



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okulo v Nambiro (Environment & Land Case 52 of 2016)
[2022] KEELC 2992 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 52 OF 2016**

**AA OMOLLO, J
JUNE 15, 2022**

BETWEEN

MARY AKUKU OKULO PLAINTIFF

AND

ROSELIDA NAMBIRO DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant by way of a plaint dated 3rd June 2016 and sought judgment as follows;
 - a. An order of cancellation of title to land parcel number L.R. No. Bukhayo/mundika/7644 on the ground that the same was obtained by fraud.
 - b. An injunction restraining the defendant whether by herself, her agents, workers and or servants from entering, working and or staying on land parcel number L.R. No. Bukhayo/mundika/7644 and or interfering with the plaintiff's use and or occupation of land parcel number L.R. No. Bukhayo/mundika/7644.
 - c. Costs of the suit.
 - d. Any other or further relief that this honourable tribunal may deem fit and just to grant.
2. The plaintiff pleaded that she is the administratrix of the estate of the late Francis Wafulo Okulo having been issued with a grant of letters of administration vide *BUSIA HCSC NO. 318 of 2014*. After the succession process, L.R. Bukhayo/mundika/4153 was subdivided to create several new numbers among them L.R. Bukhayo/mundika/7556 registered in the name of Elizabeth Lucy Mayende measuring 6 acres instead of 3 acres. That on or around 9/10/2002, the defendant by trickery, forgery and fraud caused a subdivision on L.R. Bukhayo/mundika/7556 giving rise to three parcels among



- them L.R. BUKhayo/mundika/7644 which parcel of land she proceeded to fraudulently register in her own name.
3. She listed out the particulars of fraud on the defendant's part as follows;
 - i. Subdividing land parcel number L.R. Bukhayo/mundika/7556 without the registered owner's knowledge, consent and information.
 - ii. Forging the signature of the registered proprietor.
 - iii. Forging Mutation Forms and Certified copies of register.
 - iv. Forging a sale agreement.
 - v. Transferring title to her favour without the requisite consents.
 4. The defendant entered appearance and filed a defence dated 29th July 2016. She denied each and every allegations and the particulars of fraud as raised by the plaintiff. She contended that on or about 5th August 2001, the plaintiff and Elizabeth Lucy Mayende caused L.R. Bukhayo/mundika/4153 to be subdivided into titles No. Bukhayo/mundika/7555, 7556 and 7557 and the sub divisional title Bukhayo/mundika/7556 was transferred to Elizabeth Lucy Mayende as proprietor thereof. The said Elizabeth Lucy Mayende as proprietor of L.R. Bukhoyo/mundika/7556 equally subdivided her title into L.R. Bukhayo/mundika/7644, 7645 and 7646 out of which titles no. L.R. Bukhayo/mundika/7644 and 7645 were transferred to the defendant as purchaser on the 9th December 2002 and she has been in actual possession since then to date to the exclusion of the plaintiff.
 5. The matter proceeded for hearing on November 22, 2021 with plaintiff, Mary Akuku Okulo, adopting her witness statement dated 3/6/2016 as her evidence in chief. She testified that she is the administratrix of the estate of the late Francis Okulo who was the registered proprietor of L.R. Bukhayo/mundika/4153. After the succession process, L.R. 4153 was subdivided to create three new numbers among them L.R. Bukhayo/mundika/7556 that got transferred to one Elizabeth Lucy Mayende who got 6 acres instead of 3 acres sold to her. She said that around 9/10/2002, the defendant by trickery, forgery and fraud caused a sub-division on L.R. 7556 giving rise to L.R. Bukhayo/mundika/7644-7646 with parcel No. 7644 being proceeded to fraudulently register in her own name.
 6. She continued that the defendant took advantage of her illiteracy, old age and ailments and caused the extra 3 acres given to Elizabeth Lucy Mayende by error to be transferred to her name without her knowledge and/or consent. She stated that on or around 1/4/2015, they referred the matter to the District Land Registrar who summoned the defendant to explain how she got registered as the proprietor of L.R. 7644 but she did not show up and further Elizabeth Lucy Mayende from whose parcel the defendant got the land in dispute disowned having entered into any agreement with the defendant. It was the District Land Registrar's recommendation that the court issues an order of cancellation of title for L.R. 7644 in the defendant's name and the same to be restored to the original owner. She relied on the documents in her list dated 3/6/2016 produced as Pex1-3.
 7. Upon cross-examination by counsel for the defendant, she said that Francis Okulo was her husband and owner of Bukhayo/Mundika/4153 and she took out succession in respect of his estate. She denied knowing the defendant. She said that her husband sold Elizabeth 1 acre and she also sold her 2 acres making Elizabeth to be listed in the succession cause as a purchaser. That Elizabeth was to get 3 acres and her son was to get the rest. The grant marked as 'MAO' in the affidavit filed on 17/2/2020 gave Elizabeth 6 acres. L.R. 4153 was subdivided into three (3) portions but she did not know the numbers and she was not aware that Elizabeth got L.R. 7556. She went on to say that the subdivision was done in 2001 and she later learnt that Elizabeth subdivided her land into two. She denied knowing that



- Elizabeth sold land to the defendant except when the matter came to court and Elizabeth said so. She denied knowing who uses the land but they plant nappier grass from then to date. She went on to say that she has not sued Elizabeth and she started complaining in 2014 that Elizabeth had stolen part of her land and when she discovered, she reported the matter to DCIO who summoned Elizabeth.
8. That they agreed to return to the succession court to rectify the mistake in that she was given 12.5 acres, Elizabeth 3 acres and Onesmus 1acre. During the rectification, the defendant was not invited and she was not aware that the title for two plots measuring 2 acres had been issued to the defendant. She stated that she did not know if Elizabeth agreed to the rectification so that she is not charged and according to her Elizabeth is to blame. She also did not know that Elizabeth had acquired title at the time of the rectification of the grant and she was not part of the transaction between Elizabeth and the defendant.
 9. The defendant, Roselida Nambiro, testified as DW1 and adopted her witness statement filed on 3rd August 2016 as her evidence in chief. She denied knowing the plaintiff. She testified that on or about 15th August 2002, one Elizabeth Lucy Mayende sold to her a portion of land measuring approximately two acres out of her land parcel title No. Bukhayo/mundika/7556 at a consideration of Kshs.80,000/= which amount was paid to her in full and the said Elizabeth caused her title no. Bukhayo/Mundika/7556 to be subdivided into title no. Bukhayo/Mundika/7644, 7645 and 7646 out of which title No. L.R. 7645 was transferred to her. Meanwhile on or about 14/10/2002, the said Elizabeth sold to her the remainder portion compromised in L.R. 7644 at the cost of Kshs.80,000/= which sum he paid to her in full settlement and said title was transferred to her on the 9th December 2002. She testified that she followed due process in obtaining the title and that she is a stranger to the plaintiff's allegation of fraud regarding the sale and transfer of title no. Bukhayo/Mundika/7644 as the same was sold to her by the said Elizabeth Lucy Mayende as registered proprietor thereof.
 10. She said that she has been in actual occupation of the said property since the date of purchase on the 14/10/2002 to date to the exclusion of the plaintiff, a period of over 14 years and therefore the plaintiff's claim is statute barred under the law of *Limitation of Actions Act*. She began using the land by planting eucalyptus trees near the river, nappier grass and also food crops. The plaintiff started raising complaints in the year 2014 and she had never been summoned by the Land Registrar Busia over the titles. She stated that if there was any fraud she never participated and prayed that the case be dismissed with costs. She produced the documents in her list of documents dated 25/7/2016 as DEX1, DEX2, DEX3, DEX4 and DEX5(a-b). Upon cross examination by counsel for the plaintiff, she stated that she was not aware the Land Registrar visited the suit property and she got L.R. 7644 legally because they appeared before the Land Control Board with Elizabeth. She denied that she got L.R. 7644 through fraud.
 11. The parties agreed to exchange written submissions. The defendant filed her submissions on January 24, 2022 and submitted that the issue for consideration in the matter was whether the transfer of the suit portion to the defendant was marred with fraud. She submitted that the issues raised by the plaintiff against the defendant are mere assertions and/or denials, as such they cannot be inferred in alleging fraud and the plaintiff has not laid basis of the fraud by the defendant. She submitted that she is a bona fide purchaser for value and in good faith and that she did not acquire the portion by way of fraud. She relied on the following authorities; *Elizabeth Kamene Ndolo v George Matata Ndolo* (1996) eKLR, *Bosire Ogero v Royal Media Services* (2015) eKLR.
 12. The issues that come up for determination by this court are;
 - a. Whether the plaintiff has proved the particulars of fraud;
 - b. Whether the plaintiff is entitled to the prayers sought in the plaint;



- c. Whether the suit is time barred;
 - d. Who should pay the costs of the suit?
13. On whether the plaintiff has proved her particulars of fraud, the plaintiff said that the defendant caused the subdivision of Bukhayo/Mundika/7556 which created L.R. No. 7644 and caused the same to be registered in her name. The plaintiff stated that the defendant caused the three extra acres given to Elizabeth Lucy Mayende by error to be transferred to her name. She produced a Certificate of Grant dated 15th December 2014 as PEX 2 giving Elizabeth the 3 acres. The plaintiff further stated that she referred the matter to the Land Registrar who summoned the parties and issued a report dated 1/4/2015 in which report Elizabeth denied selling the suit land to the defendant. The defendant on her part stated that Elizabeth sold to her suit land on 14/10/2002 and she produced the sale agreement as DEX 5(a). The defendant denied that the Land Registrar has ever summoned her and if there was fraud, she was not involved in any way.
 14. The vendor Elizabeth Lucy Mayende was not sued neither was she called as a witness by either side. The burden was upon the plaintiff to prove the fraud that the three acres was erroneously transferred to the defendant. According to the plaintiff, what was sold to Elizabeth which she could sell and transfer to the defendant was only 3 acres. Therefore the extra three (3) acres sold to the defendant was irregularly sold and transferred to the defendant. In support of her allegations, she relied on the certificate of grant of letters of administration which awarded Elizabeth three (3) acres and the Land Registrar's report where Elizabeth admitted she was entitled to only 3 acres. Be that as it may, the plaintiff has testified that she went to the succession court for rectification of grant after she realized that Elizabeth Lucy Mayende erroneously acquired 6 acres instead of the 3 acres without elaborating on the outcome of that application for rectification.
 15. The record does show that the plaintiff did not have any transaction with the defendant. At the time the land was sold to the defendant, the suit title was registered in the name of Elizabeth Lucy Mayende. The plaintiff does not deny signing documents transferring parcel number 7556 to Elizabeth Mayende and although she said she did not know what size of land she transferred to Elizabeth due to her illiteracy, she never applied to have that title cancelled. The defendant produced a copy of the mutation form-subdividing parcel no 7556 into three and the mutation form is executed by the owner of the land who at the time was Elizabeth Lucy Mayende. There is no evidence that the signature on the mutation registered on 9/10/2002 sub-dividing 7556 was forged.
 16. Further the defendant produced 2 titles numbers 7644 and 7645 bearing her names. L.R Bukhayo/Mundika/7644 measures 0.76ha while 7645 measures 0.80ha giving a total of 4 acres. Therefore if Elizabeth Mayende was legally entitled to 3 acres, from the size of land transferred to the defendant, it is only by one acre. This makes the plaintiff's claim if at all to lie elsewhere and not against the defendant. Otherwise, she had to distinctly prove why she felt what was sold to the defendant is not constituted in the 3 acres regularly acquired by Elizabeth Lucy Mayende.
 17. The defendant could only be guilty of fraud if the same was proved as between the Plaintiff and Elizabeth Mayende. The standard of proof for fraud is on a standard above balance of probabilities. The Land Registrar's report which the plaintiff relied on in my view is not conclusive/strict proof of the fraud alleged for two reasons; the defendant was not heard on the matter and the conclusions made by the registrar were opinions. Secondly, the documents of transfer between Elizabeth Mayende and the plaintiff have not been cancelled neither has there been a cancellation of the subdivision of 7556 as undertaken by Elizabeth Mayende so that a report cannot cancel the title 7644 whose root remains unchallenged. Consequently, I make a finding on this matter that the fraud levelled against the defendant has not been proved.



18. On whether the suit is time barred, the defendant stated that she has been in possession of the suit land since 14/10/2002 to date therefore the plaintiff's suit is time barred since it has been 14 years since she took possession. She relied on section 7 of the Limitation of Statutes Act which provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, of it first accrued to some person through whom he claims, to that person. The plaintiff did not contradict the defence of occupation by the defendant for the period stated. It follows that the plaintiff's rights over the land were extinguished by operation of the law. This means that even if the plaintiff's claim founded on fraud was merited, the same cannot vitiate the defendant's rights acquired by operation of section 7 of Cap 22.
19. In conclusion, I find and hold that the plaintiff has not made out a case against the defendant. Her suit is dismissed with costs to the defendant

DATED, SIGNED AND DELIVERED AT BUSIA THIS 15TH DAY OF JUNE 2022.

A. OMOLLO

JUDGE

