



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 81 OF 2011**

KIPKOROS ARAP SOI ..... PLAINTIFF

VERSUS

ABUYA MARAGIA MWEMBE .....1<sup>ST</sup> DEFENDANT

LAND REGISTRAR KILGORIS ..... 2<sup>ND</sup> DEFENDANT

THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit against the three (3) defendants on 3<sup>rd</sup> May 2011 seeking an order for the cancellation of the title deed for LR No. Transmara/Angata Barigo/375 (hereinafter referred to as the “suit property”) in the name of the 1<sup>st</sup> defendant and the issuance of a new title for the said parcel of land in favour of the plaintiff. In the plaintiff’s plaint dated 30<sup>th</sup> April 2011, the plaintiff averred that the plaintiff is the registered proprietor of the suit property since the year 1974 and that the 1<sup>st</sup> defendant is the plaintiff’s neighbour and that the 1<sup>st</sup> defendant is the registered proprietor of all that parcel of land known as LR No. Transmara/Angata Barigo/376 (hereinafter referred to as Plot No. 376). The plaintiff averred further that sometimes in the year 2005, the plaintiff learnt that the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant got himself registered as the proprietor of the suit property and caused a title to be issued in his name. The plaintiff averred further that being the registered proprietor of the suit property, the suit property could only have been transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant through acts of fraud. The plaintiff averred further that the 1<sup>st</sup> defendant has been called upon to surrender the title deed for the suit property for cancellation but the 1<sup>st</sup> defendant has refused or neglected to do so rendering the filing of these proceedings necessary.
2. The defendants were served with summons to enter appearance but only the 3<sup>rd</sup> defendant entered appearance and filed a statement of defence. In its statement of defence dated 8<sup>th</sup> June 2011 filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the 3<sup>rd</sup> defendant denied the plaintiff’s claim in its entirety and put the plaintiff to strict proof thereof. When this suit came up for hearing on 23<sup>rd</sup> April 2013, only the plaintiff and his advocate appeared in court. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not appear. After satisfying myself that the Attorney General who is on record for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was duly served with a hearing notice, I allowed the hearing to proceed. The plaintiff gave evidence and called two (2) witnesses. In his evidence, the plaintiff testified that the plaintiff and the 1<sup>st</sup> defendant are neighbours at Ang’ata Barigo and that whereas the plaintiff is the owner of the suit property which he has occupied and is still occupying since the year 1974 the 1<sup>st</sup> defendant is the owner of Plot No. 376 which shares a boundary with the suit property. The

- plaintiff stated that in the year 2005 he got information that the title deeds for Ang'ata Barigoi area were being issued and he proceeded to the lands office at Kilgoris to inquire about the title deed for the suit property.
3. At the lands office, he discovered that his name has been deleted from the register and replaced with name of the 1<sup>st</sup> defendant as the proprietor of the suit property. The plaintiff then lodged a complaint against the 1<sup>st</sup> defendant with the village elders and provincial administration but no solution was found. The plaintiff testified further that the 1<sup>st</sup> defendant owns and occupies Plot No. 376 which is separate and distinct from the suit property and that he is not aware under what circumstances the 1<sup>st</sup> defendant came to be registered as the proprietor of the suit property. The plaintiff urged the court to have the title deed for the suit property in the name of the 1<sup>st</sup> defendant cancelled so that a new title deed may be issued in the name of the plaintiff. The plaintiff told the court that he was not aware of any objection that had been lodged by the 1<sup>st</sup> defendant against the registration of the suit property in the name of the plaintiff during the land adjudication process in the area. The plaintiff's 1<sup>st</sup> witness, Alexander Kosgei (hereinafter only referred to only as "PW2") stated that he was a member of the adjudication committee that was formed for Ang'ata Barigoi in the year 1986 when the area was declared an Adjudication Section. He testified that the adjudication process started in the year 1987 and the same was completed in 1996 and that the people who were resident in the area had their claims to land recorded.
  4. He testified that the suit property was demarcated and recorded in the name of the plaintiff while Plot No. 396 was demarcated and recorded in the name of the 1<sup>st</sup> defendant and that he was not aware of any objection regarding the suit property or Plot No. 376. The plaintiff's 3<sup>rd</sup> witness was David Korir (hereinafter referred to only as "PW3"). PW3 was also a member of the adjudication committee in Ang'ata Barigoi during the adjudication process in the area. He was the vice chairman of the committee. He testified that the adjudication process in the area started in the year 1987 and was completed in the year 1996 and that among the area residents were the plaintiff and the 1<sup>st</sup> defendant. He testified that during the adjudication process the parcel of land that belongs to the plaintiff bordered the parcel of land that was owned by the 1<sup>st</sup> defendant and that the plaintiff Plot No. 375 (the suit property) was demarcated and recorded in the name of the plaintiff while Plot No. 376 was demarcated for the 1<sup>st</sup> defendant. He testified that after the adjudication register was declared complete the area residents were given 60 days within which to raise objection and that according his recollection, only four (4) objections were raised and none concerned the suit property or Plot No. 376. He testified further that whoever was not satisfied with the determination of the objections that were raised after the completion of the adjudication register had a right to appeal to the Minister and that in Ang'ata Barigoi, there was no appeal to the Minister. PW3 testified further that he learnt later that the plaintiff did not get a title deed for the suit property. He stated that to the best of his knowledge, the plaintiff has never had any dispute with the 1<sup>st</sup> defendant over the suit property.
  5. PW3 confirmed that the plaintiff and the 1<sup>st</sup> defendant occupied two (2) separate parcels of land and that whereas the plaintiff occupies the suit property, the 1<sup>st</sup> defendant is occupying his own parcel of land namely, the Plot No. 376. After the close of the plaintiff's case the plaintiff's advocate requested the court for leave to put in written submissions which request was granted by the court and the said advocate filed their submissions on 19<sup>th</sup> September 2013. I have considered the pleadings filed herein together with the evidence tendered by the plaintiff. The plaintiff's claim against the defendants is that whereas the plaintiff was registered as the proprietor of the suit property during the land adjudication process at Ang'ata Barigoi Adjudication Section, the title for the suit property was issued in favour of the 1<sup>st</sup> defendant instead of the plaintiff under unclear circumstances. The plaintiff has contended that through acts of collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants the name of the plaintiff was deleted from the adjudication register and replaced with the name of the 1<sup>st</sup> defendant without any objection or appeal against the registration of the suit property in the name of the plaintiff being lodged during the adjudication process.
  6. The plaintiff produced in evidence a copy of the adjudication record for Ang'ata Barigoi Adjudication Section in respect of the suit property which showed clearly that the plaintiff was entered in that record as the owner of the suit property on 9<sup>th</sup> August 1990. It is also apparent on

the face of that record that the name of the plaintiff was cancelled on 9<sup>th</sup> March 2000 and replaced with the name of the 1<sup>st</sup> defendant. The plaintiff and his witnesses testified that the suit property belongs to the plaintiff and that during the adjudication process at Ang'ata Barigoi the same was demarcated and recorded in favour of the plaintiff. The plaintiff and his witnesses also testified that there was no objection raised against the demarcation and recording of the suit property in the name of the plaintiff and that no appeal concerning the same was lodged with the minister. The plaintiff and his witnesses also testified that there has never been any dispute between the plaintiff and the 1<sup>st</sup> defendant over the suit property.

7. I am satisfied from the evidence on record that the plaintiff has proved that during the adjudication process the suit property was demarcated and recorded in his favour and that his name was entered in the adjudication record as the owner of the suit property. The plaintiff has also proved that there was no objection to the demarcation and recording of the suit property in favour of the plaintiff. It follows therefore that it is the plaintiff and not the 1<sup>st</sup> defendant who was supposed to be registered as the proprietor of the suit property on first registration pursuant to the provisions of sections 11(2A) and 14 of the Registered Land Act, Cap.300, Laws of Kenya ("RLA") (now repealed). It seems to me as if the 1<sup>st</sup> and 2<sup>nd</sup> defendants caused the Adjudication Register to be altered after the same was finalized and forwarded to the 2<sup>nd</sup> respondent under section 11 (2A) of the RLA for the preparation of the land register and subsequent issuance of titles. The 1<sup>st</sup> defendant did not enter appearance and as such did not defend this suit. The defence that was filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant as I have mentioned above was a mere denial and at the trial no evidence was tendered in support or proof thereof. It therefore remains a mystery how and under what circumstances the name of the plaintiff came to be deleted from the adjudication record and replaced with the name of the 1<sup>st</sup> defendant. The plaintiff has contended that, the deletion of his name from the adjudication record was carried out fraudulently through collusion between the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. From the evidence that was tendered by the plaintiff and the plaintiff's two witnesses, this court can only reach one conclusion namely, that the plaintiff's name was cancelled or deleted from the adjudication record through acts of fraud involving the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. The plaintiff having proved; that, the suit property was demarcated and recorded in his favour during the adjudication process, that, his name was entered in the adjudication record as the owner of the said property and that there was no objection against the demarcation of the suit property in his favour, I am satisfied that the plaintiff was entitled to be registered as the proprietor of the suit property. This entitlement was frustrated as I have stated above by the fraudulent acts of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who colluded and caused the name of the plaintiff to be deleted from the adjudication record. I am persuaded from the evidence on record that the plaintiff is entitled to the reliefs sought in this suit.
8. I am aware that, under the provisions of section 143 (1) of the RLA , this court is prohibited from cancelling a first registration on account of fraud or mistake. I have agonized over this provision having regard to the facts of this case and the need for the court to do justice. My take is that the case before me is unique. The fraud here was not committed during the adjudication process but after the process was completed and the adjudication register forwarded to the 2<sup>nd</sup> respondent for the preparation of the land register and issuance of titles. I am of the view that the statutory prohibition under section 143(1) was informed by the fact that the adjudication process is an elaborate and all
9. \inclusive exercise and all disputes over claims to land within an adjudication area or section are supposed to be resolved during the exercise before the adjudication register is finalized and registered. The case before me is unique in the sense that during the adjudication process, the suit property was demarcated and recorded in the name of the plaintiff. There was no dispute over the ownership of the suit property and as such no objection was raised against the demarcation of the suit property in the name of the plaintiff. It follows that when the adjudication process was completed, the adjudication record indicated that the plaintiff was the owner of the suit property and was entitled to be registered as such. The tables were however turned against the plaintiff when the adjudication register was presented to the 2<sup>nd</sup> defendant for the purposes of preparation of the land register and issuance of title deeds. The 2<sup>nd</sup> defendant deleted the name of the plaintiff

from the adjudication record and replaced it with the name of the 1<sup>st</sup> defendant whose name the 2<sup>nd</sup> defendant entered in the register as the proprietor of the suit property. I am of the opinion that the 2<sup>nd</sup> defendant's action was illegal, null and void and as such could not confer upon the 1<sup>st</sup> defendant the status of the first registered owner of the suit property under section 14 of the RLA. The 1<sup>st</sup> defendant's title cannot therefore enjoy the protection accorded to "first registration" under section 143(1) of the RLA. It is therefore liable to cancellation by the court under section 143(1) of the RLA on account of fraud or mistake.

10. Due to the foregoing, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probability. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint dated 30<sup>th</sup> April 2011. The plaintiff shall have the cost of this suit to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who defended these proceedings.

**Delivered, dated and signed at Kisii this 29<sup>th</sup> day of May 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A	for the Plaintiff
N/A	for the 1 <sup>st</sup> Defendant
N/A	for the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants
Mr. Mobisa	Court Clerk

**S. OKONG'O**

**JUDGE**