



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 146 OF 2015

EZEKIEL OCHUKUM (suing as the personal representative of the estate of

SEBASTIAN OCHIENG OCHEKUMU.....PLAINTIFF

VERSUS

FRED EKISA.....1ST DEFENDANT

SELINA NGENGE.....2ND DEFENDANT

JACKSON ELAMIKA ESIYA.....3RD DEFENDANT

MORRIS ORODI MUBWEKA.....4TH DEFENDANT

THE LAND REGISTRAR, BUSIA.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiff took out these proceedings as the legal representative of the estate of Sebastian Ochekumu – deceased. He pleaded that although Sebastian was the first registered owner of land reference number SOUTH TESO/ANGOROMO/724, it is his father Bangiraus Ochekumu who lived on it. The Plaintiff avers that Bangiraus – deceased passed on 12th August 1988 intestate and was buried on the suit land.

2. The Plaintiff contends that around August – September 2015, he conducted a search on the suit title and discovered the following;

a. On 10th of July 1990, the above parcel had purportedly been transferred from the original owner SEBASTIAN OCHEKUMU-deceased above named to the said BANGIRAUS ORODE OCHEKUMU also deceased.

b. On 14th of September 1990 the title comprising land parcel no. SOUTH TESO/ANGOROMO/724 was closed on subdivision to create land parcel no. S.TESO/ANGOROMO/2949,2950 and 2951 respectively which were then registered in the names of FREDRICK EKISA, MORRIS ORODI MUBWEK and SELINA ATYANG NGENGE the first, fourth and second Defendants respectively above named.

c. On 4th of September 1995 land parcel no. SOUTH TESO/ANGOROMO/2949 was closed on subdivision and land parcel no. S. TESO/ANGOROMO/4376 and 4377 respectively created which were then registered in the name of the first and third Defendant herein respectively.

3. The Plaintiff's claim is that the above transactions were undertaken in fraud thus null and void and proceeded to state the particulars of fraud as;

a. The Plaintiff's father Bangiraus Orode died on 12th of August 1988 and therefore could not have transacted on the original parcel aforesaid on 10th of July 1990.

b. The subsequent subdivisions and entries resulting from the subdivision of land parcel no. SOUTH TESO/ANGOROMO/724 are illegal null and void ab initio by reason of having resulted from transactions purportedly entered into by a deceased person.

4. Consequently, the Plaintiff prays for judgment in the following terms;

- a. A declaration that the subdivision of the original title comprised in land parcel No. SOUTH TESO/ANGOROMO/724 and subsequent subdivisions and titles created are null and void.
- b. That the subdivisions and Titles thus created from land parcel no. SOUTH TESO/ANGOROMO/724 be nullified and cancelled from the relevant land register and restored by the Land Registrar, the fifth defendant above named to the original title land parcel no. SOUTH TESO/ANGOROMO/724 and the names of SEBASTIAN OCHEKUMU the deceased above named.
- c. Costs of this suit be provided for.

5. The 1st and 4th Defendants filed a joint statement of defence on 13th January, 2016 denying the claim and putting the Plaintiff to strict proof.

The suit against the 3rd Defendant was withdrawn for the reason it had abated.

6. The Attorney General entered appearance for the 5th Defendant on 20th June 2018 and filed a statement of defence on 17th July, 2018. The 5th Defendant pleaded that it was a stranger to the averments in the plaint and invited the Plaintiff to strict proof. The 5th Defendant at paragraph 6 of its defence narrated the history of the suit parcel as per the records adding that Bangiraus had applied to be registered by transmission on 27.1.1988 which was before his death stated as 12.8.1988. The 5th Defendant pleaded that the claim is also statute barred and urged the court to dismiss the suit for the reasons stated.

7. After the pleadings closed, parties presented their oral evidence with the Plaintiff giving his testimony on 15th December 2020 as PW1. He adopted his witness statement dated 9th December, 2015 and further statement dated 02.05.2017. In the first statement, PW1 said that at the time of demise of his father, he was a minor so he went to stay with his grandmother. Later at age 17 he went to Nakuru to look for a job and returned home in the year 2005 where he asked Paul Ameer (his uncle) where to build. Mzee Ameer advised him to build on his grandfather's land and not parcel no. 724 at which point he discovered that he had no land to claim in 724. He decided to contact the daughter of Sebastian and they conducted a search on the suit title which led to the discovery of the transactions that forms the basis of this claim set out in paragraph 12 of the plaint.

8. In the further statement, PW1 stated that it appeared as if his father obtained a grant in Bungoma SRM's cause no. 68 of 1985 on 17.6.1987, which grant was confirmed on 27.1.1988. PW1 averred that the application for consent obtained on 24.7.1990 could not have been made by his late father who was by then dead. The same position applies to the signature made on 22.8.1990 on the mutation form. That there is no transfer document to show that his father executed a transfer in favour of FREDRICK EKISA on 26.7.1995.

9. The Plaintiff was put to cross examination by Mr. Bogokno, learned Counsel for the 1st, 2nd and 4th Defendants and he had this to say. PW1 said Sebastian died in the year 1982 while his father died in 1988. That he was aware his father took out letters of administration in the estate of Sebastian in 1985, however he never replaced his father Sebastian as the administrator. That before doing the search, he did not know the 2nd Defendant lived on the suit parcel no. 724 and he did not know when the 2nd Defendant started using the land. PW1 admitted that the 3rd and 4th Defendant also lived on and used the suit land. That he had not built on parcel no. 724. He denied that they have jointly sold land to anyone. That he was told by neighbours and his sister that his father died in 1988 and denied using the date of 12.8.1988 to deny that his father had sold land to the Defendants.

10. In cross examination by Mr. Tarus State Counsel appearing for the 5th Defendant, the witness admitted that he has not elaborated how the 5th Defendant was part of the fraud. PW1 denied that his father presented the grant issued to him to the lands office. He was shown a transfer form executed on 27.1.1988 and said he had sued the 5th Defendant because he had not received sufficient information. In re-examination, PW1 said he is not the one who prepared the death certificate of Bangiraus Orose.

11. Florence Etyang Wandera testified as PW2. She stated that she is a daughter to Sebastian and a cousin to the Plaintiff. That Sebastian owned L.R. No. 724 and he died on 12.11.1982. PW2 continued in evidence that she discovered in 2005 that there were other people living on the suit land. PW2 averred that on return of Sebastian from Uganda, he settled on the family land registered in the name of Ekisa Ochekumu. That Sebastian is survived by her and Roseline Etyang. That when the Plaintiff came from Nakuru in 2005 and wanted to build a house, their uncle Paul Ameer denied him where to build – that is when the Plaintiff asked about the details of the suit land. So they conducted a search on the suit property.

12. In cross examination, PW2 said her father gave Bangiraus (Plaintiff's father) the whole land. She did not know when the Defendants started using the land. She did not know if Bangiraus sold the land to them but at the time of his death, PW2 said none of the Defendants were on the suit land. In re-examination, PW2 said Sebastian and Bangiraus were to share the suit land. That they were also entitled to a share in the land. Documents filed were produced in evidence. This marked the close of the Plaintiff's case.

13. The defence case started on 16th February 2021, with the evidence of Fredrick Ekisa as DW1. He stated that Sebastian was an elder brother to his father Pancras Ochekumu making him cousin to the Plaintiff. According to DW1, the suit land was given to his father and the Plaintiff's father. DW1 stated further that Pancras sold 2 acres of land to the 2nd Defendant in the year 1984 and to a Mr. Sylvester who later sold his portion to the 4th Defendant. It is DW1's evidence that it is Pancras who subdivided the suit land into three portions i.e 2949, 2950 and 2951. That L.R. 2951 is registered in DW1's name.

14. DW1 avers that it is his father who took the buyers before the Land Control Board by sending the Plaintiff with his ID to the board. That a representative of the Land Control Board came home to confirm that indeed his father was sick and that the Plaintiff had been sent.

DW1 said pursuant to a family meeting, he was allowed to sell part of LR 2949 to the 3rd Defendant and the remainder land comprised in L.R. 4376 now belongs to the Plaintiff although the title reads his name. DW1 contended that he is the one who took care of the Plaintiffs after the demise of his parents. He produced the documents in his list as dex 1 – 7. It is DW1's evidence that the registration of the transfer dated 10.7.1990 and the mutation was done during his father's lifetime. He denied that his father died in 1988 as presented in the death certificate.

15. During cross examination by Mr. Amasakha learned Counsel for the Plaintiff, DW1 said his father was called Paulo Ameer Ochechumu and he has a brother called Robert Okedi born in 1972. He did not know the size of land given to his father. According to the witness, the suit land was jointly registered in the name of Sebastian and Pancras but the entry in the green card only had one name. That Bangiraus gave him the title to hold since he has the eldest of the grandchildren but he was not given any share of the land. DW1 maintained Bangiraus died in 1990. That he ever lived in Uganda and returned in 1985. That his biological father is still alive.

16. The 2nd Defendant testified as DW2 by adopting her witness statement dated 10th February 2017. She said that her husband David Ekire Gege entered into a sale agreement with the Plaintiff's father on 7th October 1984 for purchase of 2 acres of the suit land. That the purchase price of Kshs. 4000 was fully paid, boundaries fixed and they were put in possession immediately which possession they are in to date to the exclusion of the Plaintiff. DW1 averred that the land at the time of purchase was jointly registered in Sebastian and Bangiraus names.

17. DW2 also contend that it is the Plaintiff's father who conducted the subdivisions having obtained a grant of the estate of Sebastian Ochechumu. DW2 denied that Bangiraus died on 12.8.1988 as indicated in the death certificate saying he died in 1990 after the suit land had subdivided. DW2 state the portion sold to her is comprised in title S. Teso/Angoromo/2951. She conducted her evidence by stating that the Plaintiff's suit is misconceived and statute barred under the law.

18. In cross-examination, DW2 said they went to the board with the Plaintiff although she did not remember the year. That she was aware the children of Sebastian were not part of the agreement of sale. DW2 admitted that her transfer documents were prepared after the demise of Bangiraus. In re-examination, DW2 said Bangiraus was alive although ailing when she was given the transfer documents.

19. The 4th Defendant gave his evidence as DW3. He adopted his witness statement dated 12.11.2019. DW3 stated that he purchased his portion of the land from Sylvester Okemel in 2005. That Sylvester had a title which he transferred to him and produced the supporting documents as Dex 7 – 11. In cross examination DW3 stated he shares a boundary with the 1st Defendant and also a neighbour to the Plaintiff since 2005.

20. Mr. Nicholas Obiero a Land Registrar who is sued as the 5th Defendant testified as DW4. Mr. Obiero produced the documents that had been filed which documents include; green card for 724; RL 19, grant of administration of Sebastian's estate, mutation dated 4.9.1990, green cards for 2950, 2951 and 2949. That L.R. 2949 was later subdivided to create 4376 and 4377. DW4 stated that the documents were brought to them after they were signed. DW4 stated further that during that period documents would be sent to the lands office through post office so you could not see the people presenting them.

21. On cross-examination, DW4 said that the application for transfer by transmission was dated January 1988 but was presented on 10.7.1990. The certificate of confirmation of grant was issued on 27.7.1988 to Bangiraus Ochechumu. That the Mutation shows date of presentation as 4.9.1995 while the document was signed on 4.9.1990. This marked the close of the Defendant's case.

22. The parties thereafter filed closing written submissions between July and September 2021 which submissions I have read and considered. From the pleadings and submissions, the following questions are framed for determination;

1. Whether or not the Plaintiff has proved fraud against the defendants in regard to subdivision of L.R 724.

2. What orders ensue.

23. The issue for determination is whether not the Plaintiff proved the fraud he labelled against the Defendants. It is trite law under Section 107 & 109 of the Evidence Act cap 80 that whoever alleges a fact must prove it. Secondly, the standard of proof required is one of strict proof as fraud cannot be inferred. In the case of ***Vijay Majoria Vs. Nansingh M. Darbar & another [2000] eKLR***, Tunoi J.A. (as he then was) held thus;

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See ***Davy v Garrett*** (1878) 7 Ch. D 473 at 489.

27. In this instance, the fraud pleaded by the Plaintiff first was that his father never transferred suit title from Sebastian Ochechumu's name to himself because the date of registration shown on the green card was after demise of Bangiraus. The Plaintiff has admitted that his father took out the letters of administration in the estate of Sebastian Ochechumu who was the first registered owner of the suit parcel vide Bungoma CMC Succ cause no. 68 of 1985. The deceased was issued with a grant on 17.6.1987 and certificate of confirmation granted on 27.1.1988. The 5th Defendant produced R.L. 19 form in respect to L.R. South Teso/Angoromo/724. The RL 19 is dated 27.1.1988 and was witnessed in the presence of the Resident Magistrate Bungoma. Similarly, the transfer by transmission from bearing the names of Bangiraus Ochechumu is dated 27.1.1988.

28. The Plaintiff took issue with these documents on account of the date of registration which is 10.7.1990 and which date according to him, his father was already dead. The date of death according to the death certificate is disputed by the 1st and 2nd Defendants who stated that the

Plaintiff's father died in 1990 and not in 1988. Be that as it may and in my opinion, the Plaintiff was under a duty to prove that the signatures appearing on RL 19 did not belong to his later father Bangiraus Ochekumu. At the time the document was executed, Bangiraus - deceased was still alive (as per death certificate produced). I am not persuaded that the registration of the suit title in the name of the deceased was fraudulent.

29. From the evidence on record, the 1st Defendant was registered as owner of the suit land number 2949 on 28th July 1995, the 2nd Defendant was registered as owner of L.R number 2951 on 19th Sept 1990. Sylvester Okemer who later sold his parcel number 2950 to the 4th Defendant acquired his registration on 19th Sept 1990. On account of the date of death as per the death certificate produced, all the Defendants acquired their titles after the demise of Bangiraus-deceased.

30. Although the 1st and 2nd Defendants contested the date of death as per the death certificate, they did not produce any evidence to prove contrary date of death of Bangiraus-deceased. Neither did they call any expert evidence to challenge the validity or otherwise of the certificate of death produced by the plaintiff. In my view and I so hold that after the Plaintiff their registration was after the death as shown in the death certificate, the Defendants were put on notice to prove that they have valid titles.

31. According to the 1st Defendant, it is the deceased who subdivided the land number 724 and registered title number 2949 to his name. In the Plaintiff's documents is a copy of the consent to transfer parcel number 2949 from the deceased to the 1st defendant dated 9th May 1995 which was long after the demise of Bangiraus-deceased. Definitely, the deceased could not transfer the title to the 1st defendant from his grave. The 1st Defendant subsequently subdivided parcel number 2949 to create numbers 4376 and 4377. He sold parcel number 4377 to the 3rd Defendant who died during the pendency of this case. The 1st Defendant stated that he is holding parcel number 4376 in trust for the Plaintiff and he was willing and ready to execute the transfer documents in favour of the Plaintiff thus partially conceding to the claim.

32. With respect to the title of the 2nd Defendant, she did not produce any documents of transfer executed in her favour. The 2nd Defendant produced a sale agreement dated 26.7.1986 and a copy of title issued on 20.9.1990. The 2nd defendant said that the documents were executed in her favour but did not disclose by who. She did not demonstrate that she procedurally acquired her title based on her admission during cross-exam that the documents of transfer were signed after the demise of Bangiraus Orode.

33. For this Defendant, although I find her title was fraudulently acquired, I note that she said in her written statement at paragraph 5 that they were put in possession immediately after purchase and boundaries fixed for her 2 acre portion. At paragraph 14, she stated that the Plaintiff's claim as against her is statute barred by the Limitations of Actions Act.

34. The sale agreement that put the 2nd Defendant into possession was drawn in 1986. The agreement was not proved to be forged and the possession of the 2nd Defendant was not denied. Therefore even if her title in respect to L.R. no. 2951 is cancelled, her rights on the suit land comprised of 2 acres bought would not be extinguished. This defence of limitation in my opinion is justified.

35. The claim against the 3rd Defendant was withdrawn. No order can issue against the deceased 3rd Defendant who owned parcel no. 4377.

36. On the claim against the 4th Defendant, he produced all document that enabled him secure his registration of L.R. no. 2950. One of these documents was the search bearing the vendors name issued on 14.2.2005. The 4th Defendant purchased his land in the year 2005 and obtained consent to transfer on 19th August 2005. By the year 2005, the Plaintiff had learnt that the land had been subdivided yet he did not restrict any of the suit titles.

37. For the Plaintiff's claim to succeed against the 4th Defendant, he had a duty to prove that the 4th Defendant was a party to this fraud. The fraud complained of took place in 1990 or thereabouts. The 4th Defendant bought the land some 15 years later. In my opinion, he falls under the category of innocent purchaser for value without notice. So that even if there was no good title to be passed to him by Sylvester Okemer, he cannot be punished for mistakes he could not have known even after doing due diligence.

38. The 4th Defendant is protected by the provisions of Section 26 (i) (a) of the Land Registration Act which provides thus;

26. Certificate of title to be held as conclusive evidence of proprietorship;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

39. In view of my foregoing analysis, I find that the Plaintiff's claim against

i. The 2nd defendant who has been in occupation for over 12 years thus extinguishing the Plaintiff's right over the 2 acres by operation of the land. Cancelling the 2nd Defendant's title would be an order made in vain.

ii. The claim over 3rd Defendants parcel no. 4377 was withdrawn.

iii. The 4th Defendant was not shown to be a party to the fraud. He is an innocent purchase for value without notice.

40. The claim succeeds only in so far as it relates to parcel no. 4376 currently registered in the 1st Defendant's name. The 1st Defendant during his testimony stated he was willing to transfer this land to the Plaintiff. In conclusion, the orders prayed are in the plaint are not disallowed. In the interest of justice and pursuant to admission by the 1st Defendant, an order is made that the 1st Defendant shall forthwith execute transfer documents for S. Teso/Angoromo/4376 in favour of the Plaintiff. For having proved there was fraud although the proof does not fetter the 2nd – 4th Defendants titles for the reasons given, I award the Plaintiff half costs of the suit.

DATED SIGNED AND DELIVERED AT BUSIA THIS 27TH DAY OF JANUARY, 2022

A. OMOLLO

JUDGE