



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 116 OF 2013**

**ANTHONY KINYAMAL SANKALE ..... 1<sup>ST</sup> PLAINTIFF**

**EMMANUEL SANKALE ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DANIEL TALENG'O KORIOI ..... 1<sup>ST</sup> DEFENDANT**

**NADUPOI ENOLE KIU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendants on 21<sup>st</sup> March 2013 seeking; a declaration that Plot No. 710 and Plot No. 523 Nkararo Adjudication section rightfully and lawfully belongs to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively, an order for the rectification of the land register for the said plots by cancelling the names of the defendants as the proprietors of the two plots and inserting the names of the plaintiffs as the proprietors of the same respectively and damages. In their plaint dated 21<sup>st</sup> March 2013 the plaintiffs averred that during the adjudication process at Nkararo Adjudication Section which was completed sometimes in the year 1990 the 1<sup>st</sup> plaintiff was recorded as the proprietor of Plot No. 710 while the 2<sup>nd</sup> plaintiff was recorded as the owner of Plot No. 523 within the said Nkararo Adjudication Section. The plaintiffs averred that no objection was raised with respect to the two parcels of land during the said adjudication process.

2. The plaintiffs averred that in August, 2012 when they visited the land's office at Kilgoris, they discovered that Plot No. 523 was recorded in the name of the 1<sup>st</sup> defendant while Plot No. 710 was recorded in the name of the 2<sup>nd</sup> defendant. The plaintiffs averred that the recording of the two parcel of land in the names of the defendants was carried out fraudulently or through misrepresentation. In the particulars of fraud and misrepresentation set out in the plaint, the plaintiffs claimed that; the defendants had concealed pertinent material particulars and pretended that they were the true owners of the said plots, misrepresented facts to conceal the truth about the true owners of the said plots and colluded to falsify records to reflect them as the bona fide owners of Plot No. 523 and Plot No. 710 (hereinafter referred to as "the suit properties" where the context so admits). The plaintiffs averred that on 29<sup>th</sup> August 2012, the district land adjudication and settlement officer confirmed in writing that the suit properties belong to the plaintiffs. The plaintiffs averred further that in January 2013 the defendants entered the suit property and caused extensive damage by cutting down 72 trees all valued at kshs. 431,008.37.

3. The defendants were served with the summons to enter appearance but they both failed to enter appearance. The suit was listed for formal proof on 27<sup>th</sup> February 2014 when the 1<sup>st</sup> plaintiff gave

evidence and closed the plaintiffs' case. In his testimony, the 1<sup>st</sup> plaintiff testified that the 2<sup>nd</sup> plaintiff is his elder brother and that the defendants are known to him. The 1<sup>st</sup> plaintiff adopted the contents of his statement dated 21<sup>st</sup> March 2013 that was filed in court on the same date pursuant to the provisions of order 3 rule 2 (c) of the Civil Procedure Rules as his evidence in chief. The 1<sup>st</sup> plaintiff thereafter reiterated the contents of their plaint that I have highlighted above. The 1<sup>st</sup> plaintiff added that after discovering that the suit properties are recorded in the names of the defendants, they lodged a complaint with the area adjudication officer who thereafter summoned all the parties for a meeting to resolve the issue. The plaintiff stated that at the said meeting, it was confirmed that the suit properties belong to the plaintiffs in whose favour the same had been adjudicated. The said adjudication officer then gave them consent to file suit against the defendants because the said adjudication officer had no power to alter the register.

4. The 1<sup>st</sup> plaintiff testified further that the defendants have denied them access to the suit properties and that the defendants have also destroyed the trees that they (the plaintiffs) had planted on the suit properties. The 1<sup>st</sup> plaintiff produced in evidence; a letter dated 29<sup>th</sup> August 2012 addressed to whom it may concern by the District Land Adjudication & Settlement officer, Transmara East/West Districts to the effect that according to their records, Land parcel No. 523 Nkararo Adjudication section, Transmara District was demarcated and recorded in the name of the 2<sup>nd</sup> defendant herein Emmanuel Sankale (Pexh.1a), a letter of consent to institute proceedings in respect of Plot No. 523 dated 13<sup>th</sup> November 2012 (Pexh.1(b)), a letter by the District Land Adjudication and Settlement officer Transmara East/West Districts dated 29<sup>th</sup> August 2012 addressed to whom it may concern to the effect that land parcel No. 710 Nkararo Adjudication section Transmara District according to his records was demarcated and recorded in the names of Anthony Kinyamal Sankale (1<sup>st</sup> plaintiff), Vincent Oiputari Sankale and Felix Leparan Sankale (P.exh. 2 (a)), consent to institute suit in respect of Plot No. 710 Nkararo Adjudication Section dated 13<sup>th</sup> November 2012 (P.exh.2(b)) and a report on damage assessment (Pexh.3).

5. On being examined by the court, the 1<sup>st</sup> plaintiff stated that the defendants entered and occupied the suit properties in the year 2011 and that the defendants are cultivating and residing on the same. The 1<sup>st</sup> plaintiff told the court further that the suit properties were their ancestral land and that they used to use the same for grazing only. The 1<sup>st</sup> plaintiff claimed however that they are now staying in a shopping centre because they have nowhere to go the defendants having taken over the land that belongs to them. I have considered the contents of the plaint filed herein, the 1<sup>st</sup> plaintiff's statement dated 21<sup>st</sup> March 2013, the evidence tendered in court by the 1<sup>st</sup> plaintiff and the closing submissions by the plaintiff's advocate that was presented to court in writing on 31<sup>st</sup> March 2014. In this suit, the plaintiffs have claimed that during the adjudication process at Nkararo Adjudication Section, the suit properties were demarcated and recorded in their names and that in August 2012 upon visiting the lands office at Kilgoris they discovered that the suit properties were recorded in the names of the defendants. As at the time when this suit was filed, Nkararo Adjudication section was still under adjudication.

6. This means that land that had been adjudicated and recorded in the names of the residents of the said adjudication section had not been registered in their names. It is not clear to me from what source the plaintiffs discovered that the suit properties were registered or recorded in the names of the defendants. The plaintiffs have claimed that they made this discovery at the lands office Kilgoris in August 2012. I do not think that this would have been possible. According to Pexh.1(a) and Pexh. 2(a) which are both dated 29<sup>th</sup> August 2012, as at August, 2012 land within Nkararo Adjudication Section was still under adjudication. It was not possible therefore to have a land register for the suit properties at the lands office at Kilgoris from which one could confirm the registered owner of any land parcel within Nkararo Adjudication Section.

7. For the plaintiffs to succeed in the reliefs sought, the plaintiffs had to satisfy the court that the suit properties were adjudicated and recorded in the plaintiffs names and that the defendants had the adjudication record altered fraudulently and caused the suit properties to be recorded in the defendants' names. In Pexh. 1(a) and Pexh.2(a), the District Land Adjudication and Settlement Officer confirmed that

the suit properties are demarcated and recorded according to the adjudication records in the plaintiffs' names. It is not clear to me and it did not come out in the evidence how and when the suit properties became registered in the names of the defendants if at all they were. The letters from the District Adjudication Officer which were produced in evidence are categorical that the suit properties are still in the process of adjudication and that according to the records held at the adjudication office, the suit properties **"are demarcated and recorded"** in the names of the plaintiffs. The plaintiffs have not placed any evidence before the court to prove that the suit properties are either demarcated and recorded in the names of the defendants or are registered in their names.

8. The plaintiffs should have placed before the court copies of the adjudication records for the suit properties to show in whose names the suit properties had been demarcated and recorded and if any changes have been made to the said record. If the suit properties have already been registered, the plaintiffs should have placed before the court certificates of official search and copies of the registers for the suit properties to show the registered owners thereof and if there has been any changes in the proprietorship of the said properties. None of these documents were availed. Without any evidence that the defendants are registered or recorded as the proprietors of the suit properties, I find the plaintiffs claim herein not proved. According to the evidence on record, the plaintiffs are the ones in whose favour the suit properties are demarcated and recorded.

9. In my view, the plaintiffs should wait for the adjudication process to be finalized and titles issued. In the event that the titles for the suit properties are not issued in their names they would be at liberty to seek appropriate relief as they may be advised. In conclusion, I am not satisfied that the plaintiffs have proved their claim herein on a balance of probability. This suit is accordingly dismissed.

**Delivered, signed and dated at KISII this 31<sup>st</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bosire            for the plaintiffs

N/A                    for the defendants

Mr. Mobisa            Court Clerk

**S. OKONG'O**

**JUDGE**