



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC NO. 91 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 440 of 2015}

PRISCAH BISINGA ONGETA (Suing as the legal Administrator of the Estate of

JACKSON ONGETA CHANGE (deceased).....PLAINTIFF

=VRS=

SAMWEL GISIORA OGOTI.....DEFENDANT

JUDGMENT:

The Plaintiff is the Administratrix of the Estate of Jackson Ongeta Change who died on 12/4/2003 and her administration of the Estate was provided for by way of Grant of letters of administration dated 16/10/2011 by Kisii High Court in Succession Cause No. 154 of 2011. Prior to his death, as averred in the Plaint dated 24/9/2015, the said Mr. Change was the registered proprietor of the parcel of land known as LR. NO. GESIMA SETTLEMENT SCHEME/20. She proceeds to assert that in April 1986, the deceased contracted to sell to the Defendant a portion of the original parcel of land measuring 4 Acres, and that the said land was sub-divided between Plot Numbers 20A and 20B respectively with the latter being allocated to the Defendant. The Defendant took possession of the land he bought which was now LR. NO. GESIMA SETTLEMENT SCHEME/299 and the Plaintiff retained LR. NO. GESIMA SETTLEMENT SCHEME/298. But that it turned out that LR. NO. GESIMA SETTLEMENT SCHEME/299 measures 2.5 Hectares i.e. 6.25 Acres. It is the Plaintiff's case that the Defendant was registered the proprietor of GESIMA SETTLEMENT SCHEME/299 by way of fraud since the same exceeds the land contracted for by 2.25Acres and would therefore wish that the court determines the suit by issuing: -

(i) A Declaration that the inclusion of a portion measuring 2.25 Acres, in LR. NO. GESIMA SETTLEMENT SCHEME/299, in favour of the Defendant, was fraudulent, illegal, null & void.

(ii) An order of cancellation and/or rectification of the register in respect of LR. NO. GESIMA SETTLEMENT SCHEME /299, with a view to excising the portion measuring 2.25 Acres and reverting same to the Estate of the Deceased.

(iii) A Permanent injunction restraining the Defendant either by himself, agents and/or servants from entering upon, cultivating, occupying, encumbering, dealing and/or interfering with the Plaintiff's and the Estate of the Deceased's possession, occupation and use of the portion measuring 2.25 Acres now forming and/or comprising of LR. NO. GESIMA SETTLEMENT SCHEME/299, whatsoever and/or howsoever.

(iv) Costs of this suit be borne by the Defendant.

(v) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

The Defendant on his part denied the entire claim and averred that he purchased 2.5 Hectares from the late Jackson Ongeta Change and not 4 Acres as claimed by the Plaintiff. He claims that he got the Title legally transferred to him for 2.5 Hectares and not 1.6 Hectares and wonders why this issue was never raised during the lifetime of the vendor and therefore the Plaintiff's claim is actuated by spite, ill-motive and intent to grab. He concluded by averring that there exists Criminal Case No. 72 of 2015 which touches on the dispute herein where the Plaintiff and her son are the accused. The Defendant therefore requests that this suit be dismissed with costs.

At the Hearing, the Plaintiff testified that she is the widow of the late Jackson Ongeta Change who died on 12/4/2003. She relied on her statement dated 24/9/2015 by stating that she was also the Administratrix of the Deceased's Estate. The Deceased was the registered proprietor of the parcel of land known as LR. NO. GESIMA SETTLEMENT SCHEME/20. She said that the Deceased and the Defendant were both teachers. In April, 1986, the deceased sold to the Defendant 4 Acres, part of the above land after seeking the authority of the District settlement officer, Kisii District to sub-divide the same which now produced Plot numbers 20A & 20B respectively, the latter belonging to the Defendant. On 29/4/1986, the Deceased sought for and obtained consent from Borabu Land Control Board to sub-divide the land. Subsequently, the Defendant took possession of LR. NO. GESIMA SETTLEMENT SCHEME/299 while the Deceased retained LR.

NO. GESIMA SETTLEMENT SCHEME/298. She proceeded to adduce evidence that on 20/10/2012 the Defendant started interfering with a portion of LR. NO. GESIMA SETTLEMENT SCHEME/298 measuring 2.25 Acres belonging to the Deceased claiming that the same belonged to him (the Defendant) and formed part of LR. NO. GESIMA SETTLEMENT SCHEME/299.

After conducting an official search, it turned out that LR. NO. GESIMA SETTLEMENT SCHEME/299 measures 2.5 Hectares i.e. 6.25 Acres, hence exceeding what the Plaintiff knew to be the Defendant's by 2.25 Acres. As a result of this dispute the Plaintiff and her son One James Mirioba Ongeta were arrested and charged with the offence of stealing cypress trees which were growing on the disputed portion. The Plaintiff claims that it was not until the Defendant tried to stop her from cultivation on the disputed portion of 2.25 Acres that she discovered what she now refers to as fraud on the Defendant's part. After this discovery the Plaintiff filed this suit. On cross-examination by Mr. Bigogo for the Defendant, the Plaintiff admitted that she never witnessed the Sale Agreement between her late husband and the Defendant. Her husband only told her later that he had sold only 4 Acres to the Defendant. The land was not surveyed until the Deceased's demise. She said that she was not able to identify her husband's signature in the Sale Agreement and that no survey of the land was done after the Defendant bought the suit land. She was also not able to tell whether both Titles for LR. NOS. GESIMA SETTLEMENT SCHEME/299 and 298 were issued simultaneously on the same date. All she could tell is that the Defendant took a portion of land from the Deceased and included it in his Title. Ms. Ongeta admitted that her Deceased husband had taken a loan and the Defendant repaid part of it which payment went to the purchase price. The loan was repaid over a period of 2 years.

On re-examination by Mr. Ochwangi, the Plaintiff said that when the Surveyor came to the land, the Defendant did not show up.

In support of her case, the Plaintiff produced the following documents: -

- 1. Copy of the Plaintiff's National Identify Card Number 0944703.**
- 2. Copy of Grant of Letters of Administration issued on 26th October, 2011.**
- 3. Copy of the Green Card in respect of LR. NO. GESIMA SETTLEMENT SCHEME/20.**
- 4. Copy of Letter by the District Settlement Officer, Kisii, Reference KSI/82/20/33, DATED 11th April, 1986.**
- 5. Copy of the Letter of Consent issued on the 29th April, 1986.**
- 6. Copy of the Mutation in respect of LR. NO. GESIMA SETTLEMENT SCHEME/20.**
- 7. Copy of the Green Card in respect of LR. NO. GESIMA SETTLEMENT SCHEME.298.**
- 8. Copy of the Title Deed in respect of Copy of Green Card in respect of LR. NO. GESIMA SETTLEMENT SCHEME/298.**
- 9. Copy of the Certificate of Official Search in respect of copy of the Green Card in respect of LR. NO. GESIMA SETTLEMENT SCHEME/298.**
- 10. Copy of the Green Card in respect of LR. NO. GESIMA SETTLEMENT SCHEME/299.**
- 11. Copy of the Certificate of Official search in respect of LR. NO. GESIMA SETTLEMENT SCHEME299.**
- 12. Copy of the Registry Index Map showing LR. NO. GESIMA SETTLEMENT SCHEME/298 & 299.**
- 13. Bundle of photographs showing activities on the portion measuring 2.25 Acres (sic) forming part of LR. NO. GESIMA SETTLEMENT SCHEME/299.**
- 14. Copy of Demand Notice dated 28th June, 2015.**

David Change Ongeta, son to the Plaintiff and the late Jackson Ongeta Change, adopted his statement dated 24/9/2015 in which he said that he had read his mother's statement and associated with it fully. He further testified that the suit land LR. NO. GESIMA SETTLEMENT SCHEME/20 had been acquired by his late father from the Settlement Funds Trustees. He further stated that he had seen a letter from the District Settlement Officer, Kisii indicating that the Defendant had bought 4 Acres from his late father but that on the ground the Defendant was occupying 6.5 Acres and that the Defendant did not seek their consent to occupy the 6.5 Acres. The land in dispute is the one towards the river. On cross-examination by Mr. Bigogo, Mr. Ongeta said that he is aged 65 years and that in 1986 when the land was sold to the Defendant he was an adult working as a teacher in Nakuru. He further said that he was not a witness to the Sale Agreement. His father later died in 2003 and he was not aware that his late father signed the mutation and transfer forms in 1991. He also claimed that his father sent him with verbal instructions to Borabu Land Board to lodge a complaint about the excess land taken by the Defendant. The vendor also invited the Defendant for discussions on the excess land but the latter did not heed the call to return the "excess land." PW2 further said that the S.D.A. Church sued the Defendant for some 0.8 Hectares his family had given to the church. Mr. Ongeta also said that they were cultivating and grazing on the disputed land until 2015 when the Defendant chased them away. The Defendant never resisted the taking of possession by the church and that he was also worshipping there which he later demolished and is now in full occupation. He later adduced evidence to the effect that the family had only allowed the church to use the land for worshipping without a lease and the church did not pay for the use of the land. This was between 2007 and 2015.

PW3, Charles Mwendwa Mutua, the Land Registrar, Nyamira, testified that the 1st registered owner of the suit property, GESIMA

SETTLEMENT SCHEME/20 was the Settlement Funds Trustees on 12/11/1985. It was discharged on 26/6/1991 and transferred to Jackson Ongeta Change on the same date upon completion of payment of the loan to the Settlement Fund Trustees – The Original Parcel Number 20 measuring 6.8 Hectares ceased to exist upon sub-division on 28/6/1996 into L.R. NO. GESIMA SETTLEMENT SCHEME/298 which remained in the name of Jackson Ongeta Change measuring 4.1 Hectares (10 Acres) and Parcel No. GESIMA SETTLEMENT SCHEME/299 measuring 2.5 Hectares (6.25 Acres) was transferred to Samwel Gesiora Ogoti on 28/6/1991.

A Title Deed was issued on the same date. Mr. Mutua said that although a letter from the District Settlement Officer dated 11/4/1986 claimed that the Defendant purchased 4 Acres, records at the Land's office showed that the latter was registered as the owner of 6.25 Acres. On cross-examination, Mr. Mutua said that he didn't know who approved the mutation forms and that the office received a complaint from a member of Change's family that the S.D.A. Church was being wrongfully evicted from a portion of land they had been given by the family. The church is now registered as the owner of parcel Number 482 GESIMA SETTLEMENT SCHEME which is adjacent to the suit land. Parcel Number 482 was not derived from the suit property. The mutation of the suit property for Parcel Number 20 was done in June 1991 and that he did not have the consent to sub-divide Parcel No. GESIMA SETTLEMENT SCHEME/20 but that based on what the Land Registrar's documents in the office showed the owner of Parcel No. GESIMA SETTLEMENT SCHEME/20 signed all the necessary documents. The Land Registrar repeated with emphasis that he could not tell where Parcel No. 482 emanated from but that it was not derived from Parcel Number GESIMA SETTLEMENT SCHEME/20. The Land Registrar also agreed that the sketch plan on page 24 of the Plaintiff's bundle which only shows one demarcation sub-dividing 2.5 Hectares and 4.1 Hectares to be the more detailed one since it gives all measurements and not the one on page 23 which shows 3 different parcels of land. The mutation was prepared on 17/1/1987 and approved on 28/6/1991 and the Application for consent was made on 12/4/1996. On re-examination, Mr. Mutua said that the sketch on page 24 gives the actual representation on the ground.

The Defendant on his part testified and produced the following documents: -

- 1. Copy of Title Deed for No. LR. GESIMA SETTLEMENT SCHEME/299.**
- 2. Copy of Certificate of Official Search for LR. GESIMA SETTLEMENT SCHEME/299.**
- 3. Copy of District Land Surveyor Kisii for Gesima Settlement Scheme showing boundaries of LR. GESIMA SETTLEMENT SCHEME/298 and 299 respectively.**
- 4. Copy of mutation signed by the Plaintiff on 6th March, 1987 and registered on 28th June, 1991.**
- 5. Copy of S.F.T. Loan Repayment Letter dated 18th December, 1978.**
- 6. Copy of the Standing Irrevocable Order (Salary) addressed to the Secretary TSC dated 1st July, 1978.**
- 7. Copies of Bundles of Official Receipts (page 13 to 15) from Settlement Fund Trustees confirming the late's Loan Repayments by the Defendant.**
- 8. Copies of Loan Repayment Receipt Vouchers dated 22nd March, 1990 – page 16 and 17.**
- 9. Copy of Irrevocable Order addressed to the Secretary – TSC dated 7th March, 1991.**
- 10. Copy of Demand Notice for Arrears of Loan from Ministry of Lands & Housing dated 28th July, 1989.**
- 11. Copy of Letter from the District Land Adjudication and Settlement Officer – 18th April, 1991.**
- 12. Copy of Letter from District Land Adjudication and Settlement Officer – Nyamira dated 28th January, 1991**
- 13. Copy of Letter from District Land Adjudication and Settlement Officer – Nyamira dated 10th May, 1991.**
- 14. Copy of the Letter of consent dated 29th April, 1986 from Boraby Control Board.**
- 15. Copy of letter of consent from Chairman – Land Control Board 9th November, 2001.**
- 16. Copy of Charge Sheet for Keroka Criminal Case No. 720 of 2015.**
- 17. Copy of Letter from the Chief – Nyansiongo Location dated 27th March, 2015 and**
- 18. Photographs showing the Defendant's buildings and/or agricultural activities of LR. NO. GESIMA SETTLEMENT SCHEME/299.**

He said that he became the registered owner of GESIMA SETTLEMENT SCHEME/299 measuring 2.5 Hectares equivalent to 6.25 Acres after purchasing the same from the late Jackson Ongeta Change on 1/7/1978 when the Defendant started repaying loan that the Deceased owed the Settlement Funds Trustees. On 28/6/1991 he was issued with a Title Deed after following the laid down procedures and after paying consideration in accordance with the Sale Agreement. The Defendant said that a Sale Agreement was signed by both parties but the

same was kept in the custody of the Vendor's eldest son, David Change Ong'eta. After the purchase he took immediate possession of the suit land in the lifetime of the late Change and started utilizing it by constructing permanent houses thereon and also started carrying out various agricultural activities with the vendor's express permission and with the Plaintiff herein in full picture who did not raise any objection. But as soon as the vendor passed on the Plaintiff started accusing him of trespass which then resulted in numerous quarrels and even at one time culminated into Keroka Criminal Case No. 720 of 2015 where the Plaintiff and her 2 sons were charged with destruction of trees and later acquitted since the act of destruction was not directly carried out by them. On cross-examination, the Defendant said that he bought an enclosed piece of land L.R. NO. GESIMA SETTLEMENT SCHEME/20 and when the surveyor came to the land, the same turned out to be 2.5 Hectares. He described the land as having a barbed wire boundary on the lower side and the upper side had some thorny plants. The Deceased later suggested that since tree plants would give neighbours problems in future they replaced the upper side trees with k-apple.

PW2 was the Secretary when the agreement was being entered into. He also kept the records which he could now not produce. But from the mutation forms the land was sub-divided into 2 with the Defendant's portion being 2.5 Hectares. The Plaintiff never ever complained of any encroachment until she wrote him a Demand letter through her Advocates. The mutation forms show 2.5 Hectares and not 4.0 Acres. He also further testified that he has never sold any part thereof to anybody else and that even after occupying the 6.5 Acres, there were no complaints during the lifetime of the Deceased Vendor.

On re-examination, Mr. Ogoti said that the Plaintiff was present when her husband and the Defendant were going to collect the Title Deeds in respect to GESIMA SETTLEMENT SCHEMR/299. He also testified that the mutation forms were prepared by a Surveyor contracted by and with the dictates of the late Mr. Change and that the Plaintiff's son, PW2 must be withholding the Sale Agreement since it is prejudicial to the Plaintiff's claim. At the close of the case, the Defendant made an Application that the court visits the *locus in Quo* together with the Land Registrar and the County Surveyor, Nyamira which visit took place on 9/2/2022 at 2.00p.m. in the presence of counsel for both parties, Mr. Mutua (the Land Registrar and Mr. Francis Oganda (the Deputy County Surveyor). The 2 later prepared and filed their respective Reports in court. I have gone through both Reports which are a true reflection of what the court observed on the ground and also in tandem with the Land Registrar's evidence in court.

It is not in dispute that the late Jackson Ongeta Change sold part of L.R. **KISII/GESIMA SETTLEMENT SCHEME/20** in order to offset a loan with Settlement Funds Trustee and part of the purchase price was duly used for this purpose. From the Green Card at page 18 of the Plaintiffs' bundle of documents **L.R. NO. KISII/GESIMA SETTLEMENT SCHEME/20** was registered in the name of Jackson Ongeta Change on 26/06/91 and the Title Deed issued the same day. On 29/04/1986 the late Jackson Ong'eta Change was issued with consent to transfer to Samwel Gisiara Ogoti. The acreage is not indicated in the letter of consent. But from the mutation forms the land was sub-divided into **LR. GESIMA SETTLEMENT SCHEME/298** measuring 4.1 Hectares and **LR. GESIMA SETTLEMENT SCHEME/299** measuring 2.5 Hectares and there are 2 sketches with the second sketch dated 17/01/1987 showing these measurements. On 28/06/1991 a Title Deed in respect of the sub-division 299 in favour of Jackson Ongeta Change was issued and the second entry was in favour of Samwel Gisiara Ogoti. This was done long before the transferor died, approximately 12 years. The court had the advantage of visiting the *locus in quo* at the invitation, request and application of the Defendant. What was unimaginable is that the deceased could reserve to himself 10.2 Acres on the upper side and 2.25 Acres on the lower side and then sell to the Defendant 4 Acres with the latter sandwiched between the 2 portions belonging to the vendor.

Section 107 of the Evidence Act, CAP 80 Laws of Kenya provides as follows: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109 of the Evidence Act, Cap 80, Laws of Kenya, places the burden of proof on the Applicant as it provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 of the Evidence Act provides that:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

The Plaintiff's case is founded on fraud. In ***Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR***, Tunoi JA (as he then was) stated as follows:

“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.”

Given the seriousness of the allegations, the onus is on the Plaintiff to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof. In ***Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR*** the standard of proof was held to be beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“..... fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the

person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges..... The appellatant has made vague and very general allegations of fraud against the respondent.”

In *R.G Patel -V-Lalji Makanji [1957] EA 314* the former Court of Appeal for East Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In the instant case, the Plaintiff needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Defendant. The Plaintiff was expected to adduce evidence that fraud was perpetrated either in the sub-division and/or in the transfer of the suit land. For the Plaintiff to prove the falsification of the Application forms for Land Control Board consent and/or letter of consent, the Plaintiff ought to have called for records from the office of Borabu Land Control Board for comparison with what was produced in court. The Surveyor was not called to testify on how he was misled and no evidence was led to show that the transfer documents were forged or that the signature of the deceased was counterfeited. When the Land Registrar was called to write his report, after the visit to the suit land, he said that the boundaries on the ground have been there for more than 20 years and that they tallied with the Defendant’s explanation. The sketch map drawn by the County Surveyor shows that the land was sub-divided into 4.1 Hectares in favour of the Plaintiff and 2.5 Hectares for the Defendant. The only document that the Plaintiff seems to hang on in establishing that it is 4 Acres that the Defendant had bought from the Plaintiff’s late husband is a letter dated 11/04/1986 from the District Settlement Officer to the Secretary, Teachers Service Commission. The source of the letter is not disclosed nor was its author called as a witness. It is therefore of no probative value to this case.

As said above the threshold for proving fraud is higher than the ordinary burden in civil cases. It is not just enough to state that the vendor’s signature or documents were forged. And this happening about 20 years after the allegedly wronged person has already died.

In so far as the Plaintiff had pleaded and particularized the acts of fraud, she has failed to lay the basis for the same in her evidence. The Plaintiff was accorded enough time to establish that the signatures on the letter of Consent to the Land Control Board, the Application to the Land Control Board and the transfer documents produced herein were forgeries but she failed to do so.

On its part the Court has perused the documents allegedly said to be forgeries i.e. Application for Land Control Board, Letter of Consent from Borabu Land Control Board and Mutation forms, and considered the contents thereof. Some of these documents bear the signatures and official rubber stamps of the government officers who made them. The Government officers whose offices generated them and/or acted on them appeared in Court but were not challenged on their authenticity. I consequently believe the evidence of the Land Registrar. In essence, the court holds that there was no proof of fraud as against the Defendant with regard to his dealings with the suit land and that all the dealings leading to the transfer of Parcel No. GESIMA SETTLEMENT SCHEME/299 measuring 2.5 Hectares (6.25 Acres) to Samwel Gesiora Ogoti on 28/6/1991 was above board. In absence of any credible evidence to the contrary I would dismiss the allegations of fraud as baseless. The Court also wishes to make it very clear that as to the parcel Number 482 GESIMA SETTLEMENT SCHEME now registered in the name of the Seventh Day Adventist church as clarified by the Land Registrar, Nyamira, was not derived from the suit property. The Plaintiff was ingeniously trying to use it to obfuscate the matter on the ground in order to defeat the Defendant’s right of ownership of the suit land.

The upshot of the above is that accordingly this suit fails, and it is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 23RD DAY OF MARCH 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Ms. Ochwal online

Defendant: Mr. Bigogo online