



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO.47 OF 2003

LAZARO OKUMU SAWA.....PLAINTIFF

~VRS~

PETRO KHAEMBA MISIKO.....DEFENDANT

JUDGMENT

The Plaintiff Lazaro Okumu Sawa in his plaint dated 16/06/2003 and filed in court on 18/06/03 sues the Defendant Petro Khaemba Misiko for a declaratory order. He claims that the transfer of land parcel no.West Bukusu/Khasoko/404 from the Plaintiff's name to that of the Defendant was fraudulent and prays for cancellation of the title of land registered in the name of the Defendant.

It was the Plaintiff's testimony that he was the registered owner of L.R. No.W.Bukusu/Khasoko/404 measuring 4.6 hectares from 1972. In 1993, the land was transferred to the Defendant fraudulently. The Plaintiff had no knowledge of the transfer and denies selling his land to the Defendant or to any other party. He also denies signing any agreement or obtaining the consent of the relevant land control board for any such transaction.

The Defendant denies the claim of obtaining the title fraudulently. He testified that it is the Plaintiff who sold the land W. Bukusu/Khasoko/404 to him in 1966. He produced an agreement allegedly signed by the parties and witnessed by four people two of whom are now deceased. The Plaintiff at the time of selling the land was called Mutonyi Sawa and was the son of one Lazaro Khaemba Sawa now deceased. It is the Defendant's case that the transfer was effected on 25/02/1993 when the Defendant was issued with a land certificate. The Plaintiff then went to live in Uganda and only returned several years later. When the Plaintiff returned home, he had nowhere to stay and the Defendant gave him two acres of the same land to use. Later the son of the Defendant Charles Khaemba Namasi bought the two acres from the Plaintiff. The Plaintiff later claimed that he had lost his identity card and obtained a new one in the name of Lazaro Okumu Sawa. The Plaintiff sued the Defendant in Bumula Land disputes Tribunal claiming back his land. He won the case but the Defendant appealed in the Western Province Appeals Board and the decision was overturned in Appeals Case No.1 of 1999. The Defendant lives on the land he bought from the Plaintiff while the Plaintiff still lives on the two acres given to him when he returned to Kenya from Uganda.

The Plaintiff alleges fraud on the part of the Defendant in obtaining title of the land in his name. The Defendant produced a copy of a transfer form executed in by both parties and letters of consent from Kanduyi Land Control Board. The two documents are dated 1993 the year when the transfer was effected. There is no evidence to suggest any fraud in those documents. The Plaintiff's name is shown as Mutonyi Sawa. The Defendant explained that when the Plaintiff sold the land to him, he used the name of Mutonyi Sawa which was in his identity card. Later on, the Plaintiff said he had lost his identity card and took out another card in the name of Lazaro Okumu Sawa. The Plaintiff confirmed the loss of his identity card and the change of names. The certified copy of register shows that on the 01/11/1972 L.R. West Bukusu/Khasoko/404 was registered in the name of Mutonyi Sawa. The land was transferred to the Defendant on 25/02/1993. It appears that a restriction was placed on the title on 03/03/1993 on allegation that some fraud was being investigated. The Plaintiff did not adduce any evidence on whether he reported the matter to the police and neither did he tell the court the outcome of any investigations.

The land sale agreement dated 06/12/1969 is between Okumu Sawa selling land 6 ½ acres to Peter Khaemba. It was witnessed by the son of the Plaintiff Sawa Mutonyi and Charles Okumu among others. The said Charles Okumu testified as a witness for the Defendant herein (DW2). He told the court that the Plaintiff sold the land to the Defendant. The witness knew both parties well and is now a retired teacher. DW2 said two of the witnesses are dead. He also confirmed the name used in the agreement and in the documents as that of Mutonyi Sawa. The witness is also aware that the Plaintiff later changed his name to Lazaro Okumu Sawa. DW2 said he knew the father of the Plaintiff who was called Lazaro Sawa.

The issues for determination herein are as follows:

- a) ***Whether the Defendant fraudulently caused the Plaintiff's land W.Bukusu/Khasoko/404 to be transferred in his name;***
- b) ***Whether the Plaintiff sold and transferred his land to the Defendant;***
- c) ***Whether the Plaintiff is entitled to any remedy in this case.***

The evidence adduced by the Plaintiff was not corroborated by any other evidence. PW1 did not call any witness or produce documents to support his claim. The report to the police of the fraud and the outcome of the investigations would have shed some light in this case. The need to change names by the Plaintiff is suspect and was not explained by him. No police abstract report of the loss of the identity card was produced. It is not clear how the Registration of Persons Department agreed to issue a new identity card for replacement of a lost card in totally different names from the original ones. The Plaintiff would have to take out a deed poll in the Kenya Gazette in order to change names as required by the law. There was no deed poll or affidavit sworn to support change of names which was produced. Neither is the motive for change of the names known. The conduct of the Plaintiff casts doubt on his sincerity and honesty of character. The credibility of the Plaintiff as a witness is also doubtful. I did not believe his evidence that the Defendant would commit that kind of fraud and still have the guts to go to the Provincial Appeals Board after losing the case in Bumula Land Disputes Tribunal to pursue his rights of ownership.

The Defendant on the other hand supported his claim with documentary evidence for sale of the land, application for consent and letter of consent duly executed by the parties and endorsed by the relevant authorities. The Defendant called one of the witnesses to the land sale agreement as a witness. This witness, DW2 corroborated the case of the Defendant in all material particulars. I found the Defendant a credible witness. The Defendant established that the land was sold and transferred to him as required by the law.

I find that the Plaintiff has failed to prove the allegations of fraud against the Defendant. The Plaintiff's case must fail in the circumstances. I dismiss the case with costs to the Defendant.

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 9th day of November 2011. In the presence of Mr Areba

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JUDGE