



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC. NO. 17 OF 2012**

**MICHAEL NDEKWE OMBWAYO.....1<sup>ST</sup> APPLICANT/PLAINTIFF**

**EMMANUEL LIABI MUDEKHERE .... 2<sup>ND</sup> APPLICANT/PLAINTIFF**

**VERSUS**

**NOAH OGAYA.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**TRUDEYA OKELLO OGAYA .....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**MARTIN OWINO OGAYA.....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**DAVID INDUDI OGAYA.....4<sup>TH</sup> RESPONDENT/DEFENDANT**

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

1. The Plaintiffs suit brought by way of a further amended plaint dated 28<sup>th</sup> May 2013. They pleaded that the defendants have without any colour of right trespassed on their parcels of land and are cultivating them therefore denying the plaintiffs' right to enjoying quiet occupation of their lands. They ask for judgement against the defendants jointly & severally for;

**a. An order of a permanent injunction restraining the defendants, their agents, workers and/or servants from trespassing, interfering on LR. NO. BUSIA/LUGARE/2573, 3010, 3011, 3012, 3013, 2625, 2865, 2866, 2867, 2868 and 2869.**

**b. costs of the suit**

**c. Any other alternative relief the court may deem fit to grant.**

2. The defendants filed their defence and counterclaim on 15<sup>th</sup> January 2013 denying the allegations in the plaint and claimed that the plaintiffs were fraudulently registered as the owners of the said parcels of land. That the said certificates of title were acquired illegally, unprocurely or through corrupt means. They listed the particulars of fraud as follows;

a. Registering the plaintiffs and persons listed in Paragraph 5 of the plaint as proprietors of the said parcels of land to so secure the consolidation of proprietary interests in their names in place of persons in actual occupation of the said parcels.

b. Registering the plaintiffs and persons listed in paragraph 5 of the plaint as proprietors of the said parcels contrary to the law governing land adjudication, rules of natural justice and constitutional principles on land, bill of rights and fair administrative practices.

c. Enabling the plaintiffs and persons listed in paragraph 5 of the plaint to unlawfully acquire proprietary interests in land.

3. The defendants in the counter-claim prayed for;

**i. a declaratory order that the adjudication process in respect of which the plaintiffs and other persons acquired title was unprocurely executed, fraudulent and thus null and void,**

**ii. an order cancelling/nullifying all the title deeds as listed in Paragraph 5 of the plaint,**

iii. an order restoring/consolidating all the sub-divided parcels into one parcel,

iv. an order against the District Settlement and Adjudication Officer and the District Land Registrar Busia County to undertake fresh adjudication taking into consideration the historical and actual rights and interests of persons in active and actual possession of unregistered parcels of various sizes,

v. an order of the nature of injunction against the plaintiffs and all those whose names are listed under paragraph 5 of the plaint, their agents, and person working under their instructions not to trespass and/or in any way interfere with the affected parcels as listed in paragraph 5 of the plaint and parcel no. Busia/Lugare/2573,

vi. costs of the suit and any other order the court may deem fit.

### **Plaintiffs' Case**

4. The matter proceeded for hearing with Michael Ndekwe Obwayo as **PW1**, who started by stating that he is a teacher at Lugale Primary School and he hails from Bunyala sub-county. He brought this suit as owner of land parcel Bunyale/Lugale/3011 and co-owner of parcel 2573. That the adjudication process over the said parcels are closed and only title issuance is remaining as shown in the letters dated 5/3/2012, 13.12.2010 and 23.10.2012 which he produced as Pexs 1, 2 & 3. Parcel 3010 is in his name while 2573 is in his name and the names of Michael Sakhulo Ebuyie, Odera Mukhalala and Allan Muhahala. **PW1** continued that Michael Sakhulo is alive and has given him the power of attorney, Odera Muhahala Ombwayo is deceased and Michael Odwori Odero, the 3<sup>rd</sup> plaintiff herein obtained a grant in his estate. Victor Nema Wandera and Allan Muhahala also gave him a powers of attorney.

5. **PW1** further states that he does not have any relationship with the defendants and their agents who are using the two parcels of land without their authority. He prayed that the defendants be evicted and they be ordered to pay costs and damages for the period they have stopped the plaintiffs from enjoying their land.

6. Upon cross-examination by the 1<sup>st</sup> Defendant, **PW1** answered that the defendants started using his land in 2012 and previously, there was no issue between them over the use of the land during the adjudication process. That all the ten parcels of land listed in the plaint are being used and there is no vacant land. It's his evidence that the parcels were registered in 1997 though he cannot recall the date. Michael Sakhulo is a paternal uncle and has issued him with a power of attorney. On further cross-examination by the 3<sup>rd</sup> defendant, the witness stated that the defendants and their agents were using the bigger portions of the parcels of land in question and they were lying to say the suit lands was theirs. **PW1** maintained that he knew the boundaries of his land and his neighbours. He stated that the parcel of land belonged to the plaintiffs and not the defendants. The 4<sup>th</sup> defendant cross-examined him and he stated that the trees in his parcel had grown naturally and the defendants planted other trees after they started using the parcel.

7. The second plaintiff witness Emmanuel Liabi Mudekhaere, **PW2** said he is a farmer at Lugale. None of the parcels are registered in his name but he has sued over land he has registered in his grandchildren names who had all signed a letter of consent which was produced as exhibit 4 and on behalf of Stephen Ombuche Mangunyi and Silvano Sumba Odunga who have given him a power of attorney which he produced as exhibit 5 and 6 respectively. **PW2's** evidence is that the suit land is being used by the defendants who entered it without the authority of the registered owners. He prayed for the defendants to be stopped from using the suit land.

8. During cross-examination by the 1<sup>st</sup> defendant, **PW2** stated that he is the owner of the land which he shared and subdivided in the names of his three grandchildren. That he forgot to state in his written statement that Stephen Mangunyi had given him the power of attorney. **PW2** said he did not know the parcels of land registered in the defendants' name. That he did not have a letter from the adjudication office to show that he is the one who gave his grandchildren the listed parcels of land. On further questioning by the 3<sup>rd</sup> & 4<sup>th</sup> defendants, **PW2** said that he had never bought or sold land except the ones he inherited from his grandfather. That they were the ones who planted the Matete Masia shrubs boundaries including sisal which the defendants uprooted. He admitted that when the floods of 1962 came, their family moved to higher grounds at Makomere village. In re-examination, he maintained that he doesn't know where the defendants' parcels are. That they do not use the suit land as the defendants had chased them away.

9. The 3<sup>rd</sup> plaintiff testifying as **PW3** stated that he is in court over parcel Busia/Lugare/3010 on behalf of Odera Muhahala Ombwayo who was his deceased father. He had obtained a limited grant which was produced as exhibit 7. He was also representing Victor Nema Wandera and Allan Muhahala over land parcel 3012 and 3013 through a power of attorney produced as exhibit 8 and 9. The parcels of land he had sued for are being used by the defendants and their agents. He does not know the specific acreage of the three parcels of land. He prayed that the defendants be stopped from using the land and they should pay damages and costs.

10. **PW3** was cross-examined by all the Defendants wherein he stated that he joined the suit after obtaining the power of attorneys. That he was part of the land adjudication committee but it was his father who had registered the two parcels with Victor and Allan and not himself. **PW3** said that land parcel 2573 was being used by the 1<sup>st</sup> defendant and his family and a small portion by his uncles. There are mature trees on the parcel of land and the younger trees planted by the defendants after they took over the land.

11. He continued that he was aware the defendants have been cutting the trees in the suit land and they will seek compensation for the trees cut. The witness denied that they had used the names of Allan, Victor and Thomas to hide that the land was obtained fraudulently. That the suit land belonged to their grandparents and the defendants were lying to say they had just come from Eboho. He had never sold land or fraudulently obtained land with the aim of selling. By the time he joined the adjudication committee in 2001, the land registration of the suit lands had been completed and he had no role in their registration.

12. **PW1** was recalled on 10.10.2017 by the consent of the parties to produce the power of attorneys dated 22/1/2014 for Allan Muhahala, Michael Sakhulo Ebuyie and Victor Nema who are all co-owners of parcel no. Busia/Lugare/2573. He produced the documents as exhibits

**Pex 10 (a, b, c).** On cross-examination, he stated that Michael Sakhulo Ebuye is his uncle and he co-owns parcel no. 2573 with others. The persons who gave him the power of attorney just felt like he should represent them in this suit.

13. Aggrey Omolo Ogola was called as the 4<sup>th</sup> witness. **PW4** works with the Ministry of Lands as a Land Adjudication and Settlement officer covering Busia and Siaya counties and knew the Lugare Adjudication Section within the Busia Adjudication area. That parcel No. 2625 is in the name of Silvano umba Odunga; parcel No. Busia/Lugare/2573 in the names of Michael Sakhulo Ebuye, Odero Mukhakhala Obwayo, Michael N. Obwayo, Victor N. Wandera and Allan Mukhakhala. When they finished the adjudication in 2010, objections were filed and the objections determined that it was only Michael Sakhulo who remained the owner of 2573.

14. **PW4** continued that the others became owners of the following parcels; Odero Mukhakhala Obwayo – parcel No. 3010, Michael Ndekwe Obwayo – parcel No. 3011, Victor Neyima Wandera – parcel No. 3012, Allan Mukhakhala – parcel No. 3013. These parcels are subdivisions of the larger and former parcel No. 2573. Even after the subdivision, a smaller parcel was left with the same number 2573 and it remained in the name of Michael Sakhulo. There was no dispute as to the subdivisions. According to him, there is parcel No. 2865 which is owned by David Madimwa Oyango. There is parcel No. 2867 which is in the name of Victor Madimwa, parcel No. 2868 in the name of Godfrey Madimwa and parcel no. 2869 which is in the names of Stephen Mangunyi Ombudie. All these parcels of land i.e. 2625, 2865, 2866, 2867, 2868, 2869 had no objections. He produced the adjudication records as exhibits **Pex 11 (a, b, c, d, e, f, g and k).**

15. The witness said that he had forwarded all these numbers to Nairobi for processing of titles. That **Pex 11** were the final records of adjudication. No objection concerning them was registered in their office. The only objection which was in fact a proposal was that of subdividing the original parcel No. 2573 which they did and finished. There were other objections- about 378 of them- in Lugare adjudication section concerning parcels of land not in this case. On cross-examination by the 1<sup>st</sup> defendant **PW4** stated that adjudication in Lugare area started in 1997 and ended in 2010. The land was not divided according to clan or community or tribe but according to individual owners or joint/group owners as the case may be. He did not know the sizes of parcels subdivided from the original 2573 or whether the small parcel No. 2573 that remained after subdivision is bigger or smaller than the other parcels. He did not have a record to show who pointed out the land to them for demarcation. **PW4** did not recall the defendants ever coming to the office to complain about the suit parcels.

16. On further cross-exam by the 3<sup>rd</sup> & 4<sup>th</sup> defendants, **PW4** stated that he did not visit the site to cause chaos but to handle everything in peace. He had no recollection of who were involved in the local areas to facilitate adjudication as he had found the demarcation already done. That what they normally consider in believing and considering a person as owner is whether he has built there or is using the land. They do not consider the tribe, clan or community. They consider private, individual or group ownership. There was nothing to show that the defendants had laid claim to this land.

#### **Defendants' Case**

17. The matter came up for defence hearing with **DW1**, Noah Juma Ogaya, who said that he was a farmer and he lived and worked in Maumau in Bunyala sub-county. He adopted his witness statement filed as his evidence in chief. That the land in dispute belonged to his grandfather Kanga Ogaya. When he became of age, they started cultivating the land with their parents. Their mother is still alive and using the land. As far as he is aware the land belongs to them. There are trees planted around it on its boundaries. The witness stated that the Land Adjudication came to the ground to solve the dispute them and the plaintiffs but the officer failed to do so. That they could not lodge a complaint as required by law because the dispute began in 2011 after the closure of the adjudication exercise in 2010.

18. The third defendant, testifying as **DW2** stated that he comes from Maumau in Bunyala where he is a farmer. He adopted his witness statement as his evidence in chief. He added that the land is theirs which they inherited from their grandfather and only moved out briefly in 1962. That they returned in 1984 after the floods dried and have continued to use the suit parcels to date. According to **DW2**, the adjudication exercise which began in 1997-2010 stopped before their land was registered. The land was registered in the names of the plaintiffs who want to grab the same and sell. In 2000, they began ploughing/farming the areas initially flooded without any problem. That the dispute only began in 2011. He urged the court to dismiss the case.

19. The fourth defendant gave evidence as **DW3**. He adopted his witness statement as his evidence. He had stated that the suit parcels belonged to his father Sylvanus Ogaya Musungu who also inherited it from Musungu Kanga. That they tried to stop the recording officers & the plaintiff who was clearing the land to register it in their name. The witness said that on further reporting to the Land Adjudication officer, they were told to wait until the titles are out before they could lodge their claim. They also instructed an advocate to write to the Land Adjudication officer. On cross-examination he stated that he was aware the adjudication exercise was advertised and the Land Adjudication Officer came to the area. It is also true that room was given for parties to file their objections and everyone was allocated numbers for their parcels.

20. The defendants called Raphael Omollo Opio as their 4<sup>th</sup> witness. **DW4** said that as far as he knows, the land in dispute belongs to the Ogaya family who have been farming it. That some parcels were not registered in his and the defendants' area during adjudication process. He did not know the people registered in place of the defendants. In cross-exam, the witness said they have not been given parcel numbers.

21. Sabastian Oduori Ogaba gave evidence as **DW5**. He comes from Babamba clan while the defendants come from Bamurembo clan. He also reiterated that he knew the suit land belongs to the defendants through inheritance. **DW5** said the land adjudication exercise came to destroy the peaceful settlement of people in their area as intruders are now grabbing their ancestral land. Stephen Wanyama Omulo testifying as **DW6** gave similar evidence as **DW4 & DW5**.

#### **Analysis and Determination**

22. The parcels of land in dispute are still under adjudication since the titles have not been issued. The plaintiffs have presented records from the Land Adjudication office, one of such is the **DLAO** letter dated 13/12/2010 (**Pex 2**) which invited parties affected by the register to submit a written objection stating clearly the reasons for his objection. Secondly the plaintiffs produced as **Pex 3** the letter dated 23<sup>rd</sup> October

2012 which confirmed the interests of the various parties in the suit parcels.

23. The letter of 23/10/2012 stated ownership as follows:

1. P/No. Busia/Lugare/2625 - Mr. Sylvano Sumba Odunga
2. P/No. Busia/Lugare/2865 - Mr. David Madimwa Oyang'o
3. P/No. Busia/Lugare/2866 - Mr. David Ongeso Madimwa
4. P/No. Busia/Lugare/2867 - Mr. Victor Madimwa
5. P/No. Busia/Lugare/2868 - Mr. Godfrey Madimwa
6. P/No. Busia/Lugare/2869 - Mr. Stephen Mang'unyi Ombudie
7. P/No. Busia/Lugare/2573 - (a) Mr. Michael Sakhulo Ebuyie

(b) Odero Muhahala Ombwayo

(c) Michael N. Ombwayo

(d) Victor N. Wandera &

(e) Allan Muhahala

8. P/No. Busia/Lugare/3010 - Mr. Odero Muhahala Ombwayo
9. P/No. Busia/Lugare/3011 - Mr. Michael Ndekwe Ombwayo
10. P/No. Busia/Lugare/3012 - (a) Mr. Victor Neima Wandera

(b) Thomas Odende Wandera

11. P/No. Busia/Lugare/3013 - Mr. Sylvano Sumba Odunga

24. This court differently constituted vide a ruling on an interlocutory application dated 23<sup>rd</sup> November 2012 had this to say at page 8 of the ruling "As the Respondents have no pending appeal or objection against the decision of the land adjudication officer and are not registered as owners of the land parcels Busia/Lugare/3011 and 2573 in which the 1<sup>st</sup> Applicant has interest they have no rights to interfere with the owner's rights. If they believe the adjudication process through which the 1<sup>st</sup> applicant got registered with the parcels was fraudulent, then they have no choice than to follow the available legal process to lodge their claims if any. Until they succeed in challenging the 1<sup>st</sup> applicant's legal ownership of the parcels of land in accordance with the law they have no right or excuse to interfere with the registered rights of the 1<sup>st</sup> applicant."

25. Besides the letters from the Land Adjudication office, the plaintiffs also produced adjudication records (**Pex 11**) for; parcel No. 2573 confirming Michael – Sakhulo Ebuye as the owner thereof; parcel No. 3013 to Victor Nema Wandera & Thomas Odende Wandera; parcel No. 3011 to Michael Ndekwe Ombwayo; No. 3010 to Odero Muhahala Ombwayo; No. 2869 to Stephen M. Ombudie; 2526 to Silvanus A. Odunga; 2865 to David Oyang'o; No. 2866 to David O. Madimwa; No. 2867 to Victor Madimwa; No. 2868 to Geoffrey Madimwa.

26. The defendants did not present any documentary evidence to this court that they have appealed the decisions made in respect of any objections they may have raised before the Land Adjudication office. The defendants had filed a defence denying the plaintiffs claim as well as counter-claiming that the plaintiffs were fraudulently registered as owners of the suit parcels. The particulars of fraud were listed in paragraph 8 (a) – (c) of their statement of defence.

27. It is a well settled principle of law that fraud must be proved on a standard beyond that in Civil Cases. For instance, in the Case of *Kinyanjui Kamau Vs George Kamau (2015) eKLR*,

**"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...."....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."**

28. The defendants made an attempt to enjoin the Land Adjudication officer and the Land Registrar vide an application dated 14/1/2013. The said application was rejected on 30/1/2013 and no appeal was preferred against the judge's order. Administratively, the plaintiffs did not register themselves since the act of preparing the adjudication record was the duty of the Land Adjudication officers based on data collected. The person guilty of any such fraud in preparation and generation of the records would therefore not be the plaintiffs.

29. DW1 said he went to register his complaint with the Land Adjudication office Siaya but he was chased away. He did not present any

evidence/letter to ascertain that indeed he raised such objection. Secondly besides stating the land belonging to his grandfather, the witnesses called to corroborate their evidence were not from their clan, did not know the parcel numbers in dispute and did not participate in the adjudication process. DW4, 5 & 6 stated that the adjudication stopped before their lands were registered.

30. In light of the foregoing, I am persuaded to find that the plaintiffs have proved their case as contained in the further amended plaint. Accordingly, I enter judgement in their favour jointly and severally for;

**a. Permanent injunction restraining the defendants by themselves, their agents, workers and or servants from trespassing, interfering on L.R Nos. BUSIA/LUGARE/2573, 3010, 3011, 3012, 3013, 2625, 2865, 2866, 2867, 2868 & 2869.**

**b. Each party to meet their costs of the suit**

**DATED, SIGNED & DELIVERED AT BUSIA THIS 18<sup>TH</sup> DAY OF MARCH, 2021.**

**A. OMOLLO**

**JUDGE**