



**Okwaro v Wamukoya (Environment & Land Case 1 of 2013)
[2022] KEELC 126 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 1 OF 2013**

AA OMOLLO, J

JUNE 8, 2022

BETWEEN

JACKSON ODUOR OKWARO PLAINTIFF

AND

ALI MALALA WAMUKOYA DEFENDANT

JUDGMENT

1. The plaintiff filed the suit on 9th January 2013 then amended the plaint pursuant to a court order issued on 30th July 2019. In the amended plaint, the plaintiff pleaded that it was clear from the succession cause that the defendant had bought ten (10) acres out of L.R No. MARACHI/ELUKHARI/1101 which measured 5.81ha. Therefore land L.R No. MARACHI/ELUKHARI/2667 measuring 14½ acres registered in the defendant's name has the 4½ acres thereof belonging to the plaintiff which the defendant fraudulently obtained.
2. The plaintiff pleaded that his home has always been on the portion comprising part of the suit parcel 2667 with the knowledge of the defendant. The plaintiff accuses the defendant of fraud as set out in the particulars that;
 - (i) Registering L.R. No. Marachi/Elukhari/2667 in his name knowing well that he was only entitled to 10 acres.
 - (ii) Obtained a title deed to L.R No. Marachi/Elukhari/2670 knowing well that he was not entitled to it. The plaintiff claims ownership of the said parcel of land.
 - (iii) Agreeing to hive off 4½ acres as agreed but declining to sign mutation form.
3. It is further pleaded that on 15/10/2012, the matter was deliberated before the County Land Registrar Busia where the parties had agreed to have the survey done to ascertain the boundaries of the suit parcel. That the exercise took place but the defendant refused and or neglected to sign the new mutation



- forms. The plaintiff contends that Ibrahim Dimba – deceased had declared that he was entitled to ½ share of the original land.
4. The plaintiff's claim is his entitlement to 4½ acres to be carved out of L.R. Marachi/Elukhari/2667. He prayed for judgment that:
 - (a) A declaration that the plaintiff Jackson Oduor Okwaro is entitled to L.R. numbers Marachi/Elukhari/2668, 2669, 2670 and 4½ acres out of L.R. No. Marachi/Elukhari/2667.
 - (b) The Land Registrar be and is hereby directed to carve off 4½ acres out of L.R. No. Marachi/Elukhari/2667.
 - (c) Costs of the suit.
 5. The defendant filed a defence dated 12th February 2013 which was not amended subsequent to the amendment of the plaint. He pleaded that he is the absolute registered owner of the suit parcel which he acquired for valuable consideration. The defendant avers that the plaintiff is not entitled to any portion of the suit land. He urged the court to dismiss the suit for not disclosing any cause of action against him, is misconceived and bad in law.
 6. The plaintiff gave his testimony on 16th March 2015. He reiterated that the defendant is only entitled to 10 acres of land, therefore the 4.5 acres should be registered in PW1's name. According to the witness, L.R. Marachi/Elukhari/1101 belonged to Ibrahim Ndumba – deceased and his father Okwaro Ndumba – deceased. That the defendant purchased 10 acres from Clementina – daughter to Ibrahim which was their entitlement with the remainder 11 acres belonging to the family of the plaintiff.
 7. That the land had been demarcated into two (2) portions but the defendant removed the boundary. The witness continued that he later contacted the defendant who agreed that a survey be carried out and that the 4.5 acres be transferred to him (the plaintiff). The witness added that he is also claiming 3 acres to be carved out of parcel 2670 in another case. That parcel numbers 2668 and 2669 which are currently registered in his name measures 4.5 acres. He filed the present case after the defendant refused to transfer to him the 4.5 acres.
 8. In cross-examination, PW1 admitted that the defendant got his title from Clementina who was the administrator of the estate of Ibrahim Ndumba. That his claim for 11 acres arose from the boundaries planted between his father and Ibrahim Ndumba. The witness agreed he is not the administrator of his father's estate. That he was told by his brothers that Clementina had sold 10 acres which was her entitlement to the defendant. He accused the defendant of stealing their land which they were occupying. He denied selling two (2) acres of land to the defendant on 22/6/1995. He was also shown an agreement dated 16/12/1997 signed by his mother and brothers where one acre of land was sold to the defendant. In re-examination, he denied his signature in the agreement for sale of the two (2) acres.
 9. The Land Registrar, Mr. Tom Chepkwesi gave evidence as PW2. He confirmed meeting the plaintiff and defendant following a complaint lodged by the plaintiff over parcel 2667. He convened a meeting vide his letter dated 28/9/2012. That the parties met in his office on 15/10/2012 and after lengthy discussions, they agreed to redraw the mutation for the original No. 1101. That a surveyor was contacted who redrew the mutation but the defendant refused to sign. As a consequence he advised the plaintiff to file suit.
 10. During cross-examination, PW2 stated the suit parcel was registered in the defendant's name when he met the parties. That he did have jurisdiction to handle the dispute. He also confirmed the register does not show the defendant was registered as trustee, or that the registration was fraudulent. In re-



examination, the witness said that the succession cause had directed the land to be partitioned between two parties therefore it was illegal to sub-divide it into many portions.

11. Titus Otieno Ojuang, the County Surveyor testified as PW3. He stated that the suit parcel is indicated as measuring 14.5 acres. That he was contacted by the parties herein to draw a mutation sub-dividing parcel No. 2667. He drew the mutation and called the defendant to sign but he declined saying he did not want the 4.5 acres to be positioned where it was on the mutation which according to the witness was the place occupied by the plaintiff and his family.
12. Mr. Ojwang stated that he had visited the land in the absence of the defendant and was shown the 4.5 acres by the plaintiff. He did not bring along the mutation he had prepared because they served no purpose as they had not been signed. That the mutation for parcel 1101 had been approved in 1998 by the then District Surveyor and registered in 1999. In re-examination, PW3 said the defendant had indicated not able to join them during that visit which was a Friday because he would be going to the mosque. This marked the close of plaintiff's case.
13. The defendant gave evidence as DW1 both on 21/5/2018 and 25/10/2021. He adopted his written statement dated 22/10/2013 as his evidence in chief and the documents in the list of even date as Dex 1-6. The defendant said that he first bought 10 acres before being sold the additional 4 acres by Clementina. That Clementina has never complained that he got more land. The defendant also denied agreeing to giving the plaintiff four (4) acres of land neither is the plaintiff using the portion claimed as there is a mosque on it and he cultivates the remainder portion.
14. The defendant stated further that the plaintiff had sued him before Butula Land Disputes Tribunal which case was concluded vide Kisumu Court of Appeal Civil Appeal No. 132 of 2004. He had also sued him in Busia ELC No. 53 of 2013 and 40 of 2012 with both cases pending. That he had acquired the suit parcel for value and followed due process to get his title.
15. During the cross-examination by Mr. Obwatinya learned counsel for the plaintiff, DW1 said the plaintiff's home is in Lara. That the mother to plaintiff sold him one acre of land and which formed part of the 4 acres sold to him later by the plaintiff's mother. That the plaintiff's mother never took him before the Land Control Board because no land was registered in her name. He denied engaging in any out of court negotiations. In re-examination, the witness said all the sub-divisions were registered in the name of Clementina. That the one acre sold by Felista was also in Clementina's name. That the suit parcel measures 14 acres which is what he bought.
16. Justus Opondo son to Clementina testified as DW2. He said Clementina died in the year 2020. He came to confirm that his mother had sold land to the defendant and all due process followed to register the sold land into the defendant's name and it is the defendant in possession. In cross-examination, DW2 could not tell the size of land sold to the defendant. He was not aware of the plaintiff's share comprised in the 4½ acres. He does not know whether the plaintiff lives on part of the disputed portion. Neither was the witness aware that Clementina had made a written statement favouring the plaintiff. This marked the close of defence case.
17. The plaintiff filed his submissions on 15/3/2022 giving a summary of the evidence adduced by parties. He urged the court to find that he had made out a case for granting the reliefs sought in the plaint. The defendant had filed their submissions on 30/11/2021. They also analysed the evidence adduced and concluded that;
 - (i) The plaintiff has not established any known interest or right as stipulated in law.
 - (ii) The plaintiff is guilty of duplicity of cases thus abusing the process of the court.



(iii) The plaintiff has not proved fraud that was alleged.

iv. Plaintiff lacks capacity to bring this suit.

They urged the Court to dismiss the suit with costs.

18. The plaintiff has accused the defendant of fraudulently causing L.R Marachi/Elukhari/2667 to be registered in his name. It was therefore incumbent upon the plaintiff to prove the fraud alleged for his claim to succeed. The Court is tasked to determine whether or not the plaintiff has discharged that responsibility. One of the grounds of fraud alleged is that the defendant registered himself as owner of the suit land while well aware that he was only entitled to 10 acres thereof.
19. One of the documents produced in evidence is a certificate of confirmation of grant in Suc. Cause No. 60 of 1993 issued on 12th April 1996 to Clementina A. Opondo as the administrator of the estate of Ibrahim Okello Dimba. The grant describes Clementina as the sole beneficiary of Marachi/Elukhari/1101 and the defendant was given 10 acres in purchaser's interest. The plaintiff annexed copies of forms used in making the application for the Succession Cause No. 60 of 1993 none of which contained an application for objection to the grant and or distribution of the estate. PW1 and PW2 stated that the succession court had directed the original land to be sub-divided into two but no documentary evidence was shown to support this assertion.
20. The defendant stated in his defence that the contested 4 acres was sold to him by Clementina who has not brought any complaint against him. Clementina is said to have died in the year 2020 which was after the plaintiff had closed his case. The transfer documents of the suit title into the defendant's name were executed by the said Clementina. The plaintiff did not refer to any particular document which in his view was fraudulent/forged and used in the acquisition of the suit title.
21. Further defendant explained how he acquired the contested 4 acres. First that one acre out of the four was sold to him by the plaintiff's mother vide the agreement dated 16/12/1997. Although the plaintiff denied that his mother's signature did not appear in that document, there is a thumbprint appearing in front of his mother's name. One of his brothers also witnessed this agreement. The plaintiff did not subject the document to hand writing examination. There was also another agreement dated 22/6/1995 where it was alleged the plaintiff had sold two acres to the defendant. This document was filed in court on 6/11/2013 yet other than denying the signature, the plaintiff did nothing to engage the expertise of a professional to challenge "his signature" on the document.
22. The law provides for strict liability proof of fraud. That fraud cannot be inferred from a set of events. This was the position taken by the Court in the Case of R. G. Patel Vs Lalji Makanji where it held thus; allegations of a fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than balance of probabilities is required.
23. The parties produced a copy of record (green card) for the suit parcel Marachi/Elukhari/2667 which document shows the land is 5.81ha in size translating to 14½ acres. According to the defendant three acres were sold to him by the plaintiff and his mother while the additional 4 acres was sold to him by Clementina. However, he does not say when Clementina sold the four (4) acres neither did he produce any supporting documents like he did for the 13 acres. The fact that the late Clementina did not sue him was not sufficient to prove how he acquired the disputed portion.
24. There is another Case between the parties Busia ELC 53 of 2013 where the plaintiff sued the defendant for fraudulently acquiring land title No. Marachi/Elukhari/2670. The documents for Marachi/Elukhari/2670 indicates that it is measuring 0.96ha translated to almost 2¼ acres of land. If the two acres the plaintiff sold to him was contained in this title number 2670 then why was he awarded the



same two (2) acres in L.R Marachi/Elukhari/2667 (suit property)? The defendant's witness statement dated 28/11/2013 filed in his defence in Case number 53 of 2013 said nothing about sale of the suit portion to him. The effect of this piece of evidence explains the defendant's intention was benefit twice from the alleged agreement of 22/6/1995. This portrays him as dishonest and suffice it to say that his acquisition of L.R 2670 was through fraud and deceit (benefitting twice).

25. In the Case of *Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another* [2018] eKLR it was stated thus;

“While we agree with the appellants that title registered under the Registered *Land Act* was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did.”

26. In light of the evidence presented, I hold that although the plaintiff alleged that the defendant was only entitled to 10 acres out of the original land Marachi/Elukhari/1101, the plaintiff did not sufficiently contradict the sale agreements produced regarding the sale of the additional 3 acres. However, I am satisfied that the evidence led demonstrates that the defendant is entitled to only 13 acres out of the original title Marachi/Elukhari/1101. The 13 acres is now comprised in L.R 2667 registered in the defendant's name.

27. The consequence of my holding in paragraph 24 and 26 above is that the defendant is not entitled to 1½ acres forming part of the suit property which 1½ acres is hereby awarded to the plaintiffs. Further, the analysis of the evidence in this matter helps in resolving the dispute in Busia ELC 53 of 2013 by virtue of my finding that the defendant irregularly acquired L.R. Marachi/Elukhari/2670 measuring approximately 2¼ acres. Therefore, an Order is made cancelling his registration and ownership of the land Marachi/Elukhari/2670. In essence, the terms of this judgment shall apply mutatis mutandis ELC 53 of 2013.

28. In conclusion, the plaintiff's claim in this case succeeds and I enter judgment in terms that;

- (a) A declaration be and is hereby made that the plaintiff is entitled to a portion of L.R No. Marachi/Elukhari/2667 measuring 1½ acres.
- (b) The Defendant is directed to execute relevant documents to facilitate the sub-division and transfer of the 1½ acres into the names of the plaintiff.
- (c) The plaintiff to meet the costs of such sub-division, transfer and registration of the 1½ acres into his names.
- (d) The orders in ELC 53 of 2013 granted as prayed in paragraph (a) of that plaint.
- (e) Each party to bear their respective costs of this suit while the costs in Case No. 53 of 2013 is awarded to the plaintiff in any event.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE 2022.

A. OMOLLO

JUDGE

