



REPUBLIC OF KENYA



Lukale & 5 others v Wamuchwa & 3 others (Environment & Land Case 42 of 2018) [2022] KEELC 13793 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 42 OF 2018
DO OHUNGO, J
OCTOBER 25, 2022**

BETWEEN

**NEBO LUKALE 1ST PLAINTIFF
SOLOMON SIFUNA OCHANJI 2ND PLAINTIFF
JOSEPH MAYUSI LUKOBA 3RD PLAINTIFF
DOMINIC JUMA SIRIWA 4TH PLAINTIFF
SILAS SIMIYU NYALANYALA 5TH PLAINTIFF
ANJELINA OTUKO 6TH PLAINTIFF**

AND

**PETRONILA NAFUNA WAMUCHWA 1ST DEFENDANT
NANDAHA MAYENDE 2ND DEFENDANT
ESTHER NAMBUHILA 3RD DEFENDANT
RICHARD W. WAMAKONDI 4TH DEFENDANT**

JUDGMENT

1. This was originally filed 23rd September 2010, as HCCC No. 142 of 2010. The matter was later transferred to this court, hence its current case number. The case concerns parcels of land known as Bunyala/Sidikho/1925, Bunyala/Sidikho/1928, Bunyala/Sidikho/1495, Bunyala/Sidikho/1789, Bunyala/Sidikho/1926, Bunyala/Sidikho/1493, and Bunyala/Sidikho/1927 (the suit properties), as is manifest from the plaint dated 23rd September 2010.
2. The plaintiffs averred in the plaint that Bunyala/Sidikho/1925 & 1928, 1495, 1789, 1789, 1926, 1493 and 1927 are registered under the first to sixth plaintiffs' names respectively and that upon purchasing



their respective parcels of land they obtained relevant consents from Land Control Board, had their land surveyed, obtained title deeds, there from and have demarcated their portions of land. That the parcels have distinct boundaries since 2005 and that the defendants have on various occasions been harassing the plaintiffs and have also been bringing different surveyors with a view of surveying their parcels of land. That the defendants have illegally demolished houses belonging to the plaintiff's neighbours therefore causing plaintiffs fear that the defendants are being moved by malice to destabilize their peaceful settlement and occupation of their legally acquired property with a view of displacing them.

3. The plaintiffs therefore prayed for judgment against the defendants for the following orders:
 - a. An order of permanent injunction restraining the defendants either by themselves, their agents, servants, employees or anybody claiming through them for trespassing on to, laying claim to, surveying or in any other manner from interfering with the Plaintiffs peaceful use of their parcels of land nos. Bunyala /Sidikho/1925, 1928, 1495, 1789, 1926, 1493 and 1927.
 - b. Costs of this suit and interest
 - c. Any other relief that this Honourable Court deems fit to grant.
4. The defendants opposed the plaintiffs' claim vide an Amended Defence and Counterclaim dated 4th May 2017 through which they averred that the plaintiffs' registration on the suit properties have since been revoked by the District Surveyor and Land Registrar Kakamega and that they are no longer lawfully registered proprietors of the suit properties. That the plaintiffs' eviction carried out was in execution of a lawful court order in Kakamega Misc Award No. 54 of 2006 and the same cannot be challenged by way of a fresh suit. They further averred that the plaintiffs purchased their portions from one Zacharia Misiko whose land was only 8 acres but the plaintiffs trespassed in an expansionist exercise which was resisted by the defendants and that the plaintiffs are in breach of court order thereby disentitling them to the equitable remedy sought.
5. The defendants further averred that title numbers Bunyala/Sidikho/1925, 1928, 1495, 1789, 1926, and 1927 were fraudulently obtained. They particularised the fraud as creating title numbers on land that belong to the defendants and creating title numbers in total disregard of orders issued in Succession Cause No. 292 of 2005.
6. The defendants therefore prayed for judgment against the plaintiffs jointly and severally for: -
 - a. Eviction order from Land Parcel Nos. Bunyala/Sidikho/1484, 1490, 1483, 1485, 1487 and 1486.
 - b. An order of permanent injunction restraining the plaintiffs once evicted from trespassing on to land parcel Nos. Bunyala/ Sidikho/1484, 1490, 1483,1487 and 1486.
 - c. Costs of this suit.
7. At the hearing, Nebo Bukachi Lukhale, the first plaintiff, testified as PW1. He stated that he is a farmer from Navakholo sub-county and that his plots are Bunyala/Sidikho/1925 and 1928 which he purchased from Zakaria Misiko Ayub in 1985 and that he bought slightly over 4 acres. That he farmed and lived on the plots from 1985 up to the date of his testimony and that he lived peacefully on the land until 1996 when the defendants went to survey the land. That he reported to the District Officer but was not helped. That at the time he bought his parcels, the parcels were in Zakaria Misiko' father's name and that he had seen the certificate of confirmation of grant which states that Zakaria Misiko was given 8 acres. He added that he was aware that there were proceedings before the Land Disputes



- Tribunal and the tribunal awarded Zakaria Misiko 22.5 acres and that he never received any notice of cancellation of his title deed.
8. Joseph Mayusi Lukoba, the third plaintiff, testified as PW2 and stated that his plot is Bunyala/Sidikho/1789 measuring 0.5 acres. That he purchased it in 2004 from Benson Ayub who was the son of Zakaria Misiko who told him that his father inherited 8 acres following the decision of the tribunal. That he resides on the plot and has resided there peacefully and that. That the land registry never wrote to him to surrender his title. He further testified that he was never served with court order or notice of cancellation and that he was not aware that new parcel numbers were issued.
 9. Lastly, Dominick Juma Siriwa, the fourth plaintiff, testified as PW3 and stated that his plot is Bunyala/Sidikho/1926 measuring 0.5 acres. That he purchased it from the first plaintiff in 2004 and was issued with title. That he has built a house on it and farms on the land. That at the time he bought the land, the first plaintiff did not have a title in his name and that the registered owner at the time was Zakaria Misiko. He further stated that he is neither aware that Zakaria obtained more parcel than he was entitled to nor that Zakaria's title was cancelled. He also stated that he has not seen any surveyors on his parcel.
 10. Counsel for the plaintiffs informed the court that the second plaintiff passed away in in the year 2013. In terms of Order 24 Rule 3 of the Civil Procedure Rules, his claim abated within one year of his death since no substitution was done. The fifth and sixth plaintiffs neither testified nor offered any evidence to support their claims.
 11. The Plaintiffs' case was closed.
 12. Petronilla Nafuna Wamuchwa testified as DW1. She stated that the original land was Bunyala/Sidikho/78 which belonged to A.M. Oyalo and that Succession Cause No. 292 of 1995 was filed in which Zakaria Misiko was given only 8 acres of land and that during partition and by way of fraud, the said Zakaria Misiko apportioned himself 15 acres instead of 8 acres. That the 15 acres were made up of Bunyala/Sidikho/1491 measuring 1 acre, Bunyala/Sidikho/1492 measuring 1 acre, Bunyala/Sidikho/1493 measuring 8 acres, Bunyala/Sidikho/1494 measuring 4 acres, and Bunyala/Sidikho/1495 measuring 1 acre. That when the fraud was discovered, the defendants moved to Navakholo Land Disputes Tribunal through Land Case No. 30 of 2005 in which the sharing of Land Parcel No. Bunyala/Sidikho/78 was affirmed as per the certificate of confirmation in Kakamega High Court Succession Cause No. 292 of 1995. That Zakaria Misiko filed Provincial Appeal Committee Appeal No. 98 of 2006 and that the decision of Navakholo Land Disputes Tribunal was upheld and adopted in Kakamega CMC Civil Award No. 54 of 2006 and that the decision has been fully executed. She added that the mutation of 1996 was cancelled and a fresh one drawn and that following the new mutation, the plaintiffs herein were instructed to return their title deeds to the county land registrar for amendment to reflect the correct acreage. That the amendment has since been made and Zakaria Misiko is only entitled to land parcel no. Bunyala/Sidikho/1493 which is 3.2 hectares or 8 acres. She prayed for the suit to be dismissed with costs to the defendants.
 13. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
 14. The Plaintiffs argued that they have utilized their suit properties for more than 12 years and that the defendants claim is statute barred. They urged the court to allow their suit as prayed. In response, the defendants relied on the cases of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR and *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR. They argued that the plaintiffs' titles are fraudulent and unprocedural hence not conclusive evidence of ownership or worthy of protection. They urged the court to dismiss the plaintiffs' case and to grant them judgment as per their counterclaim.



15. I have carefully considered the parties' pleadings, evidence, and submissions. The issue that arises for determination is whether the reliefs sought should issue.
16. A perusal of the material on record and the evidence of both sides in this case reveals that the estate of the said A.M Oyallo (deceased) was distributed through certificate of confirmation of confirmation of grant issued on 14th May 1996 in Nairobi High Court Succession Cause No. 292 of 1995 wherein Zakaria Misiko was granted 8 acres of land to be excised from Bunyala/Sidikho/78. It is also apparent that in Kakamega CM's Court Misc. Award No. 54 of 2006, the respondents in the said case were restrained from Bunyala/Sidikho/78. One of the said respondents was one Benson Ayub, from whom the third plaintiff purchased his parcel.
17. According to his testimony, the first plaintiff contends that he owns Bunyala/Sidikho/1925 and Bunyala/Sidikho/1928 which he claims he purchased from Zakaria Misiko Ayub in 1985. He produced copies of titles in respect of the two parcels dated 25th September 2009 which show that both are subdivisions of Bunyala/Sidikho/1494. The fourth plaintiff testified that he owns Bunyala/Sidikho/1926 which he claims he purchased from the first plaintiff in 2004. The copy of title which he produced shows that the said parcel is a subdivision of Bunyala/Sidikho/1494. The copy of the register of Bunyala/Sidikho/1494 which the defendants produced also confirms that Bunyala/Sidikho/1494 was closed on 23rd April 2009, upon subdivision into Bunyala/Sidikho/1925, 1926 and 1928.
18. On his part, the third plaintiff testified that that he owns Bunyala/Sidikho/1789 which he purchased in 2004 from Benson Ayub who was the son of Zakaria Misiko. The copy of title dated 29th November 2004 which he produced shows that the said parcel is a subdivision of Bunyala/Sidikho/1492. The copy of the register of Bunyala/Sidikho/1492 which the defendants produced also confirms that Bunyala/Sidikho/1492 was closed on 27th September 2004, upon subdivision into Bunyala/Sidikho/1788 and 1789. In turn, both Bunyala/Sidikho/1494 and Bunyala/Sidikho/1492 are subdivisions of Bunyala/Sidikho/78, as is manifest from their registers.
19. Beyond producing the copies of title deeds, the plaintiffs did not produce any current certified copies of registers or certificates of search in respect of their alleged parcels. Considering that they were aware that the defendants were claiming that their titles which all pre-date 2010, were cancelled following a fresh mutation dated 2010, it was incumbent upon the plaintiffs to demonstrate that they remain registered proprietors. Nothing would have been easier than calling the land registrar to testify and vouch for their titles. In the absence of proof of ownership, the plaintiffs have failed to prove their case. They are thus not entitled to the reliefs sought.
20. On their part, the defendants raised fraud both to resist the plaintiffs' case and to support their counterclaim. Their case was that title numbers Bunyala/Sidikho/1925, 1928, 1495, 1789, 1926, and 1927 were fraudulently obtained. As has been repeatedly held, fraud is a serious allegation that must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR.
21. Among the particulars of fraud pleaded against the plaintiffs were that they created their titles on land that belongs to the defendants and in total disregard of orders issued in Nairobi High Court Succession Cause No. 292 of 1995.
22. The defendants claimed in their counterclaim that they own parcels of land known as Bunyala/Sidikho/1484, 1490, 1483, 1485, 1487 and 1486. They did not produce any certified copies of titles, registers or certificates of search in respect of the said parcels. They too did not call the land registrar



to testify and vouch for their alleged titles. Having failed to demonstrate and validate their own titles, their allegations of fraud have equally failed to rise to the required standard of proof.

23. Further, I note that although the defendants have sought eviction of the plaintiffs, they averred in their counterclaim that the plaintiffs were evicted in execution of a court order issued in Kakamega Misc Award No. 54 of 2006. It is not clear why they seek eviction which they themselves claim was effected. Thus, the defendants have equally failed to prove their case and are therefore not entitled to the reliefs which they seek.
24. In view of the foregoing, the plaintiffs' case as well as the defendants' counterclaim are dismissed. Each party shall bear own costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Mburu holding brief for Mr Khayumbi for the plaintiffs

Ms Eroba for the defendants

Court Assistant: E. Juma

