicate that they copied to the affected parties, whether plaintiffs or the defendants.

73. The Chief Land Registrar as found above by his own admission and a veil reprimand to the District Land Registrar clearly admitted that the lifting of restriction was fraudulent.

74. For the above reasons this court allows the plaintiffs suit and order that;

1) The following title be and are hereby cancelled namely Kisumu/Kanyakwar "B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 1028 forthwith.

2) Upon cancellation of the titles stated on (1) above, the register be rectified and the same parcels should revert to Kisumu/Kanyakwar /"B" 893. forthwith.

3) The 7th respondent should within 14 days from the date herein gazette the loss of the above title Kisumu/Kanyakwar/893.

4) Should the 7th defendant fail to do so, the Deputy Registrar of this Court should gazette the same.

5) Upon the expiry of the Statutory gazette period, the said parcel Kisumu/Kanyakwar/893 be transfered to the plaintiffs names Charles Anthony Ondiek.

6) The purported sale and transfer of land parcels number Kisumu/Kanyakwar/"B" 893 and creation of all the parcels of land known as Kisumu/Kanyakwar /"B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019 , 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 1028, is irregular, illegal, null and void.

7) A permanent injunction restraining the 1,2 ,3 4, 5 and 6th Defendants jointly and severally by themselves or agents from encroaching, into, carrying out any construction works erecting on, dealing with, transferring alienating or in any other way interfering with the proprietary rights and provision of the plaintiffs over land parcel number Kisumu/Kanyakwar "B" 893 and all the resultant title namely Kisumu/Kanyakwar "B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019 , 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 1028.

8) Removal of any structures erected on any of the suit parcels namely Kisumu/Kanyakwar/ 893 or the resultant titles, namely Kisumu/Kanyakwar /"B" 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019 , 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027 and 1028.

9) Costs of this suit to the plaintiffs.

Delivered, signed and dated at Kitale this 27th day of September, 2018

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mweneke holding brief for T. Oluoch for the Plaintiffs

Bororio holding brief for S.M. Onyango for 1, 2, 3, and 4 defendants as well as P.D. Onyango for the 5th and 6th Defendants.

No appearance for the 7th Defendant

Judgment read in open court.