



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY**

**ELCC NO. 43 OF 2021**

**ROSE AKINYI GENGA AND LENNY WANJALA GENGA**

**(Suing as the Legal Administratrixes of the Estate of**

**PAUL OTIENO GENGA, DECEASED).....PLAINTIFFS**

**Versus**

**FIDELIS OTIENO GENGA (suing as the Administrator of the estate of the**

**COSMAS OTIENO GENGA, DECEASED).....1<sup>ST</sup> DEFENDANT**

**FIDELIS OTIENO GENGA.....2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR-MIGORI.....3<sup>RD</sup> DEFENDANT**

**THE DISTRICTLAND SURVEYOR-MIGORI.....4<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A) INTRODUCTION**

1. At the heart of the instant dispute are land reference numbers Kanyamkago/Katieno/3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019 and 3020 measuring approximately 0.035, 0.33, 0.39, 0.052, 0.023, 0.048, 0.045, 0.045, 0.09 and 0.34 hectares respectively (The suit parcels of land). They are contained in Registry Map Sheet number 42 and located within Migori County.
2. Notably, the suit parcels of land were sub divisions of the original land Reference Number Kanyamkago/Katieno/1844 measuring approximately four decimal six one hectares in area (4.61 Ha in the name of Paul Otieno Genga (DECEASED-1) and subsequently registered in the joint name of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, Rose Akinyi Genga (PW1) and Lenny Nanjala Genga respectively.
3. The plaintiffs are represented by the firm of G M Nyambati and Company Advocates. Initially, they were represented by the firm of Omonde Kisera and Company Advocates.
4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are represented by the firm of Ochwangi and Company Advocates further to a notice of change of advocates dated 18<sup>th</sup> January 2021. Formerly, they were represented by M/S Oguttu, Ochwangi, Ochwal and Company Advocates.
5. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are represented by litigation counsel, Ms Esther Opiyo.
6. Originally, this suit was lodged at Kisii Environment and Land Court but on 4<sup>th</sup> of April 2017, it was transferred to Migori Environment and Land Court for hearing and determination. On 25<sup>th</sup> November 2021, the same was further transferred to this court, upon its establishment, for determination.
7. On 19<sup>th</sup> July 2018, by consent of counsel for the respective parties, the court ordered and directed, inter alia;

*“The Land Registrar and County Surveyor, Migori shall visit LR Nos. Kanyamkago/Katieno/1844 and 2049 to establish and fix*

*boundaries pursuant to sections 18 and 19 of the Land Registration Act, 2016 (2012) (the LRA) and file report (s) in court on or before 16<sup>th</sup> October 2018 for directions....”*

8. By a Notice of motion dated 5<sup>th</sup> November 2019 and duly filed on 6<sup>th</sup> November 2019, the 2<sup>nd</sup> defendant prayed to be substituted as the 1<sup>st</sup> defendant in lieu of the original 1<sup>st</sup> defendant, Cosmas Otieno Genga (DECEASED-2). On 6<sup>th</sup> November 2019, the court allowed the application accordingly.

#### **B) THE GIST OF THE PLAINTIFF’S CASE**

9. The plaintiffs mounted this suit by way of a plaint dated 22<sup>nd</sup> May 2012 duly filed in court 24<sup>th</sup> May 2012 and amended on 23<sup>rd</sup> July 2014 seeking the orders infra;

a) An order nullifying the Sub-division and Consent Title Numbers KANYAMKAGO/KATIENO/3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019 and 3020.

b) Permanent injunction restraining the defendants by themselves, servants, agents or otherwise howsoever from trespassing upon Title Number KANYAMKAGO/KATIENO/1844.

c) Costs of the suit.

d) Interest.

10. Briefly, the plaintiffs’ lamentations as per the plaint are that original land was registered in the name of Deceased-1 until 16<sup>th</sup> February 2004 when the plaintiffs became its registered proprietors through transmission in respect of the estate of Deceased-1. That in the year 2012, the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently and unlawfully colluded with the 3<sup>rd</sup> and 4<sup>th</sup> defendants to hive off a portion of the original land to make the same part and parcel of the suit parcels of land. That in May 2012, the 1<sup>st</sup> and 2<sup>nd</sup> defendants invaded the suit parcels of land, cut down several trees and crops grown thereon by the plaintiffs and attempted to assist 3<sup>rd</sup> parties to erect new fences occasioning loss and damage to the plaintiffs. Thus, it precipitated the instant suit.

11. In a nine (9) paragraphed reply to statement of defence dated 10<sup>th</sup> July 2012 and filed herein on 12<sup>th</sup> July 2012, the plaintiffs reiterated the contents of the plaint. At paragraph 4 of the reply, they stated in part as follows;

“.....parcel numbers KANYAMKAGO/KATIENO/3009-2020 were part of title number KANYAMKAGO/KATIENO/1844 which have been illegally and fraudulently been made to appear as part of title numbers KANYAMKAGO/KATIENO/2049 or 3009.....”.

12. On 18<sup>th</sup> December 2018, PW1 testified and relied on her statement dated 22<sup>nd</sup> May 2011 as part of her testimony. She further relied on a certificate of confirmation of grant (PEXhibit 1), a certificate of official search dated 2<sup>nd</sup> March 2012 (PEXhibit 2), a title deed issued to the plaintiffs on 20<sup>th</sup> April 2004 (PEXhibit 3), three maps showing the neighbouring land reference number Kanyamkago/Katieno/603 and its sub divisions (PEXhibit 4a to c), chief’s letter dated 10<sup>th</sup> May 2012 (PEXhibit 5a), Migori District Forest Officer’s letter dated 11<sup>th</sup> May 2012 (PEXhibit 5b) and two letters showing the size of the original land and its sub divisions (PEXhibits 6a and b).

13. By submissions of nine (9) pages dated 9<sup>th</sup> February 2021 filed on even date, learned counsel for the plaintiffs gave the background of the suit parcels of land and their origin. Three issues for determination including whether the court has powers to order for nullification and rectification of register and whether the plaintiffs have established their case on a balance of probabilities, are framed and analysed therein in favour of the plaintiffs. Counsel cited section **80 of the LRA, Nguruman Ltd-vs-Jan Bonde Nielsen and 2 others (2014) eKLR, Mrao Ltd-vs-First American Bank of Kenya Ltd and 2 others (2003) KLR 125 at 138 as well as Giela-vs-Cassman Brown and Co.Ltd (1973) EA 358** and implored upon this court to grant the orders as sought in the amended plaint.

#### **C) THE GIST OF THE DEFENDANTS’ CASE**

14. In their statement of defence dated 11<sup>th</sup> June 2012 which was amended on 16<sup>th</sup> July 2020 and filed on 20<sup>th</sup> July 2020, the 1<sup>st</sup> and 2<sup>nd</sup> defendants denied the plaintiffs’ claim and stated that they are strangers to the extent of the original land. They stated that the suit parcels of land arose from and were hitherto part of LR No. Kanyamkago/Katieno/2049 belonging to and registered in the name of the 1<sup>st</sup> defendant.

15. The 1<sup>st</sup> and 2<sup>nd</sup> defendants also contend that the suit as drawn and filed is misconceived, bad in law and otherwise legally untenable. They thus, crave that the plaintiffs’ suit be struck out and or dismissed with costs.

16. On 21<sup>st</sup> July 2020, the 2<sup>nd</sup> defendant (DW1) testified and relied on his statement dated 11<sup>th</sup> June 2012 and bundle of documents of even date (1<sup>st</sup> and 2<sup>nd</sup> DEXhibits 1 to 11) and supplementary bundle of documents dated 25<sup>th</sup> March 2014 (1<sup>st</sup> and 2<sup>nd</sup> DEXhibits 12 and 13). He denied the plaintiffs’ allegations of fraud and testified that the main issue herein is the size of the land in question.

17. DW1 was PETER WANJALA, County surveyor, Migori. He relied on a report dated 24<sup>th</sup> September 2018 (3<sup>rd</sup> to 5<sup>th</sup> DEXhibit 1) in his testimony.

18. DW3 was PHILIP MAKINI, the Land Registrar, Migori. In his testimony, he referred to and produced a report dated 18<sup>th</sup> Sept 2018 and filed in court on 16<sup>th</sup> October 2018 prepared by his predecessor, George Obondo Ongutu (3<sup>rd</sup> to 5<sup>th</sup> DExhibit 2).

19. The 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants did not file any amended statement of defence or at all in this suit

20. Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed submissions of four pages dated 16<sup>th</sup> November 2021 on 24<sup>th</sup> January 2021 giving the background of the suit, the evidence adduced during hearing, discussed the evidence against the plaintiffs, termed the suit an abuse of the court process and devoid of merits hence urged the court to dismiss the same with costs. To fortify the submissions, counsel relied on **Aikman-vs-Muchoki (1984) KLR 353, George Orango Orago-vs-George Liewa Jagalo and 3 others (2010) eKLR and Mrao case (supra)**.

21. The 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants also did not file submissions herein.

#### **D) ISSUES FOR DETERMINATION**

22. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determinations; see **Galaxy Paints Company Limited-vs-Falcon Grounds Limited (2000) 2 EA 385**.

23. I have thoroughly considered the entire pleadings, evidence, submissions of the plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I also note the Plaintiff's statement of agreed issues dated 24<sup>th</sup> November 2014 and filed in court on 25<sup>th</sup> November 2014 and 1<sup>st</sup> and 2<sup>nd</sup> defendants' statement of agreed issues dated 26<sup>th</sup> July 2012 (1 to 13) filed on even date. I further bear in mind **Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010** thereof.

24. In that regard, I am of the considered view that the following twin issues emerge therefrom for determination;

- a) Have the plaintiffs proved their case against the defendants to the requisite standards?
- b) Are the plaintiffs entitled to the orders sought in the amended plaint?

#### **E) DISCUSSION AND DETERMINATION**

25. The plaintiffs' assertion was that the original land was registered in the name of Deceased-1 and that PW1 jointly with her co-wife, the 2<sup>nd</sup> plaintiff, took out PExhibit 1. Therefore, I subscribe to the decision in the case of **Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) eKLR** where the Court of Appeal held-

*"...A litigant is clothed with locus standi upon obtaining a limited of full grant of letters of administration in case of intestate succession...."*

26. The plaintiffs also asserted that on the basis of PExhibit 1, they became the joint proprietors of the original land as shown by PExhibits 2 and 3. That in the year 2012, the 1<sup>st</sup> defendant fraudulently sub divided the original land and became the registered proprietor of the suit parcels of land.

27. **Article 40 (1) of the Constitution of Kenya, 2010** anchors the right to acquire and own property. However, the protection to right to property is excluded under Article 40 (6) which reads;

*"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."*

28. So, the 1<sup>st</sup> defendant's rights and registration in respect of the suit parcels of land can be challenged on grounds including fraud; see the case of **Salim-vs—Boyd 1971 EA 510** applied in **Kimani Ruchine and another-vs-Swift Rutherford Co. Ltd and another 1976-80 1 KLR 1500**, among other authoritative pronouncements and section 26 (1) of the LRA.

29. PW1 specifically pleaded fraud as per the particulars of fraud as set out at paragraph 7 (a) to (e) of the amended plaint. In **Abiero-vs-Thabiti Finance Co.Ltd and another 2001 KLR 496**, it was observed that fraud must be specifically pleaded and the particulars of fraud alleged must be specifically stated on the face of the pleading; see also **Ndolo-vs-Ndolo 2008 1 KLR G & F 742**.

30. In examination in chief, PW1 stated, inter alia;

*".....my co wife (2<sup>nd</sup> plaintiff) and myself went to Kisii Lands office for the map of the area. We realized that our land had been hived from it's original size and position. It gave rise to 11 other plots....The LR numbers were rebranded....." (Emphasis added)*

31. During cross examination by Mireri, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, PW1 maintained thus

*"...The 1<sup>st</sup> defendant hived off portion of our land, sub divided the same and sold it....The 1<sup>st</sup> defendant jumped land title number 2050 to hive off our land and subdivide it into eleven (11) subdivisions...."*

32. It is common ground that the defendants subdivided the original land into the suit parcels of land. During cross examination by Ms Opiyo learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, DW1 stated-

“...December 2012 when we sub divided the original land into 11-portions....”

33. As already observed, the anchorage of the testimony of DW2 is 3<sup>rd</sup> to 5<sup>th</sup> DExhibit 1. In examination in chief, he succinctly said;

“In a nutshell, it emerged that the defendants trespassed into the plaintiffs’ LR No. 1844 to create new LR Nos. 3011 to 3020 as shown therein. The defendants in this case are the 1<sup>st</sup> and 2<sup>nd</sup> defendants.” (Emphasis laid)

34. As regards 3<sup>rd</sup> to 5<sup>th</sup> DExhibit 2, DW3 stated in examination in chief as follows;

“... The author relied on map attached to the report....The disputed portion falls under LR No. Kanyamkago/Katieno/1844...LR No. 249 encroached LR No. 1844....”

35. The conclusion part of 3<sup>rd</sup> to 5<sup>th</sup> DExhibit 1 reads;

“Portion of land marked ABCD in the attached reference diagram by the surveyor is part of land parcel Number Kanyamkago/Katieno/1844 and that the defendants have encroached onto it.” (Emphasis added)

36. It is noteworthy that the twin reports namely 3<sup>rd</sup> to 5<sup>th</sup> DExhibits 1 and 2 were prepared and presented in court following the court’s orders as pointed out at paragraph 7 hereinabove. The reports amount to expert evidence as provided for under sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya.

37. Generally, expert evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case; See **Amosam Builders Developers Ltd-vs-Gachie and 2 others 2009 KLR 628**

38. In the instant suit, 3<sup>rd</sup> to 5<sup>th</sup> DExhibits 1 and 2 were duly adopted on 19<sup>th</sup> November 2018. The same affirm the particulars of fraud as strictly pleaded in paragraph 7 (a) to (e) of the plaint. They also echo the testimony of PW1 in this suit.

39. Indeed, DW2 and DW3 have the technical ability and resources to establish and fix boundaries between the original land and LR No. Kanyamkago/Katieno/2049. In view of the obtaining circumstances of the case, I find no reason not to unreservedly accept 3<sup>rd</sup> to 5<sup>th</sup> DExhibits 1 and 2.

40. **Section 79 of the Land Registration Act, 2016 (2012)** governs rectification of land register by Registrar. No rectification may be made to affect title of proprietor without his or her consent and a written notice of ninety (90) days of the intention to make the alteration must be issued to the proprietor accordingly.

41. Any person aggrieved by the Registrar’s decision may apply to the court for relief. **Section 2 of the LRA** defines the following term;

“Court” means the ELC established by the ELC Act, 2011 (No. 18 of 2011) and other courts having jurisdiction on matters relating to land.”

42. Moreover, rectification of land register by an order of the court is provided for under **section 80 of the LRA**. Being doing so, the court must be satisfied that any registration was made or omitted by fraud or mistake. Further, that the proprietor had knowledge of fraud or mistake or caused it or subsequently contributed to it by any act, neglect or default

43. In the case of **Kinyanjui Kamau-vs-George Kamau (2015) eKLR**, the Court of Appeal held:

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts.”

44. Plainly, the plaintiffs pleaded fraud at paragraph 7 (a) to (e) of the amended plaint. The Registrar, the 3<sup>rd</sup> defendant failed to give them notice regarding the rectification of the register of the original land. The plaintiffs did not consent to the purported rectification. Therefore, the plaintiffs’ claim is cogent and steadfast. They have established the allegations of fraud as analyzed in paragraphs 30 to 40 hereinabove. The 1<sup>st</sup> and 2<sup>nd</sup> defendants’ defence fails.

45. In the foregone, the plaintiffs are entitled to the orders of this court under **section 80 (1) of the LRA**.

46. Clearly, the suit has met the threshold in **Giella case** (supra).

47. I further bear in mind that the very foundation of the jurisdiction of this court to grant injunctive relief vests in the probability of irreparable harm, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits; see **Nguruman case (supra)**.

48. The plaintiffs have demonstrated that they initiated this suit within the conditions stated in paragraph 47 above. So, permanent injunction sought in the amended plaint is available to them.

49. This court is also mandated to grant permanent preservation orders including injunctions as stipulated under **section 13 (7) (a) ELC Act**.

50. By dint of the proviso to **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya**, costs follow the event. The same are awardable in the discretion of the court. Given the entire case and the circumstances, the plaintiffs are also entitled to costs of this suit.

51. Accordingly, the plaintiffs have established their claim against the defendants to the requisite standard as held in **Ndolo case** (supra). I proceed to enter judgment for the plaintiffs against the defendants in terms of orders (a), (b) and (c) being as sought in the amended plaint and as set out in paragraph 9 (a), (b) and (c) hereinabove.

52. It so ordered.

**DATE AND DELIVERED AT HOMA BAY THIS 31ST JANUARY 2022.**

**G M A ONGONDO**

**JUDGE**

In the presence of;

- a) Mr G M Nyambati learned counsel for the plaintiffs
- b) 2<sup>nd</sup> defendant
- c) Okelo, court assistant