



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 149 OF 2005

DAVID OMWENGA MAOBE.....PLAINTIFF

VERSUS

JOHN TELEYIO OLE SAWOYO.....DEFENDANT

JUDGMENT

The plaintiff filed a plaint on 15th November, 2005 and stated that through the process of land adjudication he became the adjudicated owner of land parcel No. **Transmara/Osinoni/49** hereinafter referred to as “**the suit land**”, measuring 4.53 hectares or thereabouts. The Adjudication Record was compiled in 1992. The plaintiff was residing on the land but in 1992, tribal clashes between the Kisii and the Maasai arose and the plaintiff was forced to move out of the suit land which is situated in an area predominantly occupied by the Maasai community.

The plaintiff further stated that in or about 1993 he agreed with the defendant that he would temporarily occupy the suit land, tend and take care of the same while awaiting peace to be restored in the area. However, the defendant fraudulently caused the plaintiff’s name to be cancelled from the Adjudication Record dated 13th February, 1991 and proceeded to have his name inserted in place of the plaintiff. Particulars of fraud were pleaded as hereunder:

“(a) Fraudulently conniving with Adjudication officials of the day to have the plaintiff’s name cancelled.

(b) Fraudulently creating an imaginary objection proceedings on the plaintiff’s land which were allegedly decided in favour of the defendant.

(c) Fraudulently causing himself (Defendant) to be registered as the owner of land parcel No. TRANSMARA/OSINONI/49.”

As a result of the aforesaid fraudulent acts, the plaintiff was deprived of his land, he alleged.

The plaintiff urged the court to make a declaration that the defendant is registered as proprietor of the suit land in trust for him and further order the defendant to transfer the whole of the suit land to him.

The defendant filed a statement of defence and said that he entered into a sale agreement with the

plaintiff in respect of the suit land whereupon payment of the full purchase price the suit land was registered in his name during the final Adjudication Process. He further stated that the Adjudication Register was published for inspection in 1991 and the plaintiff did not raise any objection whatsoever to such registration. The defendant denied that the said registration was effected fraudulently as alleged.

The defendant further averred that the registration of the suit land in his name was pursuant to a first registration, following a lawful Adjudication and Demarcation process at Osinoni Adjudication section and consequently the suit is legally untenable. He added that the relationship between himself and the plaintiff was that of a vendor and a purchaser and there was no fiduciary relationship or kinship between them as would attract the doctrine of Trust. In any event, the claim relating to Trust was bad in law for want of material particulars in terms of **Order VI rules 3 and 8** of the **Civil Procedure Rules**, the defendant added. He urged the court to dismiss the suit.

During the hearing, the plaintiff testified that he went to Osinoni area in 1980 and leased a parcel of land from one Lengoi Ole Soien. He started cultivating the land. In 1985, the said Lengoi sold the piece of land to him. By then the process of land adjudication had started in the area. In 1986 the land was demarcated and given parcel number 49. The plaintiff was given a survey plan for the land which he produced as **P.Exh.2**.

On 18th December, 1990 the plaintiff signed the Adjudication Record at Kilgoris. He produced a certified copy of the record as **P.Exh.4**.

On 3rd April, 1992 the plaintiff, who is a Kisii by tribe, was attacked by some Maasai men during the tribal clashes that broke out in the area. They took his cattle and ordered him to move out of the land failing which he would be killed. Although he had put up some houses on the suit land and cultivated maize and bananas, he feared for his life and went to live at Kilgoris town but used to go to see the land from time to time.

The plaintiff advertised for sale of the maize that was growing on the suit land. It was covering an area measuring 13 acres or thereabout. In May, 1992 the defendant offered to buy the maize crop at a price of kshs.130,000/=. That time the crop was not ready for harvest. They agreed that the defendant would move into the plaintiff's two houses which were standing on the suit land so that he could guard the maize crop. The defendant did so. Come July, 1992, the defendant paid the plaintiff kshs.130,000/= by way of a banker's cheque on account of the maize as agreed. The defendant asked the plaintiff to allow him to continue living on the suit land and the plaintiff agreed because the situation on the ground was still tense.

In 2004, the plaintiff realised that the defendant had cut down trees that were growing on the land, destroyed the two houses and used a pile of bricks which were there to construct a house. When the plaintiff approached the defendant's wife to enquire why they had done so, she became unco-operative and the plaintiff reported the matter to the area chief. The defendant was summoned but he did not show up. The plaintiff decided to report the matter to the area District Officer. The area chief was summoned by the District Officer and he explained to him what had transpired.

The plaintiff made a complaint to the area Land Adjudication Officer and the defendant was summoned. The parties were asked to produce their documents in proof of their respective claims over the land. The plaintiff produced his. On his part, the defendant produced a document dated 10th August, 1992 which showed that there had been objection proceedings between the two of them and the plaintiff had decided to sell the land to the defendant and as a result thereof, the plaintiff's name had been cancelled from the Adjudication Register and substituted with the defendant's name. The said document was produced as **P.Exh.6**. The plaintiff said that the document was a forgery as there had never been such proceedings between himself and the defendant. He denied having ever sold the suit land to the defendant.

The plaintiff called his wife, **Yunuke Omwenga, PW2**, and his brother, **David Omweno Maobe, PW3**, who testified that the plaintiff never sold the suit land to anyone.

The defendant is a fairly well educated person, having gone to school upto form four. He is an Accountant by Profession. From 1978 to 1988 he was employed by the Cooper motors Corporation (C.M.C) as an Accountant at Kisumu. Thereafter he worked as the Depot Manager for the National Cereals and Produce Board. He said that the plaintiff was introduced to him by Samuel Sarisa Montet, the defendant's uncle, who told him that the plaintiff was selling his land, the suit land. He went together with his uncle and saw the land then proceeded to Kilgoris to meet the plaintiff. He said that the plaintiff drafted an agreement on 19th July, 1992 and he paid him kshs.30,000/= in cash on that day. He said that both of them signed the agreement in the presence of PW3 and Samuel Sarisa Montet.

The said agreement, which was denied by the plaintiff, reads as follows:

“THE SALE AGREEMENT OF SHAMBA PLOT NO. 49 OSINONI ADJUDICATION SECTION ON JULY 19TH, 1992.

The properties of the seller still in the shamba.

1. ***Iron sheets- thirty Seven (37)***
2. ***Bricks - One thousand(1000)***
3. ***Two doors – One door in John's home (2)***
4. ***Five windows (three windows in John's home (5) = 2.***

The seller will collect his belonging anytime from-

COLLECTED END OF OCTOBER 1992.

THE SELLER'S NAME ID/NO. SIGN.

Mr. Omwenga D. Maobe 6550909/69 (Signature)

THE BUYER'S Nam(sic) ID/NO. SIGN.

Mr. J. Teleyio Sawoyo 1888327/64 (Signature)

PAID CHEQUE NO. 789870 KSHS. 3000/= 27/12/92.”

The defendant went on to say that the purchase price was kshs.13,000/= per acre, that they took a surveyor to the land who measured and realized that it was about 12.5 acres. The defendant stated that he paid the plaintiff a total of Kshs. 218,000/=. He first paid Kshs.30,000/= in cash, Kshs.130,000/= by way of a Banker's cheque and then gave the plaintiff some heads of cattle to make the difference. Having paid the full purchase price, the plaintiff signed a transfer on 10th August, 1992 in the office of the Land Adjudication and Settlement Officer, Kilgoris. The alleged transfer, which he produced as **D.Exh4** (a certified true copy of the original), is the same as P.Exh.6 that was produced by the plaintiff. The document is worded as hereunder:

“PLOT NO. 49

Receipt No. Ap 996261

DATE 10.8.92

NAROK DISTRICT

TRANSMARA SUB-DISTRICT

OSINONI ADJ. SECTION

OBJ.NO. 62/91

OBJECTOR- David Omwega Maobe

RESPONDENT- J.TELEYIO OLE SAWOYO

NATURE OF OBJECTION- TRANSFER

The objector David Omwega Maobe, present and duly sworn in states, I have sold the whole parcel of land P/NO.49 to the respondent and I now want this parcel of land to be transferred to hhim.(sic).

LTP of David Omwenga Maobe

ID.6550909/69.

The defendant, J. Teleyio Ole Sawoyo present and duly sworn in states. I agree with what the objector has stated above.

LTP of Teleyio Ole Sawoyo

ID. 1888327/64

DECISION

Objection allowed.

Name of David Omwenga Maobe to be deleted from the Adjudication Register and replaced with that of J.Teleyio Ole Sawoyo.

Sign. LAO 10.8.92”

The defendant said that the title deed for the suit land was issued to him on 25th July, 2000 as a first registration and he produced a copy of the same as **D.Exh.4**. The size of the land is shown as 4.53 hectares.

The defendant denied having forged any documents as alleged by the plaintiff. He stated that he lawfully purchased the suit land from the plaintiff.

In cross examination, the defendant admitted that the sale agreement did not indicate any purchase price. He said that there may have been another agreement but which he did not have. The sum of Kshs.30,000/= which he allegedly paid in cash was not shown in the sale agreement, the defendant conceded. He stated that the cheque for kshs.3,000/= shown in the sale agreement was for bricks that were on the land but that is not shown in the agreement.

The defendant referred to a letter dated **12th June, 1991**, allegedly authored by the plaintiff and addressed to the land Adjudication and settlement officer, Transmara. The same was produced as **D.Exh.1**.

The same read as follows:

“RE: APPLICATION TO FILE OBJECTION FOR TRANSFER-P/NO.49-OSINONI

ADJUDICATION SECTION.

I the above named hereby apply to file an objection to transfer my parcel of land (P/No.49) to J.Teleyio Ole Sawoyo. I have sold the whole parcel of land to him and I now want the land to be transferred to him.

David Omwenga Maobe

ID/NO. 6550909/69

(signed)”

When he was reminded that the alleged sale transaction had not yet commenced at the time the alleged letter was written, the defendant could not explain the inconsistency. He was also not able to explain what the plaintiff could have been objecting to. The defendant also conceded that the banker's cheque for Kshs.130,000/= was prepared before the alleged sale agreement was entered into.

The defendant did not call any witness to support his evidence. The advocates for the parties, Mr. Masese for the plaintiff and Mr. Oguttu Mboya for the defendant, filed their respective clients' written submissions. I have considered the same. The defendant's advocate framed the following issues for determination:

“(a) whether there was a sale transaction between the Plaintiff and the Defendant in respect of plot number 49, Osinoni Adjudication Section.

(b) Whether the Plaintiff filed and participated in the objection proceedings number 62/91.

(c) Whether the transfer and registration of the suit land in the name of the defendant was by fraud.

(d) Whether the plea of fraud was indeed proven to the requisite standard.

(e) Whether the registration in favour of the defendant was a first registration.

(f) If so, whether such registration can be defeated by fraud and/or mistake.

(g) Whether the plaintiff proved Trust.

(h) What orders is the plaintiff entitled to, if any?”

I will proceed to determine the above issues and thereby decide this case.

(a) Whether there was a sale transaction in respect of the suit land.

The plaintiff was a primary School Teacher in 1992. He is fully literate. The defendant is an Accountant by Profession. He holds a Diploma in Accountancy. One would therefore expect that all legal transactions in respect of the suit land to have been properly drawn, signed by both parties (not thumb printed as was the case with some of the documents), and attested to by witnesses. There was no dispute that as at 13th February, 1991 the Adjudication Record showed that the plaintiff was the legal owner of the suit land (see the Adjudication Record- P.Exh.4). The same showed his identity card number as 6550909/69. I accept the plaintiff's evidence that he was forced to move out of his land by the infamous tribal clashes that rocked parts of the Rift Valley Province, including Transmara District in 1992. By then he had put up some houses thereon and was also growing maize and other crops.

According to the plaintiff he agreed to sell to the defendant the maize crop at a price of kshs.130,000/= and he was paid by way of a banker's cheque dated 14th July, 1992. They also agreed that the defendant

would look after his land until peace was restored in the area. The defendant had also been evicted from elsewhere, the plaintiff added.

But according to the defendant, the plaintiff agreed to sell the suit land to him at a consideration of Kshs.218,000/=. He alleged that the plaintiff drafted the sale agreement (D.Exh.3) on 19th July, 1992 and on the same day he paid the plaintiff Kshs.30,000/= in cash. However, that amount is not even reflected in the alleged sale agreement. Looking at D.Exh.3, it is clear that it was not an agreement entered into between the parties for sale of the suit land. It does not make any intellectual sense. A valid agreement for disposition of land should not only be in writing but must also show the purchase price, the mode of payment and must also be signed by all the parties and their signatures attested to by witnesses who were present when the contract was entered into.

Although the defendant said that his uncle, Samuel Montet, and the plaintiff's brother, PW3, were present when they were signing the sale agreement, one wonders why the alleged witnesses did not append their signatures to the agreement. Both the plaintiff and PW3 said they were strangers to the alleged agreement. The defendant did not call his uncle as a witness.

My finding on the first issue is that there was no sale transaction between the plaintiff and the defendant in respect of the suit land.

(b) Did the plaintiff file and participate in objection proceedings number 62 of 1991?

The simple answer to this question is in the negative. In 1991, the plaintiff was still in peaceful occupation of his land. He had not even been introduced to the defendant. How could he have participated in any proceedings in 1991 if there existed no transaction or dispute between him and the defendant? The letter dated 12th June, 1991 (D.Exh.1) allegedly written to the Land Adjudication and settlement officer by the plaintiff was fraudulently fabricated by the defendant.

(c) Whether the transfer and registration of the suit land in the name of the defendant was by fraud.

The purported transfer was preceded by the fake objection proceedings. The transfer document (D.Exh.4) was nothing but pure fraud perpetrated by the defendant and possibly with the assistance of the area Land Adjudication Officer who, on 10th August, 1992, cancelled the name of the plaintiff from the Adjudication Record and in its place inserted the defendant's name.

(d) Whether the plea of fraud was proved to the required standard.

From the documents on record, I would say that fraud on the part of the defendant was sufficiently proved. Even some of the defendant's exhibits like the letter of 12th June, 1991 (D.Exh.1) were clear evidence of fraud. As at that date the plaintiff and the defendant had not even met. It is trite law that allegations of fraud must be strictly proved, to a level higher than a mere balance of probabilities, see **MUTSONGA VS NYATI, [1984] KLR 425**. In this case, the fraud was so obvious that it required minimal effort on the part of the plaintiff to prove the same. In the aforesaid case, it was also held that whether fraud has been proved is a question for the trial judge to answer. My answer is as stated above, that fraud was well proved.

The defendant's advocate submitted that failure to join the land Adjudication Officer as a co-defendant was fatal to the plaintiff's suit and negated the denial by the plaintiff that he did not lodge any objection proceedings. I do not think so. Prior to May, 1992, the plaintiff had not dealt with the defendant and that was not denied by the defendant. In the circumstances, filing of objection proceedings by the plaintiff against the defendant in June 1991 could not arise. And in any event, no suit can be defeated by reason of non-joinder of a party, in every suit, the court is mandated to deal with the matter in controversy so far as regards the rights and interests of the parties before it; see **Order 1 rule 9** of the **Civil Procedure Rules**.

(e) Whether the registration in favour of the defendant was a first registration.

Yes, it was a first registration, occasioned by fraudulent amendment of the Adjudication Record and possibly by breach of trust.

(f) Can such registration be defeated by fraud or mistake?

Section 143(1) of the **Registered Land Act** states as follows:

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration(other than a first registration) has been obtained, made or omitted by fraud or mistake.”

That is the absurdity of law! It is not clear to me why the legislature exempted a first registration, even in instances where a court of law has established such registration was obtained by fraud or mistake. Is it fair for a court of justice to tell a fraudster, who has cheated his friend or neighbour or even a stranger of his property, and for that matter, of a parcel of land, that:

“This court has established that you actually acquired this land illegally. You fraudulently caused the land that otherwise belonged to the plaintiff to be registered in your name. However, because you were so cunning that you obtained a first registration of the title deed in your name, you can keep it for good. The law allows that. The plaintiff may cry and curse but that is all he can do”.

In my view, that is nothing but legal absurdity! A man should never be allowed to benefit from his fraudulent activities. To sanitize such a title deed, one that is fraudulently obtained simply because it is a first registration, is a mockery of justice to the person who has been cheated of his land. I believe the rationale for the exception to **Section 143(1)** of the **Registered Land Act** needs to be re-considered. As far as I know, this provision of the law has brought considerable injustice to many Kenyans. The Legislature and/or the Law Reform commission should consider an amendment of that section of the law to empower the court to order a rectification of the register in all cases where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake. As the law stands todate, a first registration cannot be defeated by fraud or mistake.

But having said that, is the plaintiff entitled to any relief? Did the plaintiff prove a trust?

In paragraph 8 of the plaint the plaintiff urged the court to declare that the defendant is registered as the owner of the suit land in trust for him. However, in his plaint, the particulars of the trust or breach thereof were not pleaded as required under **Order VI rule 8(1)** of the **Civil Procedure Rules**. In his evidence, the plaintiff stated that having sold to the defendant the maize that was growing on the suit land, at the request of the defendant, it was agreed that the defendant could stay in the plaintiff's houses and take care of the land until peace was restored in the area. The plaintiff said that the defendant had been forced to move from some other place by the same tribal clashes.

Despite the plaintiff's failure to comply with the provisions of **Order VI rule 8 (1)** as aforesaid, from the evidence on record and the circumstances of this case one can infer existence of a constructive trust. In **JOHN GITIBA BURUNA & ANOTHER –VS- JACKSON RIOBA BURUNA**, Civil Appeal No. 89 of 2003, the Court of Appeal held that,

“a constructive trust arises where the property the subject matter of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.”

In my view, this can be said of the defendant. In **WAMBUGU –VS- KIMANI [1992] 2 KAR 58**, it was held that trust is a question of fact and has to be proved by evidence.

Registered land as per **Section 163** of the **Registered Land Act**, is subject to common law of England

as modified by equity which brings in the equitable doctrines of implied constructive and resulting trusts as was held in **KANYI –VS- MUTHIORA [1984] KLR 712**. In that appeal and in **MUTSONGA –VS- NYATI** (Supra) which involved parcels of land registered under the **Registered Land Act** as first registrations, the court, upon analysis of the facts that gave rise to such registration, concluded that there was constructive trust.

In the latter decision, the court held that though **Section 143** of the **Registered Land Act** forbids any rectification of the land register where such rectification concerns a first registration, the meaning of rectification is to correct an entry in a register and this is different from making an entry recording a lawful transfer ordered by a court. The court quoted Lindley LJ, in **RE NATIONAL BANK OF WALES [1897], 66 LJ CH 222 (CA)** at pp 226, 227 when he referred to rectifying the register under **Section 35** of the **Companies Act 1862** by saying:

“Altering the register so as to make it conformable with a lawful transfer is not to rectify the register. The section only comes into operation when the company improperly puts on the register a name which ought not to be on it, or improperly refuses to put on the register a name that ought to be on it.”

In **MUTSONGA –VS- NYATI** the court declared that the defendant was a trustee of the suit land for the plaintiff and ordered him to transfer it back to the plaintiff failing which the deputy registrar was authorized to sign and seal the necessary documents to effect the transfer. A similar decision was also made in **KANYI –VS- MUTHIORA** (supra) but here it was in respect of 3 acres of the suit land.

Turning back to this case, I observed the demeanour of the defendant as he testified, carefully listened to his answers to questions both in examination in chief and cross examination and considered most of the documents which he produced as exhibits. In my assessment, the oath that he took to tell the truth and nothing but the whole truth meant almost nothing to him. Though seemingly an intelligent man, some of his answers and/or explanations were almost non sensical and a clear demonstration of a person who knew that he had betrayed the trust bestowed upon him by the plaintiff. According to the defendant, the plaintiff filed objection proceedings so that there could be semblance of a case between them so that he could transfer the suit land to him. This was his answer to the question as to why the plaintiff had to file objection proceedings, if at all, if he had willingly sold the suit land to him. The defendant was determined to get the suit land registered in his name as a first registration. No matter what kind of objections the plaintiff would raise thereafter, as long as it was a first registration, he would be secure; so he thought and/or was made to believe.

What orders is the plaintiff entitled to?

Having established that there existed a constructive trust between the plaintiff and the defendant as far as the suit land was concerned, the defendant should transfer back to the plaintiff the entire suit land which I hereby order. Another entry will therefore be made in the register to record this transfer as ordered hereinabove. If the defendant fails to do within the next thirty days from the date hereof, the deputy registrar of this court is authorized to sign and seal the necessary documents.

The defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED at Kisii this 23rd day of July, 2009.

D. MUSINGA

JUDGE.

23.7.2009

Before: D. Musinga-J

Mobisa – CC

Mr. Sagwe HB for the plaintiff for Mr. Masese.

Mr. Otieno HB for the Defendant for Mr. Oguttu.

COURT: Judgment delivered in open court on 23rd July, 2009.

D. MUSINGA.

JUDGE.