



REPUBLIC OF KENYA



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**Karani v Barasa & 4 others (Environment & Land Case
37 of 2020) [2022] KEELC 3968 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 37 OF 2020**

**AA OMOLLO, J
JULY 28, 2022**

BETWEEN

OCHEREBUKU BARASA KARANI PLAINTIFF

AND

MICHAEL EPUKU BARASA 1ST DEFENDANT

LIUWI ERICK 2ND DEFENDANT

BARASA SAMWEL ASUMANI 3RD DEFENDANT

RODAH BARASA 4TH DEFENDANT

EVANS KARANI 5TH DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendants via a plaint dated August 7, 2020 and prayed for judgment against the defendants for;
 - a) Cancellation of LR No South Teso/Angoromo/9410, 9411, 9412, 9413 and the road reserve and restoration of LR No South Teso/Angoromo/7452 in the names of Ocherebuku Barasa Karani.
 - b) A permanent injunction restraining the defendants either by themselves or through their agents, servants and/or workers, assignees or any other person whatsoever from interfering with the LR No South Teso/Angoromo/7452.
 - c) Any other relief the court may deem fit to grant.
 - d) Costs.



2. The plaintiff pleaded that at all times material, he was the registered owner of the entire parcel known as South Teso/Angoromo/7452 measuring approximately 0.65ha having been gifted to him by his late father one Barasa Karani during his life while his brother was gifted South Teso/Angoromo/7453 measuring approximately 0.65ha. On or about February 6, 2013, the plaintiff's original number known as South Teso/Angoromo/7452 was transferred and registered in the names of the 4th defendant who proceeded and obtained a title deed in her name on the February 7, 2013 without any colour of right. He learnt that the 4th defendant has subdivided the land parcel into 5 portions in February 2014 without his consent and/or knowledge and accordingly registered in the names of other people. He listed out the particulars of fraud of the defendants as follows;
 - i) Failing and/or refusing to include the plaintiff in any transactions regarding on his land – no consent sought and obtained.
 - ii) Including the plaintiff in the proceedings before the tribunal but ignoring to serve him with the summons to noble him rebute her claim.
 - iii) Presenting the matter before the tribunal knowing very well that the said tribunal lacked jurisdiction to entertain the matter.
 - iv) Presenting the case before the tribunal when the same divested of authority and abolished all together.
 - v) Selling portions out of its strangers through the records when on the ground there are no beacons to justify the same.
 - vi) Purporting the plaintiff was duly represented by the firm of Bogonko Otanga & Co Advocates when he had no knowledge of the existence of the case before the tribunal.
 - vii) Purporting that the plaintiff was present and participated in the proceedings when he was in Uganda.
 - viii) Presenting fake transfer of land forms purporting them to be duly signed by various parties without their knowledge.
3. The 1st, 2nd and 3rd defendants entered appearance and filed a joint defence dated September 9, 2020 and informed the court that the 4th and 5th defendants are deceased. They denied that at all times LR No South Teso/Angoromo/7452 and 7453 belonged to the plaintiff and one Aggrey Shikuku Barasa respectively. They averred that LR No 7452 no longer exists having died on February 5, 2014 through subdivision into portions LR Nos 9410, 9411, 9412 and 9413. They pleaded further that Rodah Barasa got registered as proprietor of LR No South Teso/Angoromo/7452 on February 6, 2013 and denied that the ensuing subdivision of 7452 was illegal or without any colour of right as alleged. The 1st – 3rd defendants denied the particulars of fraud. That there exists another case being Busia HC ELC No119 of 2017 Evans Egesa Karani Ilolo (deceased) v Ocherebuku Barasa Karani in which the deceased plaintiff prayed for a permanent injunction and eviction order against the plaintiff herein over LR No South Teso/Angoromo/7452. The defendants urged that the plaintiff's suit be dismissed with costs.
4. The matter was set down for hearing October 4, 2021 with the plaintiff, Ocherebuku Karani testifying as PW1. He adopted his witness statement dated August 7, 2020 as his evidence in chief. He stated that he is the registered proprietor of all that entire parcel known as LR No South Teso/Angoromo/7452 having been gifted by his late father Barasa Karani during his lifetime and his brother Aggrey Shikuku Barasa was also gifted LR No South Teso/Angoromo/7453. On February 6, 2013 to his surprise, he learnt that the original number known as LR No South Teso/Angoromo/7452 had been transferred



- and title deed registered and obtained in the name of the 4th defendant on the February 7, 2013 without his consent or any colour of right. He stated that he further learnt that the 4th defendant had subdivided the land parcel into five portions in February 2014 without his consent and/or knowledge and accordingly registered in the names of the following people: LR No South Teso/Angoromo/9410 – Evans Egesa Karani, LR No 9412 – Michael Epuko Barasa, and LR No 9413 as a road reserve.
5. PW1 continued that he discovered that the said 4th defendant had filed a land dispute case with Busia Municipality Land Dispute Tribunal whose findings were allegedly adopted by the Chief Magistrate's Court at Busia via land case No 126 of 2011. That the Land Disputes Tribunal verdict was that LR No South Teso/Angoromo/7452 and 7453 then registered in his name and that of his brother be transferred to the 4th defendant. The plaintiff stated that he was not aware of any proceedings and the purported instructions of being represented by the firm of Bogonko Otanga & Company Advocates and as such had no knowledge of the existence of the case before the tribunal. That the proceedings conducted at the tribunal allowing cancellation of his title were flawed as the tribunal was divested of any authority to hear and determine the then matter before it.
 6. He also denied participating in the proceedings even though his name appears as the 1st defendant. PW1 contended that the proceedings before the tribunal was a fallacy and amounts to forgery as when the said proceedings were being undertaken, he was in Uganda. He added that he has been and continues to occupy the entire parcel of land which is alleged to have been subdivided as aforementioned but on the ground there are no beacons to separate plots from one another. The procedure adopted by the 4th defendant in subdividing resultant portions and transferring to other defendants herein was fraudulent. The plaintiff prayed that the defendants be restrained by an order of this court from interfering with his land and a cancellation of all their titles. He produced the documents on his list of documents dated August 7, 2020 as Pex1-12.
 7. In cross-examination by Mr Shihemi learned counsel for the defendants, the witness said that he did not know of the case before the Land Disputes Tribunal as he was in Uganda. He denied participating in the proceedings as indicated in page 4 first paragraph of tribunal records. When shown PEX4 (copy of order), he denied that he had an advocate acting for him insisting that he always lived in Uganda. That he had not filed any appeal against the Land Disputes Tribunal because he did not know about it. He did not know if it is the court who signed documents of transfer to Roda (4th defendant). He did not surrender his title because he was away and was not aware of the court. He also denied knowledge that his title had been degazetted.
 8. The plaintiff said his father was called Seveno Barasa Karani and in 2009 when he got his title, his father was still alive. His father was the one who gave him the land and he brought him the title for his portion LR No 7452. In 2014 when the surveyor came to the land, he was not there. He averred that the land has trees on it which he planted and he did not register any caution because he had a title deed. According to him, the title to LR No 7452 has been subdivided on paper but on the ground there is no demarcation. He said that the 1st and 3rd defendant are the sons to his paternal uncle. He denied that his share of the land is in LR No 7453. That he learnt there was a case at the tribunal after 5th defendant came to build on the suit land. In regards to particulars of fraud, he maintained he was not aware of the Land Dispute Tribunal case and he currently stays on LR No 7452.
 9. On re-examination, the plaintiff stated that he learnt there was a subdivision of his land in 2017 when he was building and 5th defendant sued him for building on his land. He had never been asked to surrender his title and the information on the gazette notice regarding loss of title is a lie. He said he planted the trees on the land in 2004 and that he had got his title during the lifetime of his father live. He maintained the allegation of fraud against the defendants.



10. The land registrar Mr Obiero gave evidence as the defendants' first witness. He said he had in his custody documents for LR No 7452 being the green card, transfer documents, subdivision documents and a restriction. That before the subdivision of LR No 7452, it belonged to Roda Barasa and he did have a transfer document from Ocherebuk to Roda. However, the transfer form was signed on behalf of the transferor by the executive officer of the court and the transfer was registered on February 6, 2013. Accompanying the transfer was an application for land control board and letter of consent issued, copy of court order dated January 17, 2012. He told the court that the transferee paid Kshs 20,000/= for stamp duty and other statutory payments. There was also a gazette notice No 14000 dated October 5, 2012 gazetted loss of title. Based on those documents, Roda Barasa obtained a valid title. He produced the green card as DEX1, transfer form as DEX 2, application for land control board consent as DEX 3, letter of consent as DEX 4, order of court as DEX 5, receipts as DEX 6 and gazette notice as DEX 7. He went on that a restriction was registered on this title by Ocherebuk Barasa on January 24, 2014 but which was lifted on February 25, 2014 after due process.
11. Upon cross-examination by plaintiff's counsel, DW1 stated the date of registration of the transfer is October 30, 2012 and date of executive officer's signature is February 16, 2012. That paragraph 6-8 of application for land control board are not filled. The letter of consent did not have the date of application for the land control board or provide for the consideration of the land. He agreed that paragraph 1 of the order does not show that the parties are family members. The valuation form did not put a figure on the value because there was no valuation report and the applicant in the valuation submitted a consideration of Kshs 200,000/= which was raised to Kshs 500,000/= by the government valuer. He reiterated that stamp duty on Kshs 500,000/= is Kshs 20,000/=. DW1 conceded that the search dated May 2012 shows the land belonged to Ocherebuk Barasa Karani with the title issued on September 18, 2009 and there were no encumbrances on the title at that time. He said that the procedure for removal of a caution included a proprietor asking/applying to have the caution removed and said application can be done by a letter or appear personally before the registrar. He stated that the appearance was not minuted because there was no hearing. He further stated that Ocherebuk was represented by an advocate so the letter was issued to him or his advocate but he had no evidence that the letter reached them.
12. The 1st defendant Michael Barasa Epuko gave evidence as DW2 by adopting his statement dated March 22, 2021 as his evidence. He said that the plaintiff is their elder brother and the 4th defendant brought them up after their mother's demise. He testified that LR 7452 does not belong to the plaintiff and it comprised part of LR No 7 which belonged to their father. The plaintiff and their other brother called Aggrey divided LR No 7 between themselves hence the creation of LR No 7452. The 4th defendant sued the plaintiff in the land disputes tribunal which ruled in her favour and the plaintiff never filed an appeal against the decision. He said that LR No 7452 was subdivided to produce LR Nos 9410-9413. That LR No 7453 was left to be shared between Ocherebuk, Aggrey Shikuku and another brother who is deceased. DW2 asserted that the land was legally subdivided using a valid court order. That the plaintiff's title was gazetted as lost after he refused to surrender it hence the current title LR No 7452 held by Ocherebuk is void. He asked the court to dismiss the suit with costs and order the plaintiff to get his share from LR No 7453.
13. During cross-examination, DW2 stated that he does not live on land comprised in LR No 7. That they lived in no-man's land and moved out on the government's directives. He said that the plaintiff sold his share in LR No 7 and bought land in Burumba where he lives. When Roda filed the case at land disputes tribunal, the land was registered in the names of the plaintiff and the order made a directive for rectification of the register to remove plaintiff's name and put the 4th defendant's name. DW2 admitted that the plaintiff was not asked to execute transfer documents in favour of Roda. That



- LR No 7 became family land after their father Barasa bought it. He conceded that there is no date on the part of attestation both on page 1 and 2 of the transfer form but there is an advocate's sign and name. the 1st defendant denied that the plaintiff lived in Uganda as their father lived on no-man's land not Uganda until they were removed. He further denied that the plaintiff lives on the suit land.
14. On re-examination, DW2 stated the land registrar signed the transfer in February 2013. That the plaintiff, the 4th defendant and himself all appeared before land disputes tribunal. After the decision of the land disputes tribunal, they have never been served with any appeal against the tribunal proceedings.
 15. Parties agreed to exchange written submissions. The defendants filed their submissions on March 8, 2022 and said that all allegations of fraud have been satisfactorily rebutted either through evidence or production of documents. They submitted that the titles they hold have not been impeached and they are good titles which cannot suffer cancellation as envisaged by the plaintiff. They submitted that the plaintiff did not appeal against the ruling of land disputes tribunal and neither did he apply to set the same aside or quash it. That the ruling still stands and the plaintiff having been a participant is estopped from complaining about the decision. They further said that the suit is founded on fraud and it should have been brought within 6-years and the plaintiff filed the suit outside the 6-year period without seeking leave. They prayed that the suit be dismissed for lack of merit. The plaintiff did not file any submissions by the time of writing this judgment.
 16. Having carefully considered both parties' pleadings together with the evidence they adduced and submissions on record, the issues that come up for determination are;
 - a) Whether the suit is time barred;
 - b) Whether the plaintiff has proved his allegations of fraud;
 - c) Who should pay the costs of the suit?
 17. The defendants have said that the suit is time barred because suits based on fraud should be filed within 6 years. Section 26 of the [Limitation of Actions Act](#) provides as follows;
Where, in the case of an action for which a period of limitation is prescribed, either -
 - (a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) The right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
 18. Section 26 as read with section 4(2) of the [Limitations of Actions Act](#) basically means that in land cases where fraud is pleaded, the period of limitation is 3 years and time starts running when the fraud is discovered. In this present case, the plaintiff said that he discovered the fraud in 2013 and he filed the suit in 2020. A period of 7 years had passed which means that the suit was filed out of time without leave of the court.
 19. The plaintiff has pleaded that the defendants fraudulently transferred LR No South Teso/Angoromo/7452 to themselves and set down the particulars of fraud in paragraph 12 of his plaint. It is settled in law that the allegations of fraud must strictly be proved beyond the standard of proof in civil cases of the mere balance of probabilities. In section 107 of the [Evidence Act](#), the onus to prove a fact is on the party who alleges it.



20. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

21. In his evidence, the plaintiff has stated that he was never a party to the Busia municipality land dispute tribunal whose ruling was adopted in the Chief Magistrate’s Busia land case No 126 of 2011 which ordered for the transfer of land parcel LR No South Teso/Angoromo/7452 in favour of the 4th defendant - (deceased). The 4th defendant subsequently subdivided and transferred the suit title 7452 in the names on the other defendants. In cross-examination, the plaintiff maintained that he was in Uganda when the land disputes tribunal proceedings were ongoing and that it was his father who gave him the suit land. DW2 said that the plaintiff is his older brother and that he was present when the land dispute tribunal held its proceedings. DW2 denied that the plaintiff ever lived in Uganda. The proceedings of the Busia Municipality Land Dispute Tribunal were produced PEX 3 and DEX 10 respectively. From my reading of the said proceedings, it shows that the plaintiff gave evidence as the 1st defendant as follows;

“I was given land by my father, the late Barasa Karani and now I don’t know what the plaintiff is complaining about.”

22. The tribunal’s proceedings further shows that he was cross-examined by both the plaintiff (now 4th defendant) and the panel of elders. The plaintiff is also indicated to be present during the sit visit by the panel of elders. When the ruling of the tribunal was being adopted as an order of the court on January 17, 2012, it was noted that the defendants were being represented by Bogonko Otanga advocate. DW3 has stated that the plaintiff has not appealed the ruling of the tribunal or sought to set aside/quash them. If indeed the plaintiff was not a party to the land disputes tribunal proceedings as he claims, he has not challenged the proceedings as being an untrue representation of what happened. His evidence was not corroborated by an additional witness to show that indeed when the proceedings of the tribunal were conducted, he was not present.

23. The plaintiff testified that LR No South Teso/Angoromo/7452 was transferred to him in the lifetime of his father and produced the green card for LR No 7452 which shows that he was registered as the proprietor on August 11, 2009. DW2 countered this assertion by producing the death certificate of their late father as DEX12 which indicates the date of death as October 20, 1989. The plaintiff only dispute to the death certificate was that the name was different than that of his father. Other than the death certificate which was produced by the defendants, there was no other mention of the date of death when the late Severio Barasa Karani passed on.

24. The plaintiff stated that his father took to him the title No 7452 already in his name. He did not bother to produce documents to support his title. Since the plaintiff is attempting to revise the award of the tribunal indirectly, he was under a duty to demonstrate that the root of his title was good. However DW2 having shown that their father Baraza Karani was dead as at 1989, it casted doubt on the validity of the title held by the plaintiff.



25. In any event, the transfer from the plaintiff to the 4th defendant was pursuant to a court order. The proceedings which the order emanated were produced. The process of execution of that order have also been exhibited by the documents produced by the land registrar (DW1). The allegations of fraud levelled by the plaintiff have been effectively contradicted by the 1st – 3rd defendants. This means the plaintiffs suit have no legs to stand on.
26. The only conclusion this court can arrive at is that the plaintiff has failed to prove his case. Accordingly, his suit is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF JULY 2022.

A. OMOLLO

JUDGE

