



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL CASE NO.58 OF 2005**

**JONATHAN APPHUS OYALO WABALA.....PLAINTIFF**

**VERSUS**

**VINCENT WABWIRE NGALU.....1<sup>ST</sup> DEFENDANT**

**DORRIS NANZALA MAKHANDIA.....2<sup>ND</sup> DEFENDANT**

**AND**

**EMILY NABWILE WABALA.....APPLICANT**

**JUDGEMENT**

By a plaint filed herein on 30<sup>th</sup> June 2005, **JONATHAN APPHUS OYALO WABALA** (the plaintiff herein) sought judgement against the defendants **VINCENT WABWIRE NGALU** (1<sup>st</sup> defendant) and **DORIS NANZALA MAKHANDIA** (2<sup>nd</sup> defendant) in the following terms:

- 1. Removal of caution placed on the land parcel No. W. BUKUSU/KHASOKO/146.**
- 2. Costs of the suit.**
- 3. Any other relief this Honourable Court may deem fit to grant.**

The basis of the claim is that whereas the plaintiff is the registered proprietor of the land parcel **No. W. BUKUSU/KHASOKO/146** measuring 5 Ha or thereabout (the suit land) having been so registered following the demise of one **MAKHANDIA NGALU** (the deceased), the defendants have placed cautions on the said land claiming a beneficial interest therein.

The defendants filed a joint defence and counter-claim conceding that although the plaintiff is the registered proprietor of the suit land, that registration was irregular, illegal and tainted by fraud particulars of which were pleaded in paragraph 4. They pleaded that the suit land was registered in the joint names of the deceased, the 1<sup>st</sup> defendant and **WASWA NGALU** on 1<sup>st</sup> November 1972 and at no time did the other proprietors execute any transfer of the suit land to the plaintiff. That when the deceased died on 27<sup>th</sup> July 1980, he left his widow the 2<sup>nd</sup> defendant in occupation of the suit land on which the plaintiff does not reside. The 1<sup>st</sup> defendant pleaded that as a co-owner of the suit land, he has a valid interest therein which cannot be abrogated by operation of the law. The 2<sup>nd</sup> defendant denied the plaintiff's averment that she has been adequately compensated.

In their counter-claim the defendants sought an order, cancelling entries number 2 and 3 on the register and the suit land to revert back to the original registered proprietors and that the plaintiff's suit be dismissed.

The 2<sup>nd</sup> defendant passed away on 22<sup>nd</sup> March 2011 and was substituted by **EMILY WABWIRE WABALA** following an application dated 20<sup>th</sup> March 2012.

Meanwhile, the plaintiff filed a reply to the defence and defence to the counter-claim on 20<sup>th</sup> June 2013 reiterating that he is the registered proprietor of the suit land and denying the allegations of fraud pleaded in paragraph 4 of the plaint. He added that the cautions lodged on the suit land by the defendant are out of malice and that the 1<sup>st</sup> defendant had voluntarily and without coercion surrendered his entitlement to the suit land to **APOLLO MAKHANDIA** (deceased) and is estopped from denying that fact. He pleaded further that the defendants counter-

claim is barred by the statute of Limitation and should be struck.

The trial commenced before **OMOLLO J** on 17<sup>th</sup> June 2013 when the plaintiff told the Court that he is the registered proprietor of the suit land having obtained it from his father in 1973. He produced the Green Card [plaintiff's exhibit 1] showing that the first registered proprietor were his father **MAKHANDIA NGALU** and his step brothers **WASWA** and **VINCENT NGALU**.

However, when he became the registered owner in 1973, the names of **WASWA** and **VINCENT NGALU** were removed. That his grandfather **NGALU** had four other brothers namely **MICHAEL RUPIA**, **SIKWATA ORINDA**, **NOAH OLELE** and **WASILWA OLELE** and since **MICHAEL RUPIA** didn't have a son, he approached **NGALU ORINDA** for his children to stay with him while **MICHAEL** stayed in a village in **BUSIA**. During the land demarcation process the plaintiff's father called his brothers to share his land with them.

Later, the 1<sup>st</sup> defendant and **WASWA** surrendered their share in the land to his father voluntarily in 1973 and that is how the plaintiff became the registered proprietor of the suit land. He added that owned land parcel **No. S. TESO/AMAGORO/901** in Busia **MICHAEL RUPIA** and after he died in 1979, his family divided it into two portions **No. S. TESO/AMAGORO/1922** and **1923** and parcel **No. S. TESO/AMAGORO/1923** was subsequently sub-divided into parcels **No.2398** and **2399**.

Parcel No.2399 was registered in the names of **VINCENT WABWIRE NGALU** and he produced the Green Cards (plaintiff's exhibit 2,3 and 4) adding that the 1<sup>st</sup> defendant had never used the suit land since he moved to Busia but **Doris** [the 2<sup>nd</sup> defendant who later died and was substituted with **EMILY NABWIRE WABALA**] was buried on the suit land which was shared between the plaintiff, **DORIS** and her brothers i.e. **ALFRED MAKHANDIA**, **GEOFFREY MAKHANDIA** and **DANIEL OJWANG**. The plaintiff was to own half share while **DORIS** was to own the other half jointly with her three brothers. However, when the plaintiff commenced the process of sub-division of the suit land the defendants placed cautions in 2005. He denied having obtained the suit land fraudulently and produced the consent that he obtained for the sub-division. He added that the 1<sup>st</sup> defendant acquired his share from his grandfather and therefore has no interest on the suit land but added that he had no objection with **DORIS**'s children inheriting her share.

The plaintiff called as his witness the Officer in charge of the Bungoma Land Registry **WATIERI NGAANYI (PW2)**. His testimony was that the suit land was first registered in 1972 in the joint names of **MAKHANDIA NGALU**, **VINCENT WABWIRE** and **WASWA NGANYI**. On 14<sup>th</sup> March 1973, the ownership was transferred to the plaintiff and **MAKHANDIA NGANYI** for valuable consideration of Ksh.3,000. It was they transferred on the same day to the plaintiff after the Land Control Board had given the consent. He produced the relevant Land Control Board application for consent forms (exhibit 7(a), (b) and (c)). He produced the Green Card as well. However, on 29<sup>th</sup> March 2005 **WABWIRE NGALU** placed a caution on the suit land.

**VINCENT WABWIRE NGALU** the 1<sup>st</sup> defendant testified that **MAKHANDIA NGALU** the deceased herein was his brother and died in 1980 and that the plaintiff is his son. He produced the death Certificate of the said **MAKHANDIA NGALU** (Defence Exhibit 1). He added that the suit land was registered in the joint names of **MAKHANDIA NGALU**, **WASWA NGALU** and himself as they are brothers. He denied having transferred his share in the suit land or having been compensated with another parcel of land in Busia. He said he does not thumb print documents but signs them using a pen. He said the suit land should be shared jointly and even the original 2<sup>nd</sup> defendant **DORIS** was buried thereon.

I took over this case on 14<sup>th</sup> June 2018 upon my transfer to **BUNGOMA ELC** and the parties having agreed to proceed from where **MUKUNYA J** had left it, I took the evidence of the 1<sup>st</sup> defendant in cross – examination and also that of **FRANCIS NYONGESA NGALU (DW2)**, **ALFRED BULUMA (DW3)** who adopted their statements dated 17<sup>th</sup> July 2013. In the said statements, they stated that the suit land was registered in the joint names of **MAKHANDIA NGALU** (deceased) **VINCENT WABWIRE NGALU** and **WASWA NGALU**. They were however surprised to discover that the suit land was fraudulently transferred to the plaintiff.

At the end of the trial, submissions were filed both by **Mr. OMONDI ADVOCATE** for the plaintiff and **Mr. MAKALI ADVOCATE** for the defendants.

I have considered the evidence by the parties and the submission by Counsel.

In my view only two issues call for my determination:

- 1. Whether the plaintiff fraudulently registered himself as the sole proprietor of the suit land and therefore entries No.2 and 3 on the register should be cancelled.**
- 2. Whether the cautions placed on the suit land by the defendants were justified.**
- 3. Who should bear the costs.**

*The plaintiff's case is that he is the sole proprietor of the suit land and in paragraphs 4 and 5 of the plaint filed herein on 30<sup>th</sup> June 2005 he made the following bold pronouncement:*

- 4. "At all material times for purposes of this suit, the plaintiff is the registered proprietor of all that land known as W. BUKUSU/KHASUKU/146 measuring 5.4Ha or thereabout"**
- 5. "The plaintiff will aver that he became so registered upon the demise of one MAKHANDIA NGALU now deceased"**

It is common ground that prior to 14<sup>th</sup> March 1973, the suit land was registered in the names of **MAKHANDIA NGALU, VINCENT WABWIRE and WASWA NGALU OYALO** as per the register. On 14<sup>th</sup> March 1973 it was registered in the names of the plaintiff and **MAKHANDIA NGALU** but on the same day, the plaintiff became the sole proprietor after a death certificate No.668593 had been registered against the name of the other joint owner **MAKHANDIA NGALU**.

According to the record therefore, the plaintiff became the sole owner of the suit land by virtue of the principle of jus accrescendi, which is captured under **Section 118 of the repealed Registered Land Act** under which the title was issued and which reads:

**118 “If one of two or more joint proprietors of land, lease or charge does, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”**

That is really the fulcrum of the plaintiff’s case. That he became the sole proprietor of the suit land following the death of the other joint owner **MAKHANDIA NGALU** in 1973. The above provision in the repealed Act is replicated in **Section 60 of the new Land Registration Act 2012**. However, as part of his defence, the 1<sup>st</sup> defendant produced the death certificate of **MAKHANDIA NGALU** (Defence Exhibit D) showing that in fact he died on 27<sup>th</sup> June 1980 and not 14<sup>th</sup> March 1973 as alleged by the plaintiff. Further, the death Certificate is No. B 870019 and not 668593 registered against the title. The validity of the Certificate No. B870019 was not rebutted by the plaintiff and this Court is satisfied that it is a genuine certificate issued by the Registrar as evidence of when **MAKHANIDA NGALU** actually died. In paragraph 4 of their defence to the plaintiff’s claim, the defendants pleaded that the plaintiff obtained registration of the suit land through fraud and it is specifically pleaded in paragraph 4(c ) under particulars of fraud as follows:

**4(c): “Misleading the Land Registrar to the effect that MAKHANDIA NGALU was deceased in 1973 which fact he knew or ought to have known was false”**

That evidence is enough to prove that the plaintiff fraudulently registered himself as the sole proprietor of the suit land and the defendants are entitled to the orders sought in their counter claim.

But that is not enough. Whereas the plaintiff claims to have been, at all material time, the registered owner of the suit land, the defendants in paragraph 4(b) of their defence pleaded the following particulars of fraud:

**4(b): “Procuring registration of the suit land without any valid documentation or at all”.**

In his evidence in chief when he testified before **OMOLLO J**, the plaintiff went to great lengths to show how the 1<sup>st</sup> defendant surrendered his share to the suit land by applying for the transfer at the Land Control Board. This is what he told **OMOLLO J**:

**“I obtained consent of the Land Control Board to sub-divide the land. The application for consent and letter of consent produced as Exhibit P 6(a) and (b). I didn’t acquire this land fraudulently. VINCENT and my father applied to the Land Control Board to surrender their share in this land”.**

The form for transfer of un-divided share in the suit land was produced as part of the plaintiff’s evidence and it shows a thumb print against the names of the 1<sup>st</sup> defendant and **MAKHANDIA NGALU**. In his evidence in chief however as recorded by **MUKUNYA J**, the 1<sup>st</sup> defendant had this to say:

**“I never thumb print documents. I sign with a pen”.**

In order to confirm whether the 1<sup>st</sup> defendant signs or thumb prints documents, I looked at the 1<sup>st</sup> defendant’s affidavit filed in **BUSIA HIGH COURT CIVIL SUIT NO.16 of 2001 VINCENT WABWIRE NGALU V FANICE ADHIAMBO OKWERA** which was in fact produced by the plaintiff as part of their supplementary list of exhibits dated 24<sup>th</sup> March 2017 and filed herein on 6<sup>th</sup> April 2017.

That document bears the signature of the 1<sup>st</sup> defendant and therefore it cannot be possible that the thumb printed application for transfer of undivided share (plaintiff’s exhibit 7(c) ) was made by the 1<sup>st</sup> defendant. It can only have been a forgery.

The plaintiff also went into details as to how the 1<sup>st</sup> defendant was compensated with land elsewhere and was not therefore entitled to the suit land. That was however denied by the 1<sup>st</sup> defendant. However, even if the 1<sup>st</sup> defendant has other land elsewhere, his share in the suit land can only be taken away from him through a lawful process. It is clear that the plaintiff fraudulently obtained registration of the suit land in his sole name and this Court must interfere.

The next issue is whether the cautions placed by the suit land by the defendants were justified. A party who has a valid claim to land is entitled to place a caution on it to protect his interest. From what I have already found above, the plaintiff’s registration as the sole proprietor of the suit land was fraudulent. **Section 131(1) of the repealed Registered Land Act** which was the Law applicable at that time provided as follows:

**131(1) “Any person who –**

**(a) Claims the right, whether contractual or otherwise, to obtain an interest, to obtain an interest in land, lease or charge, that is to say some defined interest capable of creation by an instrument registrable under this Act; or**

(b) –

(c) –

**may lodge a caution with the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same.”**

A similar provision is found in **Section 71 of the new Land Registration Act**. The 1<sup>st</sup> defendant was, until 14<sup>th</sup> March 1973, a joint owner of the suit land. That is not in dispute. He therefore was entitled, as of right, to place the caution on the suit land to protect his interest. The plaintiff cannot therefore be heard to plead, as he has done in paragraph 7 of his plaint, that:

**“... the 1<sup>st</sup> defendant has no interest at all in the land aforesaid and that if he had any interest at all (which is denied) the same was extinguished by operation of law”**

It has not been demonstrated how the 1<sup>st</sup> defendant’s interest in the suit land was **“extinguished”** and if the extinction that the plaintiff is referring to is the process that I have just discussed above and which I have found to have been fraudulent, then I can only advise him that he used a **“faulty extinguisher”**.

It must be now clear that the plaintiff fraudulently registered himself as the proprietor of the suit land and the defendants were justified in placing the caution thereon.

I am satisfied that the defendants, and not the plaintiff, have proved their case and are entitled to the order sought in their counter – claim.

On the issue of costs, the parties are family. While I am tempted to order the plaintiff to meet the costs of this suit due to his fraudulent activities which were meant to unduly enrich himself at the expense of the defendants, I would not wish to further set them up against each other in view of their relationship. I would instead order that each party meet their own costs.

There shall be judgement for the defendants against the plaintiff in the following terms.

**1. The plaintiff’s suit is dismissed.**

**2. An order is made that entries number 2 and 3 on the register of land parcel No. W. BUKUSU/KHASOKO/146 are cancelled so that the same reverts back to the original proprietors to pave way for eventual partition.**

**3. Each party to meet their own costs.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Judgement delivered, dated and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma.

Mr. Wekesa for Mr. Makali for defendants – present

Mr. Omondi for plaintiff – Absent

Plaintiff present

1<sup>st</sup> defendant present

Right of Appeal.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**