



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 73 OF 2016

WILFRIDA OWAYO OCHOLA.....PLAINTIFF

- VERSUS -

BUSIA VILLA LIMITED.....1ST DEFENDANT

ANTONY OCHIENG' OCHOLA.....2ND DEFENDANT

J U D G E M E N T

1. The plaintiff brought this claim against the two defendants over land parcel No. BUKHAYO/BUGENGI/950 measuring 1.52ha. That Mr. Ochola Orwa – deceased lived and was buried on the suit land. The plaintiff pleads that the purported transfer and registration of the 1st defendant and subsequent transfer to the 2nd defendant was illegal and fraudulent. She listed the particulars of fraud/illegalities as;

- i. The 1st defendant never purchased the subject matter.**
- ii. The deceased never executed any transfer documents in favour of the defendants.**
- iii. Effecting transfer and registration without the relevant transfer & LCB consent documents.**
- iv. There are no transfer documents and consent from the 1st to the 2nd defendant.**
- v. Registration of a non-legal entity.**
- vi. Disregistration of the deceased without his consent, involvement or executing any instrument of transfer.**

2. The plaintiff prayer is for;

- a. For cancellation/deregistration of the defendants (entries 5, 6, 7 and 8) and restoration of entry 3 & 4 restoring ownership to Achola Orwa Owiti.**
- b. The 2nd defendant be compelled to settle loans due to AFC and cause title No. LR. Bukhayo/Bugengi/950 to be discharged.**
- c. Costs of the suit.**

3 Both defendants opposed the suit with the 2nd defendant filing his statement of defence on 30th September 2016 while the 1st defendant filed his on 18th September 2020. The 1st defendant pleaded that he was not aware of any dealings in regard to the suit land and made no admission to the allegations of fraud pleaded. The 2nd defendant on his part pleaded that the land was transferred to him during the lifetime of his father. He denied the particulars of fraud attributed to him and put the plaintiff to strict proof. The 2nd defendant urged that the plaintiff's suit be dismissed for disclosing no cause of action.

4. The plaintiff called the evidence of two witnesses to prove her case while each of the defendants relied on their sole evidences in defending the claim. The plaintiff testifying as **PW1** stated that her husband Orwa Ocholla Owiti owned land parcel No. Bukhyao/Bugengi/950 as per the green card produced as **Pex 3**. That currently the land is registered in the 2nd defendant's name. **PW1** continued that she wrote to the Land Register to enquire how the 2nd defendant got the land and produced the said letter as **Pex 4** and the

Registrar's response as **Pex 5**. That she did not get documents of transfer to the defendants from the lands office. It is her case that the land got transferred to the defendants unlawfully.

5. In cross-examination, **PW1** conceded that the 2nd defendant became the registered owner of the suit title in the year 1990 during the lifetime of Orwa Ocholla. That the 2nd defendant is her step son. In re-examination she stated that she discovered the 2nd defendant registered himself as owner of the suit land in 2014 when he started telling her to vacate the land.

6. The Land Registrar, Wilfred Nyandoro Nyaburi testifying as **PW2** stated he is the in-charge of Busia lands office. That the 2nd defendant got his title from the 1st defendant. That he was requested for;

a. Transfer documents.

b. Land Control Board application form.

c. Land Control Consent.

7. **PW2** continued that he was unable to trace the said documents but could only trace the discharge of charge dated 24/8/1987 and application for correction of name from Ochola Orwa to Achola O. Owiti which he produced as *Pex 6 & 7*. That every entry in the register must be supported by documents in the parcel file and where the documents are missing, the owner has to prove the registration by giving supporting documents.

8. In cross-examination by Mr. Okutta learned counsel for the 2nd defendant, **PW2** confirmed receiving a letter from Fwaya & Co. Advocates and he responded to the letter. He could not confirm that the 2nd defendant was properly registered as the witness could not trace the transfer documents from the 1st defendant to the 2nd defendant. That he had not been shown any documents by the defendants. This marked the close of the plaintiff's case.

9. The 1st defendant gave its evidence on 19/10/2020 through Wilson Ogola Olendo. **DW1** stated that he knew Ochola Orwa Owiti – deceased from when he was young. **DW1** further stated that the deceased approached him to help him offset a loan and in return he would give **DW1** land. It is **DW1**'s evidence that he was shown the land being sold which land neighboured the deceased home. Consequently, he gave the deceased Kshs.60,000.

10. It's the 1st defendant's further evidence that he later discovered that the parcel No. Bukhayo/Bugengi/950 transferred to him was the deceased home. Therefore, they agreed he returns the title for parcel no 950 after being given the correct title. **DW1** stated that he returned the impugned title and executed the transfer documents. **DW1** denied selling any land to the 2nd defendant. He adopted his witness statement filed in court. In cross-examination, **DW1** stated that it is Ochola – deceased who prepared the documents during their transactions transferring the land back to himself. That he only dealt with the 2nd defendant's father. This marked the close of the 1st defendant's case.

11. The 2nd defendant testified on 29th October 2020 as **DW2** and he confirmed that the plaintiff is his step-mother. The witness denied registering himself as owner of the suit land through fraud. **DW2** said he did not know who the owner of the suit land was before he acquired it. **DW2** continued that in 1992 his father took him to Busia lands office and had the suit land transferred to him. That his father died in March 1997 and between 1992 – 1997 nobody raised a complaint. **DW2** admitted that the 1st defendant is unknown to him. He concluded his evidence by stating that although he does not live on the suit land, he will not disinherit his brothers who are equally entitled to a share in the land.

12. In cross-examination by Jumba advocate for 1st defendant, **DW2** stated that he got title to the suit land from his father. That all transactions were done by his father. **DW2** confirmed he lives on the land purchased for him by his uncle while the plaintiff lives on the suit land. In further cross-examination by Fwaya counsel for the plaintiff, **DW2** said that both his mother and father were buried on the suit land. That he is holding the title of the suit land in trust for his siblings. That the plaintiff had not told him she wants the title returned to the deceased name. **DW2** said he knew the process of getting land but he did not have the said documents in respect to this parcel. That the deceased gave him some documents to sign but he had no idea if his father confused the number of the suit land with the adjacent land. In re-examination, **DW2** said he was unaware of the transaction between his father and the 1st defendant. This marked the close of the 2nd defendant's case.

13. At the close of hearing the advocates for the respective parties agreed to file their written submissions. The plaintiff in her submission besides rehashing the evidence adduced submitted that it was false evidence for the 2nd defendant to plead that he got the land from his father when the green card shows the transfer was from the 1st defendant who was the registered owner at the time. The plaintiff submits that the registration of the 2nd defendant was fraudulent for lack of transfer and Land Control Board consents or any instrument of transfer executed by Orwa Ocholla.

14. The 1st defendant in his submissions stated that the transfer from the deceased to the 2nd defendant was fraudulent. The 1st defendant had no claim over the suit land. The 2nd defendant submitted that the allegations of fraud pleaded against him have not been proved. That the plaintiff was late in bringing this claim as she did not raise any complain during the lifetime of the deceased. It is the 2nd defendant's evidence and submissions that he does not work at the lands office so he should not be blamed for the lack of transfer instruments at the lands office. He relied on the provisions of section 26(1) of the Land Registration Act to have the plaintiff's suit dismissed.

15. The 2nd defendant's further submissions on page 3 was akin to adducing evidence and introducing new matters. For instance, he made

reference on the transfer from Obila Orono to Achola Orwa which was a matter not in issue in this case. Secondly he alleges that 1st defendant only filed the part concerning him but left the part of the transferee blank for Ocholla to fill. This was speculation as what was filled in the form in the transaction between Ocholla and the 1st defendant was not pursued during the trial. The 2nd defendant submitted the land cannot revert to the deceased name now since it did not form part of his estate at the time of his death.

16. Having taken into account the evidence adduced and the submissions rendered, I safely conclude that the 1st defendant conceded the plaintiff's claim since he expressed no interest in the suit title. The contest was between the plaintiff and the 2nd defendant. The question for determination is whether or not the plaintiff has proved her case against the 2nd defendant. The 2nd defendant cited the provisions of section 26(1) of the Land Registration Act (equivalent to section 143 of Registered Land Act repealed which was the relevant law at the time of registration of the suit title in the 2nd defendant's name) Sec 143(2) of the repealed law stated thus;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

17. The statute law allows for rectification of the register especially one which is not a first registration where fraud or mistake where it is shown a proprietor had the knowledge of the omission, fraud or mistake or substantially contributed to it. The 2nd defendant as shown in the green card is a fourth owner of the suit land. The plaintiff itemized the illegalities and fraud against the defendants thus;

- i. The 1st defendant never purchased the subject matter.
- ii. The deceased never executed any transfer documents in favour of the defendants.
- iii. Effecting transfer and registration without the relevant transfer consent and documents.
- iv. There are no transfer documents and consent from the 1st to the 2nd defendants.
- v. Registration of a non-legal entity.
- vi. Disregistration of the deceased without his consent, involvement or executing any instrument of transfer.

18. In her endeavor to prove her claim, the plaintiff wrote to the Land Registrar, Busia to provide her with instruments of transfer from Ocholla-Orwa to the 2nd defendant's name. The Registrar wrote back that he had no such documents in their records. The Registrar went further to come to court and support the letter he wrote as well as avail himself for cross-exam by the defendants. Both defendants admitted having had any transaction with each other neither did they know one another before the appearances in court.

19. The 1st defendant confirmed that he signed documents prepared by Ocholla to have the suit title removed from his name and be registered in the deceased name. He never signed any documents in favour of the 2nd defendant yet the green card does show the transfer was from the 1st defendant's name to the 2nd defendant. In his defence, the 2nd defendant stated that he accompanied his father to the lands office and it is his father who did everything to have the land registered in his name. He stated further that he did not perform any role during the transfer to his name since according to him, everything was done by the deceased. How then can he state that there were blank forms signed by the deceased. He did not give evidence during his testimony in court/witness statement that he was given documents earlier signed by the 1st defendant to sign. His attempts to introduce this limb of evidence through his submissions is unprocedural. In any event, how would he have known they had been signed by the 1st defendant whom he did not know to be able to identify his signature.

20. The 2nd defendant stated further that he does not work at the lands office to be made accountable for missing documents at the lands office. However, the plaintiff had put him on notice when he was served with a letter to the Registrar and the Registrar's response thereto. If he felt the Registrar was negligent in his duties, then he would have raised a counter-claim against him which he failed to do. Secondly, the plaintiff also does not work at the lands office that is why she sought clarification from the same lands office. The report she got has not been controverted by either of the defendants.

21. This suit was brought for and on behalf of Ocholla Orwa – deceased by the administrator of his estate. It is inferred legally that it is Ocholla Orwa challenging the registration of the 2nd defendant. It is presumed that the deceased position is he never signed the documents of transfer to the 2nd defendant. It is therefore a misinterpretation of the succession law for the 2nd defendant to submit that the land cannot revert to the deceased name because he was not the registered owner at the time of his death.

22. So did the 2nd defendant acquire title to the suit land validly? I am alive to the fact that the burden of proof lies on the plaintiff to prove the irregularity and or fraud on strict liability. In my opinion I hold that she has proved the irregularity/fraud. She did this on two fronts;

- a. Demonstrating that there were no transfer documents signed between the 2nd defendant and the deceased. This was done by the evidence of PW2 and Pex 4 & 5.

b. Secondly, the evidence of the 1st defendant who stated that he never signed any document in favour of the 2nd defendant.

c. The 2nd defendant is not in physical occupation of the suit title and he did not demonstrate any interest he has on the suit title.

23. If the 2nd defendant was registered as trustee for the benefit of the beneficiaries of the deceased, why then did he not disclose the information to them? The 2nd defendant added that he was registered to hold the land in trust for his siblings. For the defence of trust to hold the 2nd defendant needed to go further to bring evidence showing how such an arrangement was reached and that his siblings (or any family member) were made aware. Customary Trust is a principle that must be proved through facts and in this case, the 2nd defendant failed to do so making this line of defence not useful to him. Why was he (The 2nd defendant) threatening his step-mother (plaintiff) who is one of the beneficiaries of Ochola's estate with eviction if indeed he is holding the title in trust?

24. Having said enough on the illegalities of the 2nd defendant and therefore, it is my finding that the 2nd defendant acquired the suit title irregularly and through fraud. Consequently, the land should revert to the estate of Ocholla Orwa Owiti for purposes of distribution to all his dependants/beneficiaries in the suit title. Accordingly, the plaintiff's suit succeeds and I enter judgement for her as prayed in the plaint in terms of following;

a. An order is hereby issued for cancellation/deregistration of the defendants (entries 5, 6, 7 and 8) in respect to land title No. Bukhayo/Bugengi/950 to restore entry 3 & 4 restoring ownership of the suit title to Achola Orwa Owiti-deceased.

b. The 2nd defendant to settle any liabilities accrued by him while the title was in his name.

c. Costs of the suit awarded to the plaintiff payable by the 2nd defendant.

Dated, signed & delivered at BUSIA this 4th day of February, 2021.

A. OMOLLO

JUDGE