



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL CASE NO. 29 OF 2007.

1. BARNABA OUMA WAFULA)
2. MORRIS OYULA MAKANDA).....PLAINTIFFS
3. RODGERS JOAB WAFULA)
4. EMMANUEL OSONGU MAKANDA)

VERSUS

1. THE CHIEF BUKHAYO CENTRAL).....1ST DEFENDANT
2. ASSISTANT CHIEF MALANGA SUB-LOCATION...2ND DEFENDANT
3. HON. ATTORNEY GENERAL & 11 .OTHERS).....2ND DEFENDANT

(CONSOLIDATED WITH BUSIA HCCC. NO. 8 OF 2010 - FORMERLY KAKAMEGA HCCC. NO. 184 OF 1995 – BARNABA OUMA WAFULA AND ANOTHER VS COUNTY COUNCIL OF BUSIA)

J U D G M E N T.

BARNABA OUMA WAFULA and **MORRIS OYULA MAKANDA** filed Kakamega H.C.C. No. 184 of 1995 against **County Council of Busia** on 18th September, 1995. They prayed for the Defendant's registration with Bukhayo/Malanga/619 to be cancelled, alleging that the registration was obtained fraudulently. They also prayed for injunction against the defendant and in the alternative they be compensated for the land.

The Defendant filed their defence through M/S. Balongo & company advocates denying the allegation of fraud and averred that their registration with Bukhayo/Malanga/619, being a first registration, was sacrosanct.

An amended plaintiff was later filed dated 15th April, 2009 bringing in two additional plaintiffs, namely Rodgers Joab Wafula and Emmanuel Osungu Makanda as the 1st and 2nd plaintiff and the original two as the 3rd and 4th plaintiffs. The amended plaintiff was served on counsel for the Defendant.

The hearing commenced before the Resident Judge, Kakamega and the 1st plaintiff's evidence was taken as PW 1 on 23rd November, 2009. The 2nd plaintiff testified as PW 2 on the same day. Thereafter an order was made for the Land Registrar to establish the boundaries and acreage of land parcels Bukhayo/Malanga/160, 162 and 619 and report be filed in court.

The file was then transferred to this court on 16th February, 2010 and given reference Busia H.C.C.C. No. 8 of 2010. On 24th February, 2010 an order was made consolidating Busia HCCC NO. 8 of 2010 with Busia H.C.C. No. 29 of 2007. It is now in Busia H.C.C. No.29 of 2007 that the rest of the proceedings has taken place.

In case No.29 of 2007 the plaintiffs are the same to those in Busia H.C.C. No. 8 of 2010 formerly Kakamega HCC. No.184 of 1995. The Defendants are 14 in number as listed herein below.

1. Chief, Bukhayo Central
2. Assistant Chief Malanga sub-location.
3. The Hon. Attorney General.
4. George Ongaya
5. Boaz Owase.
6. Gregory Ouma
7. Maurice Mutimba
8. William Muyodi
9. Anselim Abondo.
10. Hezron Awour.
11. Busera Wadenya.
12. Oduor Alaja.
13. Wilson Wamalwa.
14. Fredrick Kwedho.

The four plaintiffs pray for Permanent injunctions against Defendants in respect to Land parcels Bukhayo/Malanga/160, 162 and 619, mesne profits, de-registration of Bukhayo/Malanga/619 and reinstatement of original boundaries, costs and interests.

A defence dated 15th November, 2007 for the 3rd defendant, described as third party, was filed in Busia HCC. NO. 29 of 2007 by M/S. Balongo & company Advocates on the 15th November, 2007 denying the plaintiffs claim. This defence appears misplaced as **County Council of Busia** who are the defendant in Busia HCCC. No.8 of 2010 were not named as Defendants in Busia HCCC No. 29 of 2007. A defence dated 13th November, 2008 was later filed by the Litigation Counsel for the Attorney general who is the third defendant in Busia HCC. No.29 of 2007. The Attorney General avers that Bukhayo/Malanga/619 is registered in the names of County Council of Busia as a first registration and that it was not fraudulently created from Bukhayo/Malanga/160 and 162 as alleged.

When the consolidated matters came before me for hearing on 9th May, 2013 the four plaintiffs and M/S. Jumba for the Defendant agreed that the hearing proceed from where it had reached. The plaintiffs then closed their cases and defence hearing commenced on 18th June, 2013 with the Land Registrar testifying as DW 1. He produced copies of green cards for parcel Bukhayo/Malanga/160, 162 and 619 and survey map for Bukhayo/Malanga registration section covering the three parcels of land as exhibit 1 and 2 respectively. He also produced a copy of the report prepared by the then District Surveyor and Land Registrar dated 4th April, 2011.

The fifth Defendant then testified as DW 2 after which defendants closed their case. The third plaintiff then filed submissions for himself and the other plaintiffs while Mr. Jumba advocate filed submissions for the Defendants.

From the pleadings in the two cases described herein above, the following are the issues that need to be determined:

1. Who are the registered owners of Land parcels Bukhayo/Malanga/160, 162 and 619.
2. Did Land parcel Bukhayo/Malanga/619 come from Bukhayo/Malanga/160 and 162, and if so, was the process fraudulent.
3. Whether the registration of land parcel Bukhayo/Malanga/619 should be revoked and the land

returned to the owners of land parcels Bukhayo/Malange/160 and 162.

4. Whether the plaintiffs are entitled to the orders or any of the orders prayed for in the two suits.

After carefully considering the evidence adduced by Rodgers Joab Wafula and Emmanuel Osongu Makanda who testified as PW 1 and PW 2 and the evidence of Land Registrar (DW1) and 5th Defendant (DW 2) the court finds as follows;

1. That the copies of the Official Search and green card for the three parcels of land Bukhayo/Malanga/160, 162 and 619 produced by the plaintiffs had indicated the sizes of the parcels as 5, 8 and 1.8 **hectares** respectively while those produced by DW 1 indicated the sizes were 5, 8, and 1.8 **acres** respectively.
2. That the official sizes of the three parcels Bukhayo/Malanga/160, 162, and 619 are 5, 8 and 1.8 **acres** and not 5, 8, and 1.8 **hectares respectively**
3. That Land parcel Bukhayo/Malanga/160 belongs to Morris Oyula and Makanda Oyula who were registered on first registration on 1st October, 1968.
4. That land parcel Bukhayo/Malanga/162 is registered in the names of Baranaba Wafula and Ouma Wafula as first registered owners on 1st October, 1968.
5. That land parcel Bukhayo/Malanga/619 is registered in the name of County Council of Busia on first registration on 1st October, 1968.
6. That the details of registration set out in 3, 4 and 5 above shows clearly the three parcels of land were registered on first registration on the same date, 1st October, 1968.
7. That the court has not been given evidence that shows land parcel Bukhayo/Malanga/619 was excised from parcels Bukhayo/Malanga/160 and 162 exclusively or at all.
8. That the court takes judicial notice that during the process of land consolidation and adjudication, land set aside by communities for public use was routinely registered in the names of local authorities responsible for the areas the land was situated. Such land set aside, may at times have been for specified or general public use and the local authority would hold the title in trust for the community. The court finds that County Council of Busia was registered with Bukhayo/Malanga/619 as trustee for the community.
9. That there is no evidence adduced by the plaintiffs to show that there was fraud attributable to the Defendants or any of the Defendant in the process of setting aside and registering Bukhayo/Malanga/619 in the names of County Council of Busia, as it was and still is reserved for community use.

10. That the absence of physical boundaries on the ground did not mean land parcel Bukhayo/Malanga/619 did not exist on the ground, or that it was part of land parcel Bukhayo/Malanga/160 or 162, alleged by the plaintiffs.

11. That the confusion as to the boundaries of land parcels Bukhayo/Malanga/160, 162 and 619 may have been caused or contributed by the contents of the green cards and search certificates which had reflected the sizes in **hectares** instead of **acres**. The plaintiffs may have been misled to believe their parcels of land were bigger than they were on the ground by the contents of the copies of the green cards and certificates of official searches which had been issued to them by the lands office erroneously indicating the sizes in hectares. This has now been clarified through the evidence of DW 1.

12. That any of the plaintiffs or any other person who had been aggrieved by the decision to register land parcel Bukhayo/Malanga/619 with County Council of Busia as trustee for the community was required under the provisions of section 26 and 29 of the Land Adjudication Act Cap 284 of Laws of Kenya to lodge an objection or appeal to the adjudication officer or minister within the time stipulated. There is nothing presented in this case to show that the plaintiff's or any other person filed an objection or appeal against the decision to register Bukhayo/Malanga/619 with County Council of Busia.

13. That no evidence of fraud was adduced by the plaintiffs in relation to the setting aside and registering Land parcel Bukhayo/Malanga/619 with County Council of Busia and the registration

cannot be interfered with.

That from the foregoing, Land parcel Bukhayo/Malanga/619 was registered in the names of County Council of Busia on first registration in trust for the community in the area the land is situated. It is meant for public use, and for avoidance of doubt, is not part of Bukhayo/Malanga/160 or 162. The plaintiffs have failed to prove their case against the fifteen (15) Defendants or any of the Defendants to the standard required and their case is dismissed with orders that each party bear their own cost as the plaintiffs may have filed this case believing their parcels of land were bigger from the contents of the documents issued by the lands office.

S. M. KIBUNJA,

JUDGE.

Delivered on 19th day of September 2013.