



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 27 OF 2012.**

**MATHIAS ONDIRO OGAMA.....PLAINTIFF**

**VERSUS**

**PASCAL NGIRA OLOUCHI.....DEFENDANT.**

**J U D G M E N T.**

**MATHIAS ONDIRA OGAMA**, the Plaintiff, filed this suit as the Administrator Ad litem of the estate of Agabet Ogama Onkiambo, against Pascal Ngira Oluochi, the Defendant, for:

0. Injunction restraining the Defendant from disposing or dealing in any manner with the said land and/or certificate of title.
0. An order to rectify the Land Register by removing the name of the Defendant and inserting the name of the deceased, Agabet Ogama Ojiambo.
0. Costs of this suit and interest.

The Plaintiff suit is based on fraud attributed to the Defendant's father, namely Oluochi Ngira now deceased, in the way he acquired registration as owner of Land parcel Samia/L.Bukhungu/116 which belonged to Agabet Ogama Onkiambo. The defendant got the land by transmission following the death of his father.

The claim is denied by the Defendant. He disputes that Land parcel Samia/Bukhulungu/116 belonged to Agabet Ogama Onkiambo at any time. Defendant avers that he is the bona fide owner of the land in question and cannot be enjoined and adds that the prayers sought are bad in law and cannot be effected.

Mr. Juma and Okutta advocates appeared for the plaintiff and Defendant respectively.

Plaintiff testified as PW 1 . He said he is a son of Agabet Ogama Ojiambo who died on 07.07.2004 and live with his family and mother on Land parcel Samia/Luchululo Bukhulungu/116 which he knew belonged to his father until recently when he learnt from National Irrigation Board Personnel that the land was registered in the Defendant's names. He lodged a complaint with the Chief and in the presence of National Irrigation Board Personnel, the Defendant denied any interest on the said land. This allowed the Board to release the payment for the portion of the land they had taken. Plaintiff said he then conducted a search with the Land Office and it confirmed the land in question was registered in the Defendant's name. He also obtained a copy of the adjudication record for the land which showed the land parcel 116 had been registered in the names of his father which had then been cancelled and the names of Defendant's father inserted. Plaintiff produced a copy of proceedings before the special District Commissioner, Busia in Ministers' Appeal case number 34 of 1974 which was heard on 10<sup>th</sup> April, 1986. The proceedings shows that the Special District Commissioner allowed the appeal and awarded the

disputed land to Agabet Ogama, father to the plaintiff. A copy of the sketch plan showing the disputed portion of land and some of the neighbouring parcels, shows the disputed land was part of land parcel 116 that belonged to Agabet Ogama while parcel 119 belonged to Oluochi Ngira, father to the Defendant. He said after the Special District Commissioner's ruling they had taken over the disputed land and have been using the whole of parcel 116.

Defendant testified as DW1 and adopted his evidence affidavit sworn on 4.10.2013. He said land parcel Samia/Luchululo/Bukhulungu/116 belonged to his father who died in 1989 after which he filed Nairobi P & A Succession Cause No. 96 of 1994, through which he got registered as the owner of the said land. He denied giving plaintiff authority to sell a portion of parcel 116 to the National Irrigation Board. He said he had learnt plaintiff had been paid Kshs.360,000/= as first instalment for a portion of land. He said plaintiff had also been paid a second instalment of an amount he could not establish. That when he learnt a third instalment was to be paid he filed an objection with the National Irrigation Board as parcel 116 was his. He said after inheriting land parcel 116 he found some people living on it and he informed them that the land was his. He said he had filed a Succession Cause for only parcel 116 even though his deceased's father owned several parcels, but denied he did so to fraudulently obtain the land.

He conceded having been called by the chief after National Irrigation Board found the land plaintiff lived on was registered in his (Defendant's ) names. He denied authorizing the transaction between the National Irrigation Board and plaintiff. He conceded he was present when plaintiff received the first payment from National Irrigation Board for sale of a portion of the land.

### **ISSUES FOR DETERMINATION.**

1. To whom Land parcel Samia/Luchululo/Bukhulungu/116 was allocated to after land adjudication.
2. Whether the registration of Oluochi Ngira, father to Defendant as proprietor of Land parcel Samia/Luchululo/Bukhulungu was through fraud and or misrepresentation.
3. Whether the Defendant obtained good title to Land parcel Samia/Luchululo/Bukhulungu/116 when he got registered as the proprietor following the death of his father Oluochi Ngira.
4. Whether the plaintiff is entitled to any of the orders sought in the Plaintiff.

### **FINDINGS.**

1. That the fathers to the Plaintiff and Defendant were relatives. This is discerned from the proceedings before the Special District Commissioner in Minister's Land Appeal Case number 345 of 1974 in which Agabet Ogama was the Appellant and Oluochi Ngira the Respondent. The appeal brought to a closure the adjudication dispute between the two parties by confirming that Agabet Ogama was the rightful owner of land parcel Samia/Luchululo/Bukhulungu/116 and that the disputed portion marked on the sketch map was part of that land.
2. That the copy of adjudication record clearly shows land parcel Samia/Luchululo/Bukhulungu/116 was initially registered in the names of Agabet Ogama. It shows the chairman signed the adjudication record on 16.8.1971 while the Executive Officer signed it on 4.12.1970. Then Agabet Ogama's name was crossed out and above it the name Oluochi Ngira inserted as the owner of the land. There is a signature and a date of 19.4.1972 which signifies the date the alteration was made. The alteration in the adjudication record must have occurred following the Arbitration Boards decision in favour of Oluochi Ngira which he referred to when he testified before the Special District Commissioner in Minister's Land Appeal case number 34 of 1974.
3. That by the time the Minister's Land appeal case number 34 of 1974 was decided on 16.4.1986, Oluochi Ngira had been registered as the proprietor of land parcel Samia/Luchululo/Bukhulungu/116 on the strength of the Arbitration Boards decision in his favour. This notwithstanding Agabet Ogama had continued to occupy the land parcel Samia/Luchululo/Bukhulungu/116 except the disputed portion which is shaded on the sketch plan attached to the proceedings before the Special District Commissioner.
4. That it follows that the register for land parcel Samia/Luchululo/Bukhulungu/116 was not amended to reflect the decision of 16.4.1986 in Minister's Land Appeal Case number 34 of 1974 which effectively recognized Agabet Ogama as the proprietor of the land and that the portion in

- dispute which is shaded on the sketch plan attached, was part of that land.
5. That Agabet Ogama continued occupying land parcel Samia/Luchululo/Bukhulungu/116 including the portion in dispute until his death in 2004 leaving his family members, including the plaintiff on the land. Strangely Oluochi Ngira, though registered as the owner of the land parcel Samia/Luchululo/Bukhulungu/116, never attempted to assert the rights of an owner over the land during his life time until he died in 1989. In view of the decision in Minister's Land Appeal case number 34 of 1974 the land in question belonged to Agabet Ogama and not Oluoch Ngira and therefore Oluochi Ngira's title to that land was worthless. He had no interest on that land capable of being transmitted to his son, the Defendant through Busia Succession Cause number 96 of 1991. (Though Defendant had claimed the Succession Cause had been filed in Nairobi, the copy of the Certificate of Confirmation he attached to his evidence affidavit sworn on 4.10.2013 had been signed by one Maloba, Senior Resident Magistrate, Busia). Just like his father, the Defendant never asserted any rights of a land owner over the land even after being registered as the proprietor. Agabet Ogama and his family continued in occupation of the land and for all intent and purposes behaved as the owners of the land. It is no wonder plaintiff engaged the National Irrigation Board when they wanted a portion of the land and it was during that transaction he discovered the title to Samia/Luchululo/Bukhulungu/116 was in Defendant's names. The Defendant was summoned by the Chief and in his presence some payment for the land was released to the plaintiff. If indeed the Defendant believed he was the owner of the land, he would not have remained quiet when the plaintiff and the National Irrigation Board were entering into an agreement over portion of land. Though he denied giving his no objection to the transaction, the fact that he was present when Kshs360,000/= was paid to plaintiff under the agreement shows the opposite. The court can only conclude that he knew he had no good title to the land even though it was in his name.
  6. That even though Oluochi Ngira may not have fraudulently registered land parcel Samia/Luchululo/Bukhulungu/116 in his names, as he possibly did so following the Arbitration Boards decision, any claim he may have had over that land ended on 16.4.1986 following the decision in Minister's Land Appeal case number 34 of 1974. It follows, however that when Defendant included that land as part of his father's estate in Busia Succession Case No.96 of 1991, he knew or ought to have known the land was not part of his father's estate. The transaction through which Defendant acquired the registration of Samia/Luchululo/Bukhulungu/116 into his names was tainted with fraud and misrepresentation attributable to the Defendant and he therefore never acquired good title to that land. The Land should have been registered in the names of Agabet Ogama Ojiambo after 16.4.1986 following the decision in Minister's Land appeal case number 34 of 1974. It is never late to do justice and justice requires that the Minister's Appeal case decision be given effect by rectifying the register of Land parcel Samia/Luchululo/Bukhulungu/116 by cancelling or deleting the names of Oluochi Ngira and substituting it with the name of Agabet Ogama Ojiambo as the proprietor. All the other entries on the register including those of Pascal Ngira Oluochi as proprietor should also be deleted.

Having found as above, the court enters judgment for the plaintiff against the Defendant and orders as follows:

- a. That the Land Registrar, Busia County, is hereby directed to rectify the register of Land parcel Samia/Luchululo/Bukhulungu/116 by deleting all the entries thereon and inserting the names of Agabet Ogama Ojiambo, now deceased as the first registered proprietor in accordance with the decision of 16.4.1986 in Minister's Land Appeal case number 34 of 1974.
- b. That the Defendant will pay the plaintiff the costs of this case.

**S.M. KIBUNJA,**

**JUDGE.**

DATED AND DELIVERED ON 26<sup>TH</sup> DAY OF MARCH, 2014.

IN THE PRESENCE OF;

**JUDGE.**