



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 48 OF 2014 (FORMERLY HCC. 69 OF 2011)

DARIA NEKESA.....1ST PLAINTIFF

PHAUSTINA APONDO OLOO.....2ND PLAINTIFF

VERSUS

JAPHETH NYAWADE CHERSSAH.....DEFENDANT

J U D G M E N T.

1. BACKGROUND

- a. **DARIA NEKESA** and **PHAUSTINA APONDO OLOO**, hereinafter referred to as the 1st and 2nd Plaintiff, commenced their claim through the plaint dated 25th July, 2011 against Japheth Nyawade Chessah, hereinafter referred to as the Defendant. They had filed the suit in their capacity as administrator of the estate of Gabriel Oloo alias Gabirel Oloo Kombo, hereinafter referred to as the deceased, who was the first registered proprietor of the suit land, Marachi/Elukhari/528. They further averred that the deceased died on 21st October, 1979 and on or about 2007, they discovered that the Defendant had fraudulently registered the suit land in his names.
- b. The Plaintiffs have set out the particulars of fraud under paragraph 8 of the plaint. The particulars include allegations that Defendant got the suit land registered in his names without obtaining Land Control Board consent and without a transfer form duly signed by the deceased. The Plaintiffs therefore prays that the register of the title to the suit property be rectified by cancelling the Defendant’s names and restoring the proprietorship to the deceased’s name. They also pray for costs.
- c. The Defendant opposed the Plaintiffs’ claim through the statement of defence dated 1st December, 2011. The Defendant disputes that the Plaintiffs are administrators of the deceased estate and avers that they have no capacity to commence this suit. The Defendant further avers that he had bought the suit property from the deceased and that the Plaintiffs were aware of the transactions since 1975 and the claim is therefore time barred. He further denied that he obtained registration of the suit land and change of name through fraud. The Defendant avers that there has been other suits with the Plaintiffs’ agents and prays for the suit to be dismissed with costs.
- d. The Plaintiffs filed a reply to the defence dated 13th December, 2011 denying the Defendant’s claim that he had bought the suit land from the deceased.

2. THE PLAINTIFFS EVIDENCE.

- a. The 1st and 2nd Plaintiffs testified as PW 1 and PW 2 respectively. They also called Tom

- Chepkwesi, the County Land Registrar as a witness and he testified as PW 3. The evidence adduced show that PW 1 and PW 2 were the 1st and 2nd wives to the deceased who died on 21st October, 1979. The two Plaintiffs then filed Busia Succession Cause No. 117 of 2011 and were issued with limited grant ad litem on 29th June, 2011. It is the Plaintiffs' evidence that the deceased inherited the suit land, Marachi/Elukhari/528, from his father and got registered as proprietor on 8th November, 1966. They further testified that the deceased had another land which he had bought as there was a problem with the suit land involving their mother –in-law.
- b. That upon the Plaintiff's discovering that the Defendant had had the suit land registered in his names without their consent or that of their deceased husband, they filed this suit.
 - c. That the Plaintiffs had left the suit land and settled on the land their husband had bought during his lifetime and have not gone back to the suit land except in 2008 when they wanted their grown up children to move there. It was the Plaintiffs evidence that the deceased did not sign the transfer documents in favour to the Defendant. They also denied that the deceased used the proceeds he received on selling the suit land to Defendant to buy the land they moved to and still resides on.
 - d. The County Land Registrar,(PW 3), confirmed that the deceased was the first registered proprietor of the suit land as per the entry of 8th November, 1966 in the register. The witness pointed out that he had noted an error on entry number 2 of 13th October, 1975 under which the Defendant's name was entered on transfer. He said though the certified copy of the registered produced by PW 1 as exhibit 2 had been signed off by his office, the original register whose copy he produced as exhibit 4, showed that entry No. 2 had not been signed of and instead had been cancelled. He also testified that he was unable to trace the letter from the chief and consent of the Land Control Board to support entry number 3 for correction of name. The witness disputed the transfer form in the Defendant's list of document saying it was incomplete and could not have come from his office. He pointed out that the transferee in the document was Japheth Nawade Zablon Chesa while the name in entry number 3 of the register is Japheth Nyawade Chessah. The Land Registrar added that he took entry number 3 on correction name to be meant to change the names in entry number 1. He said correction of names is only used to correct names of the same person and not to introduce a new person.

3. THE DEFENDANT'S EVIDENCE.

- a. The Defendant testified as DW 1 and called Tomas Chesa and Teres Cheruiyot as witnesses and they testified as DW 2 and DW 3 respectively. The Defendant's evidence is that he bought the suit land from the deceased at a purchase price of Kshs.3,400/= and two cows in 1975. They had made a written land sale agreement and obtained the Land Control Board consent and after executing the transfer forms, the Defendant got registered as the proprietor of the suit land on 13th November, 1975 and obtained title deed in 1991. The Defendant said the identity card number indicated in the copy of the transfer form as [particulars withheld] was the number for his old identity card number but when registration was done in 1991, the number in the new generation identity card number was used.
- b. The Defendant testified that 1st Plaintiff was aware of the land sale agreement between him and the deceased. He further testified that the deceased used the money he paid him to buy another land to which he and 1st Plaintiff moved to. He added that the deceased also used part of the purchase price to marry the 2nd Plaintiff as a second wife. The Defendant testified that after buying the suit land, he brought a surveyor to confirm the boundary and has used that land since 1975.
- c. The Defendant gave details of the court and tribunal cases he had had with relatives of the Plaintiffs over the suit land. He disclosed that the tribunal had awarded Julius Namwenge two acres of the suit land but he has challenged that decision in Busia H.C. J.R. No. 19 of 2010 which was still pending in court.
- d. The Defendant denied ever applying to have his names in the register of the suit land corrected. He denied that he had been registered with the suit land through fraud and prayed for the Plaintiff's suit to be dismissed with costs. He testified that Julius Namwenge lives on the suit land and stated that he was ready to give him two acres of the suit land as awarded by the

tribunal.

- e. The Defendant confirmed that he used the suit land until 2006 when Julius Nawenge sued him before the tribunal. He testified that he had obtained the copy of the transfer form in the list of his documents from the Land Registrar's office even though it does not bear the official stamp. He said he could not remember seeing the letter of consent though he could remember they had applied for it.
- f. DW 2 testified that he had witnessed a sale agreement between the deceased and Defendant over the suit land for a purchase price of two cows which he witnessed being given to the deceased. The witness said the agreement later got burnt when Defendant's house was set on fire.
- g. DW 3 is a court staff and produced some court records for other court cases involving Defendant and other persons other than the Plaintiffs herein.

4. ISSUES FOR DETERMIANTION.

- a. Whether the Plaintiffs have capacity to institute this suit for the estate of Gabriel Oloo Kombo, the deceased.
- b. Whether the deceased was ever registered as proprietor of the suit land.
- c. Whether there was a land sale agreement between the deceased and the Defendant over the suit land, and if so what its terms were.
- d. Whether the transfer of the title to the suit land to the names of the Defendant was obtained irregularly and or fraudulently.
- e. Whether the Plaintiffs are entitled to the orders sought.

5. ANALYSIS.

- a. That the Plaintiffs herein are widows of Gabriel Oloo Kombo, who died on 21st October, 1979 and have obtained Limited grant of letters of administration ad litem issued on 29th June, 2011 in Busia H.C. Succession Cause No. 117 of 2011. The copy of the grant produced as exhibit 1 shows it is "**Limited to the purposes only for filing suit.**" The Plaintiffs therefore had capacity to file this suit through the plaint dated 25th July, 2011 and filed in court on 3rd October, 2011 as administrators of the deceased estate.
- b. That the deceased was the first registered proprietor of Marachi/Elukhari/528. This is confirmed by the copies of the register produced as exhibit 2 and 4. The copy of the register produced as exhibit 2 was certified as a true copy by the Land Registrar on 25th May, 2011. The second entry dated 13th November, 1975 showing that Japheth Nyawade Chessah of identity card number [particulars withheld], was registered as proprietor through a transfer was confirmed by the Land Registrar, (PW 3), to have been erroneously inserted as the original register whose copy he produced as exhibit 4 shows that entry had not been signed for and has been cancelled out through a line cutting across. Though the Defendant evidence was that the transfer form signed by the deceased and himself was registered on 13th November, 1975, it is apparent the evidence adduced by the Land Registrar does not support his contention.
- c. That the Defendant defence to the Plaintiffs' claim was that he had bought the suit land from the deceased in 1975 and that they had obtained all the statutory requirements before registering the transfer. The Plaintiffs have disputed this defence. The 1st Plaintiff had been married to the deceased before the year 1975 as confirmed by both the Plaintiffs and Defendant and has denied knowledge of sale of the suit land. In the absence of the land sale agreement and Land Control Board application for consent and the letter of consent, the court is unable to satisfy itself as to the existence of a sale agreement between the deceased and Defendant. The court is also unable to confirm the terms of the land sale agreement, and whether the consent of the Land Control Board was obtained as required under **section 6 and 8 of the Land Control Act Chapter 302 of the Law of Kenya**. In any case, if the deceased and Defendant had attended the Land Control Board for the consent application as alleged, the 1st Plaintiff would have been involved, as is the practice, as she was the only spouse of the vendor then.
- d. That County Land Registrar's (PW 3), testimony shows that there were no documents traced in his

office to support a transfer of the suit land from the deceased to any other person. This is obviously contrary to the Defendant's testimony that he had indeed registered the transfer form signed in his favour by deceased in 1975. The Defendant had annexed a copy of a document headed '**Transfer of Land**' in his filed list of documents dated 10th August, 2012. The document indicated the transferor as **Gabriel Oloo** of identity card number [particulars withheld] NBI of P.O. Box 30080, Nairobi, and the transferee as **Japheth Nawade Zablon Chesa** of identity card number [particulars withheld] of Post Office Box Butula. The Defendant had during cross-examination stated that he had not obtained the copy of the transfer form from the Land Office but later in re-examination said that he had obtained it from that office. The Defendant must have wanted the court to consider the document as part of his exhibit when he annexed it to his list of documents. When the County Land Registrar (PW 3) was shown the transfer document he stated as follows;

".....It cannot have come from our office as it was not certified and is not complete. I would have seen the original if we had it when I was checking for the documents. The document shows the land was being transferred to Japheth Nawade Zablon Chesa which are different (names) from the names in entry No. 3 of the register. If this transfer was effected, the register would have read Japheth Nawade Zablon Chesa and not Japheth Nyawade Chessah that are now in the register."

The testimony of the Land Registrar, who under **section 7 of the Land Registration Act 2012**, is the custodian of parcel files that contain instruments and documents that support subsisting entries in the land registers, shows that the transfer document which Defendant claim was the one deceased signed to transfer the suit land to him cannot be the basis of the entry No.2 which was later cancelled, or entry No. 3, under which the Defendant's names were first introduced in the register of the suit land. The transferee's names and identity card details in the copy of the transfer form alleged to have been signed by the deceased in 1975 are different from those entered in both entries numbers 2 and 3 of the register. This makes the court believe the plaintiffs when they told the court that the deceased never transferred the suit land to the Defendant and that the transfer was irregular, and fraudulent. That the Land Registrar (PW 3) evidence that he could not trace any documents to support correction of names in entry number 3 was supported by the Defendant who said that he has never applied to correct or change his names in respect of the suit land. He stated as follows about the entries in the suit land register;

" The second registered owner was Japheth Nyawade. The name had been crossed out. The third registered owner is Japheth Chessah Nyawade of identity card No. [particulars withheld]. There are words "C/name" which I do not know what it means. If the Land Registrar said I had claimed to be correcting the names from Gabriel Oloo to read Japheth Chessah Nyawade, he did not tell the truth as I have never applied to change my names in respect of land parcel Marachi/Elukhari/528. I got registered with the land through the transfer form signed by Gabriel Oloo and myself. I have not obtained a copy of that transfer form."

The Defendant added the following day during re-examination;

" I got the transfer form dated 12th September, 1975 from the Lands office and it bears the Registrar's name but not the stamp from the Lands office."

The evidence set out above leads the court to the conclusion that entry number 3 was not based on the transfer form dated 12th September, 1975 as claimed by the Defendant. The Land Registrar evidence that the copy of the transfer form dated 12th September, 1975 could not have been issued by his office is more credible, than the Defendant's claim that it came from that office as the document is not stamped, not certified and there is no evidence of any payment having been made when it was issued.

e) That in view of the foregoing, the court agrees with the opinion of the Land Registrar that

entry number 3, that was reflected as a corrections of names was meant to introduce a new registered proprietor of the suit land in the names of Japheth Nyawade Chessah without following the laid down procedure. This was to say the least irregular, unprocedural, and illegal. The court is aware that under **section 26 of the Land Registration Act 2012**, a certificate of title like the one held by the Defendant herein, is to be held as conclusive evidence of proprietorship. The exceptions are where fraud or misrepresentation to which the registered proprietorship is a party is proved or where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme. The Plaintiffs herein have proved that the transfer of the suit land from the deceased name to Defendant's name was done without following the procedure required. It was therefore illegal. The registration was obtained through corrupt means or misrepresentation.

6. That in the case of ***Ephantis Muturi Kigoro –vs- Willaim Mukui Myaga [2015]*** eKLR, the Court of Appeal was dealing with an appeal from the decision of the trial court which had cancelled the Appellant's title and expunged his name from the suit property. The trial court had found that the registration of the suit property in the names of the person who was registered with the title before the Appellant was suspect and fraudulent, and that the Appellant was at all material times aware of the allegations of fraud. The trial court found that the Appellant had acquired the suit property in circumstances which made it inequitable for him to be allowed to retain the land. The Court of Appeal referred to its previous decision in the case of ***Macharia Mwangi Maina & 87 others –vs- Davidson Mwangi Kagiri*** Civil Appeal No. 6, 26 & 27 of 2011, where it had held;

“ This court is a court of Law and a court of equity. Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

The court then pronounced itself on the appeal before it as follows;

“ The trial court did not error in issuing the orders it did. This is because it would be inequitable to allow the appellant to assert absolute ownership of the suit land given the evidence on record and the respondent's beneficial interests over the same.”

This court comes to a similar finding that the Defendant herein must have known that his registration as proprietor of the suit land was through fraudulent means. He cannot be allowed to remain as so registered and to assert the rights of a registered proprietor over the suit land, considering that the Plaintiffs herein have beneficial interests over the same land by virtue of their being widows of the deceased and administrators of the deceased's estate. The registration exercise could not have been done by Japheth Nyawade Chessah alone, but must have received inside assistance from the personnel from the Land Registrar' office. The court has noted the contents of entry number 5 that some investigations were being carried out as far back as 2007 and hopes that all those involved in the corrupt and fraudulent scheme would be identified and appropriate legal action taken at the conclusion of the investigations.

7. (a) That having found as above, the court is satisfied that the deceased never signed any transfer form transferring the suit land to Japheth Nyawade Chessah of National Identity card number [particulars withheld].

(b) That the court is also satisfied that the deceased never applied to correct his names from Gabriel Oloo to Japheth Nyawade Chessah as seems to be suggested in entry number 3 of 30th January, 1991 as he had died about 16 years earlier.

(c) That the registration of the Defendant's names as proprietor of the suit land under entry 3 was irregularly, illegally and unprocedurally done.

8. The Plaintiffs have therefore proved their case against the Defendant on a balance of probabilities.

Judgment is therefore entered in favour of the Plaintiffs , as administrators of the estate of the deceased, as follows;

- i. That the County Land Registrar, Busia is hereby ordered to correct the register of Marachi/Elukhari/528 by cancelling entry No. 3 and 4 and restore the name of Gabriel Oloo, now deceased, as the registered proprietor of the said land.
- ii. The Defendant to pay the Plaintiffs costs.

It is so ordered.

S. M. KIBUNJA

JUDGE.

DATED AND DELIVERED ON 30TH DAY OF JUNE, .2015.

IN THE PRESENCE OF;

1ST PLAINTIFF.....ABSENT.....

2ND PLAINTIFF.....PRESENT.....

DEFENDANT..... ..ABSENT.....

COUNSEL... MR. MAKOKHA FOR ONSONGO FOR DEFENDANT.

JUDGE.