



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 7 OF 2013**

**FREDRICK IDIAMA EMOJONG.....PLAINTIFF**

**VERSUS**

**XEPHERIO MANG'ENI MANYARU.....1<sup>ST</sup> DEFENDANT**

**DINA ACHIENG' NYONGESA .....2<sup>ND</sup> DEFENDANT**

**LYDIA BENTA TATA MANG'ENI .....3<sup>RD</sup> DEFENDANT**

**J U D G E M E N T**

1. The plaintiff filed this suit vide a plaint dated 30<sup>th</sup> August 2012. The plaintiff pleaded that at all times he was the registered owner of land title S. Teso/Angoromo/7331 measuring 0.46ha and still holds the title. That the defendants caused sub-division of his land and registered the resultant titles in their names as follows:

- (i) **LR South Teso/Angoromo/8424 (0.140ha) Lydia Benta Tatah Mangeni, Samwel Wanjala Mangeni (minor).**
- (ii) **LR South Teso/Angoromo/8425 (0.150ha) Seferio Mangeni Manyuru.**
- (iii) **LR South Teso/Angoromo/8426 (0.05ha) Seferio Mangeni Manyuru.**
- (iv) **LR South Teso/Angoromo/8427 (0.12ha) Dina Achieng' Nyongesa.**

2. The plaintiff pleaded that the actions of the defendants was fraudulent. He proceeded to list the particulars of fraud at paragraph 6 of the plaint. The plaintiff prays for judgment against the defendants for;

- (a) **Cancellation of title No. South Teso/Angoromo/8424, LR South Teso/Angoromo/8425, LR South Teso/Angoromo/8426 and LR South Teso/Angoromo/8427, and reverting of the title to South Teso/Angoromo/7331, in the names of the plaintiff.**
- (b) **An order to the District Land Registrar Busia/Teso to recall the resultant fraudulent titles and cause their nullification.**
- (c) **An order of eviction against the defendants, their servants and or agents from the above 4 resultant titles.**
- (d) **Costs of this suit and interest.**
- (e) **Any other relief this Honourable court deems fit and just.**

3. The defendants filed a joint statement of defence dated 20<sup>th</sup> November 2017 which denied that the plaintiff is the registered owner of the suit parcel and if he is then he obtained the said registration irregularly and ought to be cancelled. The defendants pleaded that the plaintiff is not entitled to the orders sought. That the plaintiff's title is bad in law pursuant to the Land Control Act provisions. The defendants urged that the plaintiff's suit be dismissed with costs.

4. At the close of the pleadings, both parties relied on the evidence of a single witness. The plaintiff testifying on 29<sup>th</sup> September 2020 stated that he works with Mombasa County Government. He adopted his affidavit evidence filed on 28/7/2015 as his evidence in chief. He also relied on the documents contained in his list which were produced as **Pex 1 to 14**. In the witness statement, the plaintiff stated that he followed the laid down procedures to get his title after purchasing it from the 1<sup>st</sup> defendant. The plaintiff produced a copy of the sale agreement as **Pex 2**. It is his evidence that he took possession of the sold land after paying the purchase price by planting trees and putting

up other developments.

5. The plaintiff added that the 1<sup>st</sup> defendant used the money he paid to buy land from Mr. John Emoto as shown in **Pex 5**. That he sued the defendants because he found his title cancelled and registered in the defendants' names. That it is the 1<sup>st</sup> defendant who initiated the cancellations. The witness produced searches for the resultant numbers as **Pex 14(a)-(d)**. He stated that he has not been refunded his money and he was not notified of the cancellation of his title.

6. In cross-examination, the plaintiff agreed that their sale agreement does not mention L.R No. 7331 but added that it comprised the 1<sup>st</sup> defendant's share in L.R No. S. Teso/Angorom/348. That the succession Cause No. 3 of 2000 had not been done at the time of sale. He maintained that the 1<sup>st</sup> defendant participated in the succession proceedings. That he is praying for eviction because in 2009 the 1<sup>st</sup> defendant put some structures on the suit land. That the 1<sup>st</sup> defendant's sub-divisions were illegal. That the ruling in Succession Cause No. 3 of 2000 directed his name to be removed. In re-examination, the witness affirmed that the ruling in the objection proceedings was made on 11/3/2015 while the sub-division was undertaken on 27/7/2012 before the ruling. This marked the close of the plaintiff's case.

7. The defendants opened their defence with the evidence of the 1<sup>st</sup> defendant Xepherio Mang'eni Manyuru. He stated that he is a boda boda rider and father to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. According to the 1<sup>st</sup> defendant, he had sold ½ acre and not 0.46ha land to the plaintiff. He adopted his written statement dated 2/12/2019 together with documents in his list which were produced as **Dex 1 – 10**. He urged the court to dismiss the plaintiffs suit with costs.

8. The 1<sup>st</sup> defendant's witness statement filed in court is brief and state thus;

*(i) That the plaintiff's claim is remote and bad in law as the plaintiff's title is riddled with irregularities and the same acquired in breach of statutory procedures.*

*(ii) That the plaintiff ever since he purported to have acquired his alleged title, I have never known peace and denied peaceful use of my land and I have never since then set foot on my land.*

*(iii) That I annex in my list of exhibits all the documents the plaintiff used in the acquisition of his alleged title and what the court had to say.*

9. In cross-examination, the 1<sup>st</sup> defendant stated that he sold ½ acre of land vide the agreement dated 5/11/2002 and prepared by Onsongo Advocate. That he discovered the sold land was more than ½ an acre on 4/12/2002 and he lodged a complaint at the D.O's office. That the D.O wrote a letter. The 1<sup>st</sup> defendant stated that he never lodged a complaint against Onsongo Advocate nor the plaintiff. He admitted doing sub-division before the ruling in his objection proceedings was rendered. That he has not given the plaintiff the ½ acre because the plaintiff caused his arrest. This marked the close of the defendants' case.

10. The advocates filed their closing written submissions. The defendants cited the provisions of section 82(b)(ii) and of 55(1) of the Law of Succession Act which prohibits sale of immovable property before confirmation of the grant. It is their submission that what the parties to the sale agreement did amounted to intermeddling with a deceased estate. The defendants further relied on the provisions of section 6 and 8 of the Land Control Act which required consent to be obtained within 6 months of the date of sale agreement. That failure to so act rendered the sale agreement voidable. He concluded that the plaintiff's case has not been proved.

11. The plaintiff's claim was premised on fraud. Section 107 and 109 of the Evidence Act puts a duty on he who alleges a fact to prove the allegations. Secondly, the standard of proving fraud is on strict liability and beyond the probabilities standard. In the case of **Arthi Highway Developers Limited Vs West end Butchery Limited & 6 others (2015) eKLR**, the definition of fraud as set in Black's law dictionary as follows; **"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another"**.

12. From the facts present herein, there is no dispute that there was a sub-division carried out on the suit title to create new numbers. That at the time of undertaking the sub-division, the plaintiff was the registered owner. Lastly, that the said sub-divisions were done by the 1<sup>st</sup> defendant and without authority or consent of the plaintiff. It is the result of the defendants' actions which the plaintiff pleads fraud and irregularities that ended in denying him rights over the suit title land.

13. The defendants produced the green card for parcel No. 348 as **Dex 2** which at entry No. 4 dated 26/5/2008, the following names are given as the registered owners and their shares indicated as;

- a) Joseph Nyongesa – 0.53ha
- b) Christopher Emojong – 0.48ha
- c) Fredrick Emojong – 0.46ha
- d) Charles Wandera – 0.32ha

This entry was pursuant to distribution of an estate made in the confirmation of grant issued on 3/3/2008 in the estate of Raphael Manyuru – deceased. The plaintiff stated that at the time of drawing the agreement, the 1<sup>st</sup> defendant's share in L.R No. 348 was already identifiable and it is this share which the 1<sup>st</sup> defendant sold to him vide their agreement made in 2002 which share was identified to be 0.46ha of the title No. 348.

14. The plaintiff stated that he got his title after his name was included as a beneficiary of Raphael's estate. This is not a disputed fact going by the entry No. 4 in the green card and the ruling made on 11<sup>th</sup> March 2015 pursuant to the objection proceedings taken out by the 1<sup>st</sup> defendant in BSA HC Suc. Cause No. 3 of 2000. In that ruling, the 1<sup>st</sup> defendant's brother stated that he removed the 1<sup>st</sup> defendant's name and replaced it with the plaintiff's name after the 1<sup>st</sup> defendant sold his share to the plaintiff. The plaintiff produced a mutation form dated 23/12/2001 which bears the said crossings on its face. Together with the mutation, was attached an application for Land Control Board consent to subdivide and letter of consent issued on 5/12/2001. The consent was for partitioning L.R No. 348 into six plots. The defendants' argument that the plaintiff's title is void for want of Land Control Board consent does not hold in view of the title having been issued pursuant to a grant and Land Control Board letter of consent attendant to the partition having been obtained.

15. There was no counter-claim filed by the defendants to plead for cancellation of the plaintiff's title for having been acquired irregularly. Therefore, the burden shifted on the defendants to show this court the source of their authority used to carry out the subdivisions yet they were not the registered owner of L.R No. 7331. The plaintiff produced a mutation dated 11/1/2012 where it is recorded at 1(a)(i) that **"The proprietor wishes to sub-divide the parcel as shown by the dotted lines on the sketch."** The owner's name is given as the 1<sup>st</sup> defendant. This mutation was registered on 28<sup>th</sup> December 2012.

16. The 1<sup>st</sup> defendant in his defence stated that he relied on the ruling made on 11/3/2015 to carry out the sub-divisions. However, in cross-examination, the 1<sup>st</sup> defendant admitted that he did the sub-division before the ruling was made. The trial judge held thus at paragraph 10 and 11 of his decision thus;

**"10. It is clear from the rival evidence that save for the entitlement to the Objector, there is no dispute in respect to the rest of the Estate. It therefore behooves upon this Court to make an Order that will not disrupt the settled position of the rest of the Estate. In discharging it's duties as a Probate and Administration Court this Court has inherent power to make Orders as would be necessary for the ends of Justice (Rule 73 of the Probate and Administration Rules). Invoking that power, I do hereby Order that the Certificate of confirmation of Grant be amended by deleting the name of the Interested Party herein, Fredrick Emojongo Odiama and inserting in its place the name of the Objector, Saferio Mangeni. Any changes effected in the Registry to South Teso/Angoromo/348 or any resultant sub plot from the said parcel of land shall be reversed so that the name of the Interested Party shall be substituted with the name of the Objector."**

**"11. It must be made abundantly clear that the decision of this Court does not authorize the Interested Party to change the status quo in respect to possession of the land. The emerging evidence is that the Interested Party is in use and occupation of the disputed land. The Objector cannot use the order made by this Court to evict the Interested Party. That issue will have to be taken up before another forum."**

17. The Probate Court did grant the 1<sup>st</sup> defendant rights to have his name put on the title of the plaintiff. However, by the time the ruling was made, the 1<sup>st</sup> defendant had gone ahead to change the title into his name – as per the entries in the certificate of search dated 13/8/2012 in the defendants' documents. The search shows the 1<sup>st</sup> defendant was the registered owner of the suit title as at 12/7/2009 before the title was closed on sub-division on 26/3/2012. If the 1<sup>st</sup> defendant did not have a court order as at 2009 and or 2012; plaintiff did not sign the transfer documents in his favour. This court is left with one conclusion to make that which is the 1<sup>st</sup> defendant acquired title to the suit land irregularly and the consequent sub-divisions were irregular and ought to be cancelled.

18. The defendants challenged the plaintiff's right to the land that he has not given the plaintiff title because he only sold to him ½ an acre and not the whole 0.46ha that the plaintiff was claiming. In paragraph 5 of the ruling in the Probate Cause, the judge stated that the Court restrains itself from examining the sale transaction entered between the Objector and the Interested Party because the acreage of the land sold or the legality of the sale was not a matter for the **"Probate & Administration Court"** to resolve.

19. The issue of the size of the land sold was thus not resolved in the Succession Proceedings. The defendants did not bring up any dispute as to the payment of the purchase price. The defendant in his oral evidence stated that he had sold ½ an acre to the plaintiff. The 1<sup>st</sup> defendant does not deny his signature on the sale agreement dated 5/11/2002. That agreement stated that, **"whereas the vendor is a shareholder in L.R S. Teso/Angoromo/348 and whereas he wants to sell all his share to the purchaser (0.46ha) and whereas the purchaser is willing to purchase the same."**

20. The defendants submitted that the sale amounted to intermeddling with the deceased estate section 55(1) of Cap 160 which provides that; **"No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71."** in my view is inapplicable to this case as the plaintiff did not acquire his title before confirmation of the grant. The issue before the court is that the defendants cancelled his title without following due process. Similarly, the 1<sup>st</sup> defendant did not deny putting the plaintiff into possession of the suit land. If he intended to dispossess him, he was legally bound to get an order of court to do so. Both actions could not be cured using the order obtained post the irregularities already undertaken.

21. In relation to the submission of contravening section 55 of the Succession Act Cap 160, it is not in doubt that the defendant did not have letters of administration at the time of sale. He still does not have the letters since he is listed as a beneficiary in the estate of Raphael

Manyuru – deceased. From the contract, what he sold was his share in the land parcel No. 5 S. Teso/Angorom/348 measuring 0.46ha. The same size was allocated to him during the distribution of his father’s estate. He received the entire purchase price for the land sold. To use the provisions of section 55 of CAP 160 as a defence amounts to unjust enrichment. Equity considers as done that which ought to have been done. The circus of having the plaintiff’s title cancelled to allow for suing the administrators of the estate of Raphael Manyuru – deceased for his title will achieve the same result in my opinion and under the principles of justice in having the plaintiff remaining the registered owner of the suit parcel S. Teso/Angorom/7331.

22. The share being sold was clearly stated in the contract executed between the parties as no evidence was led to support. The 1<sup>st</sup> defendant averment that he did not know the size written was more than ½ an acre appears to be an afterthought. The plaintiff on his part demonstrated that the 1<sup>st</sup> defendant sold his whole share in the Parcel No. 348 to him. That the plaintiff took occupation after the 1<sup>st</sup> defendant moved out and bought one acre of land from John Emoto (Pex 5). Given that the 1<sup>st</sup> defendant had put the plaintiff into possession of his share in the estate, it is my considered opinion and I so hold that the findings of the Probate Court did not alter the relationship between the plaintiff and the 1<sup>st</sup> defendant so much so that even if the 1<sup>st</sup> defendant used the said order to have his name entered in the register as owner of the suit title, he was still mandated to transfer the same to the plaintiff pursuant to the terms of their contract of sale.

23. Consequently, it is my finding that the plaintiff has proved his case against the defendants. Accordingly, I do enter judgment for him as prayed in the plaint.

**Dated and signed at BUSIA this 17<sup>th</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**