



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 19 OF 2008

**GEORGE ORANGO ORAGO
PLAINTIFF**

VERSUS

GEORGE LIEWA JAGALO 1ST DEFENDANT

AMBROSE LIEWA..... 2ND DEFENDANT

**DAVID OCHIENG LIEWA 3RD
DEFENDANT**

**SAMWEL OKELLO OREGA 4TH
DEFENDANT**

JUDGMENT

1. At all material times, the plaintiff was and still is the registered proprietor of all that parcel of land known as **LR No. Kanyamkago/Kawere I/3212** (hereinafter referred to as “**the suit property**”). The plaintiff purchased the suit property from one, Rose Achieng Akech (hereinafter be referred to only as “**Rose**”) sometimes in the year 2006. The suit property is a sub-division of a parcel of land that was known as **LR No. Kanyamkago/Kawere I/1219** (hereinafter referred to as “**Plot No. 1219**”). Plot No. 1219 was initially registered in the name of one, **Akech Jagalo**, deceased (hereinafter referred to only as “**Akech**”). Rose is the daughter and legal representative of the estate of Akech.
2. In that capacity, Rose caused Plot No. 1219 to be transferred to her name after which she sub-divided the same into four (4) portions namely LR No. Kanyamkago/Kawere I/3211, Kanyamkago/Kawere I/3212 (“**suit property**”), Kanyamkago/Kawere I/3213 and Kanyamkago/Kawere I/3214. It is after this subdivision that Rose transferred the suit property to the plaintiff at a consideration of kshs. 490,000/= on 2nd August 2006. The 1st defendant is the brother of Akech and as such an uncle to Rose while the 2nd and 3rd defendants are nephew and son of the 1st defendant respectively. The 4th defendant on the other hand is not related to the 1st, 2nd and 3rd defendants or to Rose. The 4th defendant is said to have been a tenant on Plot No. 1219 before it was sub-divided and the suit property that was a portion thereof transferred to the plaintiff.
3. The plaintiff brought this suit against the defendants on 21st April 2008 seeking; a declaration that the plaintiff is the registered owner of the suit property, a permanent injunction to restrain the defendants from trespassing onto, interfering with and/or in any other manner dealing with the suit property and general damages for trespass. In the plaint dated 18th April 2008, the plaintiff

averred that the plaintiff is the registered proprietor of the suit property and that on or about the 11th day of February, 2008 the defendants jointly and severally set the plaintiff's sugarcane that was growing on the suit property on fire thereby causing substantial loss and damage to the plaintiff. The plaintiff averred further that following the arson, he was only able to harvest part of the burnt sugarcane with the rest going to waste. The plaintiff averred further that after the clearance of the burnt sugarcane from the suit property, the plaintiff was prevented by the defendants from tending the ratoon by denying the plaintiff and his employees access to the suit property. The plaintiff averred further that on 10th April 2008, he found the defendants and/or their employees grazing cattle on the suit property particularly on the sugarcane ratoon and that the defendants jointly chased the plaintiff away from the suit property and vowed never to allow him to set foot on the suit property again.

4. The plaintiff averred that despite demand and notice of intention to sue, having been served upon the defendants, the defendants failed and/or refused to stop trespassing on the suit property and/or interfering therewith thereby leaving the plaintiff with no alternative but to file this suit. The defendants filed a joint statement of defence on 3rd June 2008 in which the 1st, 2nd and 3rd defendants also brought a counter-claim against the plaintiff herein and Rose. In their defence, the defendants contended that Rose had no legal capacity to sell the suit property to the plaintiff. The defendants contended that Plot No. 1219 from which the suit property originated was registered in the name of Akech to hold in trust for the family members of the late Jagalo who included the 1st, 2nd and 3rd defendants. The defendants contended that upon the death of Akech, Plot No. 1219 reverted to the 1st, 2nd and 3rd defendants and other heirs of Jagalo and that Rose was not one of the said heirs. The defendants contended that Rose was married and had her matrimonial home elsewhere and as such had no right to inherit any portion of Plot No. 1219. The defendants contended that Rose could not sell and transfer the suit property which was held in trust as aforesaid to the plaintiff without the consent of the 1st, 2nd and 3rd defendants and other beneficiaries under the said trust. The defendants denied that they had set the plaintiff's sugarcane on fire and that they had grazed their cattle on the suit property more particularly on the sugar cane ratoon. The defendants also denied that they had chased away the plaintiff from the suit property as contended in the plaint. The defendants contended that the plaintiff acquired the suit property fraudulently.
5. In the counter-claim, the 1st, 2nd and 3rd defendants reiterated the contents of the defence and averred that Rose had no interest in the suit property and as such could not alienate the same to the plaintiff. The 1st, 2nd and 3rd defendants contended further that the suit property was transferred to the plaintiff through fraud and collusion. The 1st, 2nd and 3rd defendants sought; a declaration that Rose had no interest in the suit property that she could transfer to the plaintiff since the suit property was held in trust for the 1st, 2nd and 3rd defendants and a declaration that the 1st, 2nd and 3rd defendants are entitled to have the title of the suit property rectified by the cancellation of the plaintiff's name there from and the substitution thereof with the names of the 1st, 2nd and 3rd defendants. The plaintiff and Rose filed a reply to defence and defence to the 1st, 2nd and 3rd defendants' counter-claim on 6th June 2008. They denied the 1st, 2nd and 3rd defendants' claim against them in its entirety. The plaintiff and Rose contended that the 1st, 2nd and 3rd defendants counter-claim is *res judicata* and has no basis.
6. Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 18th April 2008 seeking a temporary injunction to restrain the defendants from trespassing onto, interfering with and/or in any manner dealing with the suit property pending the hearing and determination of this suit. The plaintiff's application that was opposed by the defendants was dismissed by Musinga J. (as he then was) on 5th February 2009. The plaintiff was dissatisfied with the decision of Musinga J. and preferred an appeal against the same to the Court of Appeal in Civil Appeal No. 62 of 2009. The plaintiff's appeal against the decision of Musinga J. was allowed on 30th April 2010 and the plaintiff's application for temporary injunction granted.
7. When this suit came up for hearing on 30th September 2013, the defendants' advocates did not appear in court although the hearing date was given in court in their presence. The 1st, 2nd and 4th defendants also did not appear. Only the 3rd defendant appeared in court. The hearing proceeded.

The plaintiff gave evidence and was cross examined by the 3rd defendant in person. After the evidence of the plaintiff, the matter was adjourned to 22nd January 2014. On that day, the plaintiff's advocate together with the plaintiff and his witness appeared. Again, there was no appearance by the defendants' advocates. The defendants did not also appear save for the 1st defendant. On that day, the plaintiff's witness (PW2) gave evidence and was cross examined by the 1st defendant in person after which the plaintiff closed his case. The 1st defendant thereafter gave evidence in his defence and called one (1) witness. After the close of the 1st defendant's case, the matter was set down for submissions on 22nd July 2014 when only the plaintiff's advocate appeared and notified the court that the plaintiff had opted for written submissions and had already filed the same in court.

8. I have considered the pleadings filed by the parties herein and the evidence that was tendered by the plaintiff and the 1st defendant together with that of their witnesses. I have also considered the submissions that were filed herein by the plaintiff and the authorities that were cited in support thereof. The parties did not frame and agree on issues for determination by the court. Upon consideration of the pleadings and the evidence that was tendered, the following in my view are the issues that present themselves for determination in this suit.
- i. Whether the plaintiff is the registered owner of the suit property?
 - ii. Whether the plaintiff acquired the suit property unlawfully, fraudulently and through collusion?
 - iii. Whether the defendants trespassed on the suit property and set the plaintiff's sugarcane on fire and thereafter prevented the plaintiff from tending the ratoon on which they set their cattle upon?
 - iv. Whether the plaintiff is entitled to the reliefs sought?
 - v. Whether the 1st, 2nd and 3rd defendants are entitled to the reliefs sought in the counter-claim?

9. Issue No. I;

The plaintiff testified that he is the registered proprietor of the suit property. The plaintiff produced in evidence a copy of certificate of official search dated 14th February 2008 (Pexh. 7) which shows that the plaintiff is the registered proprietor of the suit property and that he was so registered on 2nd August 2006. The plaintiff also produced a copy of a title deed for the suit property dated 2nd August 2006 in his name (Pexh.6) as proof of his ownership of the said property. The said title deed also shows that the plaintiff was registered as the proprietor of the suit property on 2nd August 2006. Section 37 of the Land Registration Act, 2012 provides that, a proprietor may transfer land to any person with or without consideration and that such transfer shall be completed by the filing of the instrument through which the transfer was effected and the registration of the transferee as proprietor of the land. Section 30 (1) of the said Act provides that, the registrar may if requested by a proprietor of land issue to him a certificate of title in the prescribed form showing all subsisting entries in the register.

10. Section 26 of the same Act provides that, the certificate of title issued by the registrar as aforesaid to a purchaser of land upon transfer shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner of the land subject to any restrictions or conditions that may be contained in the said certificate. I am satisfied from the material before me that the plaintiff is the registered owner of the suit property. The defendants have not placed any evidence before me to the contrary. In his evidence, the 1st defendant did not deny that the suit property is registered in the name of the plaintiff. The 1st defendant in fact acknowledged the fact that the plaintiff purchased the suit property from Rose. His main contention was that Rose had no capacity to sell the suit property to the plaintiff and not that the suit property is not registered in the name of the plaintiff. It is therefore my finding that the plaintiff is the registered owner of the suit property.

11. Issue No. II

As I have stated above, the defendants' main contention in this suit and which also forms the basis of their counter-claim is that, the plaintiff acquired the suit property unlawfully and that the

plaintiff's title is tainted with fraud. In his evidence, the 1st defendant stated that Rose had no right to sell the suit property to the plaintiff. According to the 1st defendant, the suit property belonged to Rose's father, Akech and that Rose was already married as at the time when Akech died. The 1st defendant testified that Rose being a married woman had no right to come back to her father's home to sell the property that was left behind by the father. According to the 1st defendant, such property belongs to the members of Rose's father's clan. The 1st defendant testified that the clan members had to be consulted by Rose before she could dispose of any property that belonged to Akech. I find the 1st defendant's argument legally flawed and untenable to the extent that it is solely based on Rose's gender and local customs that have been overtaken with time. The 1st defendant has admitted that the suit property belonged to Akech and that Akech is deceased. The 1st defendant has also admitted that Rose is Akech's daughter. I am unable to agree with the 1st defendant's argument that on the death of Akech who seems from the record not to have had a son, the properties left behind by him reverted to his clan and not to his surviving daughter (s).

12. Those of the 1st defendant's ilk must be told in no uncertain terms that we are in the 21st century and that Kenya like the rest of the world has made strides in ensuring gender parity and equity through legislation and culture change. There is no difference any more between the girl child and boy child. All are born equal and have equal rights during their life time. It is unimaginable that the 1st defendant would prefer that Akech's property goes to the clan rather than to Rose who is Akech's daughter. On the material on record, I am satisfied that Rose had a valid proprietary interest in the suit property and that she had the right and the capacity to transfer the property to the plaintiff. The plaintiff therefore acquired the suit property lawfully contrary to the defendants' contention. The defendants did not at all prove their allegations of fraud against Rose and the plaintiff. In the case of **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd [2004] 2 KLR 269**, it was held that:-

“Fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt...”.

13. The defendants pleaded fraud and set out the particulars thereof. The same was denied by the plaintiff and Rose. The defendants had the duty to prove the same. The defendants failed to discharge this duty even on a balance of probability. No evidence or material was placed before the court in proof of Rose's and the plaintiff's alleged acts of fraud. It is not disputed that the suit property is a portion of Plot No. 1219. It is also not in dispute that Plot No. 1219 was registered in the name of Akech, deceased before it was transferred into the name of Rose and subsequently sub-divided to give rise to among others, the suit property. It is not disputed that Rose obtained grant of letters of administration in respect of the estate of Akech and that the same was confirmed on 30th June 2006. The plaintiff testified and produced in evidence material which shows that Plot No. 1219 was transferred to Rose on 4th July 2006 after the confirmation of the said grant and that Rose proceeded to sub-divide Plot No. 1219 into four (4) portions which gave rise to among others the suit property on 2nd August 2006. See P.exhibits 2, 3 and 5.

14. It is after the said sub-division that Rose transferred the suit property that had been registered in her name as the proprietor to the plaintiff on 2nd August 2006. The plaintiff also testified that the 1st defendant's application seeking the nullification and/or revocation of the grant that had been issued to Rose and the nullification of all processes that had been undertaken pursuant to the said grant that included the sub-division of Plot No. 1219 and the sale of portions thereof to among others the plaintiff was dismissed by the court on 8th April 2011 by Makhandia J. in Kisii High Court Succession Cause No. 219 of 2010. The plaintiff produced the ruling of Makhandia J. (as he then was) as Pexh. 13. Rose having obtained a confirmed grant of letters of administration in respect of the estate of Akech who owned Plot No. 1219 and a challenge to the said grant at the instance of the defendants having been rejected by the court which upheld the validity of the said grant, I can see no basis at all in the defendant's contention that Rose had no interest in Plot No. 1219 and by extension the suit property which is a sub-division thereof. For the foregoing reasons, it is my finding that Rose had the legal capacity to sell and transfer the suit property to the

plaintiff and that the plaintiff acquired the suit property lawfully.
15.Issue No. III;

- The plaintiff has claimed that on 11th February 2008 the defendants jointly and severally trespassed on the suit property and set the sugarcane that the plaintiff had planted thereon on fire. The plaintiff has also claimed that on 10th April 2008 the plaintiff on a visit to the suit property found **“the defendants and/or their employees”** grazing cattle on the sprouting sugarcane ratoon and that the defendants “jointly and/or severally” chased the plaintiff away and vowed never to allow the plaintiff or his employees back onto the suit property. As I have stated above, the defendants denied these allegations in their statement of defence. The onus was therefore upon the plaintiff to prove the same. In his evidence, the plaintiff testified that on 11th February 2008 he had gone to the suit property to inspect sugarcane that he had planted on the same when without any provocation, he was attacked by the 2nd and 3rd defendants who beat him up and set his sugarcane on fire. The plaintiff testified that the 2nd and 3rd defendants told him that once they were through with beating him, they would set his sugarcane on fire and that is what they did.
16. The plaintiff testified that only a small quantity of the burnt sugarcane was harvested and taken to the factory and that the rest went to waste. The plaintiff testified further that he never benefited at all from the ratoon because his workers and him were chased away from the suit property by the defendants. The plaintiff testified that the defendants did not give him access to the suit property even after he secured an injunction from the Court of Appeal that I have referred to above. The plaintiff testified further that when he was beaten by the 2nd and 3rd defendants as stated above, he reported the matter to the police and the 3rd defendant was arrested and charged in Migori Court in Criminal Case No. 44 of 2008. The 3rd defendant was charged with the offence of assault and forcible entry. He was convicted on both counts and fined Kshs. 250,000/= in default of 7 months imprisonment. The plaintiff produced in evidence a copy of the charge sheet (Pexh. 12 (a)) and the proceedings in Migori Criminal Case No. 44 of 2008 (Pexh. 12(b)).
17. In his evidence, the 1st defendant denied that he burnt the plaintiff’s sugarcane and wondered why he was not arrested if the allegation is true. I have carefully considered the evidence that was adduced by the plaintiff in proof of his claim that the defendants burnt his sugarcane. I am satisfied that the plaintiff has proved that his sugarcane on the suit property was burnt. I am however not convinced from the evidence on record that the plaintiff’s sugarcane was burnt by the defendants or any of them. The plaintiff has claimed that when he went to inspect his sugarcane on the suit property on 11th February 2008, the 2nd and 3rd defendants beat him up and thereafter burnt his sugarcane as they had threatened to do. Burning of sugarcane like assault is a criminal offence. The plaintiff has claimed that the 2nd and 3rd defendants burnt his sugarcane on the same day that they beat him up. If that was the case, it would have been only natural for the plaintiff to have reported to the police about the assault and the burning of sugarcane the twin acts which he claims to have been committed by the 2nd and 3rd defendants on the same day.
18. A perusal of the charge sheet and the proceedings of the criminal case referred to above shows that the 3rd defendant was charged with causing grievous harm to the plaintiff and forcibly entering the suit property and planting maize thereon. I have noted from the evidence that was adduced by the plaintiff in the criminal case aforesaid that he did not at all mention that the 2nd and 3rd defendants who had assaulted him had also burnt his sugarcane. Although the plaintiff has claimed in his plaint that the defendants jointly and severally burnt the sugarcane, in his evidence, he only zeroed in on the 2nd and 3rd defendants and even for these two defendants, the plaintiff did not tender convincing evidence that they were involved in the act. The plaintiff did not testify that he saw the 2nd and 3rd defendants burning the sugarcane or that he received the information from anyone. I am not satisfied from the evidence on record that the plaintiff has discharged the burden of proof of his allegation that the sugarcane on the suit property was burnt by the defendants. To me, the plaintiff’s contention that the sugarcane was burnt by the 2nd and 3rd defendant is based on mere suspicion; the 2nd and 3rd defendant having threatened that they would burn the sugarcane, the only conclusion that the plaintiff could make after the sugarcane was burnt was that the 2nd

and 3rd defendants were responsible.

19. I do not think that this court can make a finding that a fact has been proved based on suspicion however strong and compelling. On being prevented from tending the ratoon, I am satisfied with the evidence on record that the 2nd and 3rd defendants prevented the plaintiff from continuing with the farming activities on the suit property. Assault on the plaintiff is clear evidence of the hostile atmosphere that was created by the 2nd and 3rd defendants around the suit property. I am unable however to find any evidence linking the 1st defendant and the 4th defendant to these acts of trespass. For the foregoing reasons, I hereby hold on the third issue that the plaintiff has failed to prove that the defendants were responsible for the burning of his sugarcane on the suit property. The plaintiff has however established that the 2nd and 3rd defendants prevented him from continuing with farming activities on the suit property.

20. Issue No. IV;

The plaintiff has proved that he is the registered proprietor of the suit property. The plaintiff has also proved that he acquired the suit property lawfully. Section 24 of the Land Registration Act, 2012 confers upon the plaintiff absolute ownership of the suit property together with all rights and privileges belonging or appurtenant thereto. The defendants herein therefore have no right to interfere with the plaintiff's use and possession of the suit property. The defendants have not given any valid grounds that would justify their continued interference with the plaintiff's quiet and peaceful possession of the suit property. The plaintiff for the foregoing reasons is entitled to the declaratory and injunctive reliefs sought in the plaint. The plaintiff has also proved that the 2nd and 3rd defendants prevented him from making use of the suit property. The plaintiff has therefore suffered loss which he is entitled to recover from the 2nd and 3rd defendants by way of an award of general damages. As I have stated above, the plaintiff has not proved that the defendants were responsible for the burning of his sugarcane on the suit property. The plaintiff is therefore not entitled to recover the loss occasioned by the burning of the said sugarcane from the defendants.

21. In any event, I am of the view that such claim is in the nature of special and not general damages. As special damages, the same should have been pleaded with the necessary particulars and specifically proved. The plaintiff did not plead special damages and although he led evidence in proof of the same, this court would not have awarded the same. On general damages, the plaintiff tendered in evidence an assessment of the income that he would have earned from the suit property if the 2nd and 3rd defendants had not interfered with his farming activities thereon. The total income was put at Ksh.2,292,000/= by PW2. This was inclusive of the income from the sugar cane that was damaged through fire. As I have stated above, there is no proof that the defendants set the plaintiff's sugar cane on fire. The defendants are therefore not liable for the income that the plaintiff would have earned from the sugar cane that was damaged by fire. In the circumstances, in assessing general damages payable to the plaintiff, I would be guided only by the income that the plaintiff would have earned from the sugarcane ratoon. The income from the ratoon was put at Ksh. 1,396,000/=. This sum was arrived at without factoring in labour and farm inputs which in my view would have taken away about 50% of the same leaving a net income of Ksh.698,000/=. I would therefore assess general damages payable to the plaintiff at ksh. 700,000/=.

22. Issue V;

The 1st, 2nd and 3rd defendants' counter-claim was based on the contention that the plaintiff had acquired the suit property unlawfully, fraudulently and in breach of trust. I have already held hereinabove that the plaintiff had acquired the suit property from Rose lawfully. On the issue of trust, I am in agreement with the plaintiff that the issue had been raised and conclusively determined in Kisii HCCC No. 465 of 1994 the decree in which was produced in evidence by the plaintiff as P.exh. 14. In that case, it was held that Akech held a portion of Plot No. 1219 measuring 3.43ha in trust for the 1st defendant herein. There is no dispute that upon sub-division of Plot No. 1219, Rose transferred a portion thereof 3.75ha. that was comprised in LR No. Kanyamkago/ Kawere I/3214 to the 1st defendant pursuant to the decree that was issued in the

above case. See P.exhibit 8. In view of the foregoing, the defendants' claim over the suit property based on the alleged trust is misconceived. In any event, it is not enough just to allege trust. Trust is a matter of fact and must be proved. The defendants did not tender any evidence in proof of trust relationship between them and Rose that would have entitled them to the reliefs sought. In view of the foregoing, I hereby hold that the defendants are not entitled to the reliefs sought in their counter-claim.

23. Conclusion;

In conclusion, it is my finding that the plaintiff has proved his claim against the defendants on a balance of probability and that the 1st, 2nd and 3rd defendants' counter-claim is not proved. I therefore dismiss the 1st, 2nd and 3rd defendants counter-claim with costs to the plaintiff and enter judgment for the plaintiff against the defendants as follows;

- a. As against all the defendants jointly and severally, judgment is entered in terms of prayers (i) and (ii) of the plaint dated 18th April 2008.
- b. As against the 2nd and 3rd defendants jointly and severally, judgment is entered for the plaintiff in the sum of kshs. 700,000/= as general damages for trespass.
- c. As against the 1st, 2nd and 3rd defendants jointly and severally, the plaintiff shall have the costs of the suit.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the plaintiff

N/A for the 1st, 2nd, 3rd and 4th defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE