



No. 191

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL CASE NO. 49 OF 1996

OMBAIRE GIKENE.....PLAINTIFF

-VERSUS-

MBARANYA INDIRE.....DEFENDANT

JUDGMENT

Ombire Gikene, the plaintiff filed this suit on 5th February, 1996 against **Mbaranya Indire**, the defendant. The facts relevant to the suit as gleaned from the plaint are that sometimes in 1986 and by an agreement dated 21st May, 1986, the plaintiff purchased from one, **Samwel Omenda Indire**, a brother of the defendant all that piece or parcel of land known as **Suna East/Kakrao/1052** and paid the full purchase price. The plaintiff later went to collect the title documents but due to an oversight in the HomaBay Lands Registry he was wrongfully issued with the title **Suna East/Kakrao/1053** instead of **Suna East/Kakrao/1052** for the suit premises. Following the said mix –up and despite several requests by the plaintiff, the defendant had refused to have the mistake rectified. The latter parcel belongs to the defendant though. He therefore sought declaration that the land assigned to him by virtue of title **Suna/East/Kakrao/1053** belonged to the defendant whereas land parcel **Suna East/Kakrao/1052** belonged to him.

The defendant filed an amended defence denying the plaintiff’s allegations and pleaded that the two parcels of land were free properties of the deceased **Indire Iyuya** who died intestate in 1982 and to whose estate, no grant of letters of administration had been issued nor was he the administrator of such estate. The defendant further pleaded that the alleged transfer of the suit premises by **Samuel Omenda** was fraudulent and illegal.

Thereafter and though the case came up for hearing severally it was adjourned for one reason or another. On 29th May, 2003, it once again came up for hearing. However the plaintiff was absent though the defendant was present in court. It was then that it was dismissed with costs for want of prosecution. On 13th September, 2004 the plaintiff filed an application seeking that the order of dismissal

aforesaid be set aside and the suit reinstated for hearing. Despite resistance from the defendant the application was eventually allowed by **Muchelule J.** on 15th June, 2009.

The case was then set down for hearing before me on 13th July, 2010. This time around however, the defendant was absent though duly served with a hearing notice going by the affidavit of service on record. There being no explanation for the defendant's absence and indeed that of his advocates on record, I allowed the plaintiff to prosecute his case, the absence of the defendant and or his counsel notwithstanding.

The plaintiff testified that sometimes in 1986, he bought a parcel of land from one, **Samwel Omendo** pursuant to the agreement of sale dated 21st May, 1986. The parcel of land measured 2½ acres. However the land was mistakenly transferred and registered in his name as **Suna East/Kakrao/1053**. It ought to have been registered as **Suna East/Kakrao/1052** which he currently occupies. That registration, **Suna East/Kakrao/1053** ought to have gone to the Defendant. He therefore prayed that this court directs the Land Registrar, HomaBay to rectify the register affecting the 2 parcels of land so that the plaintiff and defendant assume ownership of their rightful parcels of land. That marked the close of the plaintiff's case.

Counsel for the plaintiff, **Mr. Nyagesoa**, applied to file written submissions. His request was allowed. Subsequently he filed the written submission which I have carefully read and considered.

The two issues for determination is whether the plaintiff was wrongfully and or erroneously issued with the defendant's title deed and/or vice versa? If so, whether the plaintiff is entitled to the remedies sought in the plaint.

From the evidence adduced and which was unchallenged, it is apparent that there was a mistake committed by the lands office at Homabay in the issuance of the title deeds in respect of the two parcels of land. Though the plaintiff bought land parcel **Suna East/Kakrao/1052** and which he occupies presently, the title deed issued in respect thereof is **Suna East/Kakrao/1053**. On the other hand whereas the defendant presently occupies **Suna East/Kakrao/1053**, the title is in his possession reads **Suna East/Kakrao/1052**. This is a mistake and or error which can easily be corrected or rectified by way of interchanging the title deeds aforesaid. Such an act will not prejudice any of the parties as regards their various positions on the ground with regard to their various parcels of land.

In my view therefore, the plaintiff has established his case on a balance of probability and is entitled to the remedies sought in the plaint. In the premises I grant prayers (a), (b) and (c) in the plaint dated and filed in court on 5th February, 1996.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE