



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 34 OF 2019**

**STEPHEN OTIENO OGUTU.....1<sup>ST</sup> PLAINTIFF**

**JAMES ACHURA OUDA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CLEMENTINA ANYANGO OGUTU.....1<sup>ST</sup> DEFENDANT**

**CHARLES JUMA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs' brought a suit against the defendants for an order of cancellation of title and registration of the defendants in respect of land parcel LR. Bukhayo/Bugengi/6222 and restoration of the said title in the name of Oudo Opondo (deceased). They alleged that the defendants illegally transferred the land and registered it in their names and listed the particulars of fraud and/or illegality as follows:

- (a) Transferring land parcel LR. Bukhayo/Bugengi/6222 to their names in total disregard to the law relating to succession.*
- (b) Transferring part of the deceased estate without transfer documents and LCB Consent.*
- (c) Transferring the deceased estate to themselves without any consideration to other rightful heirs/beneficiaries/or their consent.*
- (d) Dealing unlawfully and unprocedurally in the transfer and consequent registration of the deceased estate.*
- (e) Disregarding requirements of the law and procedures in the transfer and registration in respect of LR. Bukhayo/Bugengi/6222.*

2. The defendants denied the plaintiffs' claim and stated that George Ogutu Oudo was never at any time registered as the proprietor of Bukhayo/Bugengi/6222 as such succession was unnecessary. They denied the particulars of fraud levelled against them by the plaintiffs. The defendants pleaded further that the plaintiffs are not Kenyan citizens and that the deceased settled them on a 25-acre land in Uganda. It is the defence contention that the plaintiffs have come to court with unclean hands.

3. During the hearing the 1<sup>st</sup> Plaintiff adopted his witness statement as part of his evidence. He produced the limited grant in respect of the estate of Oudo Opondo issued to them allowing them to bring this suit as **Pex 1. PW1** stated that the 1<sup>st</sup> defendant is his step-mother and the 2<sup>nd</sup> defendant his step-brother. He produced the death certificate of Oudo Opondo as **Pex 2**. He stated that his grandfather (Oudo Opondo) was the registered owner of the parcel of land known as Bukhayo/Bugengi/6222 which came to be as a result of the subdivision of LR. Bukhayo/Bugengi/ 42. That the defendants became the subsequent owners on 6/02/2001 by way of transfer from Oudo Opondo yet by 2001, Oudo Opondo was deceased. That there is no indication that succession was done before the transfer was registered.

4. The witness continued that he wrote to the County Land Registrar requesting for copies of documents which bestowed ownership of the suit land to the defendants. In response, the Registrar provided him with the following documents;

*i) an undated application for L.C.B consent showing that George Ogutu Opondo was the transferee, Pex4.*

*ii) A letter of consent issued on 2/07/1997 produced as Pex5 which shows that Oudo Opondo appeared before the LCB and the consent letter issued.*

*iii) A transfer form indicating the transfer from Oudo Opondo to George Ogutu Opondo dated 11/9/1997 and witnessed by Nakhone & Co. Advocates. On the back page of the said document, there was no signature of the transferee or the Land Registrar and /or the date of registration. The form was produced as **Pex 6**.*

5. **PW1** argued that from the documents presented there was none transferring the land to the defendants and as such the defendants did not acquire the suit land using due process. He stated that the copy of the mutation in the defendants list of documents was in respect of parcel no. 42 which was subdivided to create parcel numbers 6218-6222. On the 2<sup>nd</sup> page of the mutation, it appeared that Oudo Opondo (deceased) signed it on 2.3.1997. Further that the meeting of 30<sup>th</sup> Jan 1997 did not indicate when parties would meet with the surveyors. The Defendants document no 6 (chief's letter dated 7/4/2019) stated the land was left under the care of George Ogutu Opondo. However, the letter does not say that they were sharing the land pursuant to a succession process done. He concluded his evidence stating that he had not seen any transfer documents giving the defendants the suit land. He prayed for the orders in the plaint stating that he tried to settle the matter at home but failed.

6. In cross-exam, **PW1** agreed that the chiefs letter dated 7<sup>th</sup> April 2019 refers to Kalasina Makokha who is his mother. That the agreement of 30<sup>th</sup> Jan 1997 was sharing of the land parcel No. 42 between the sons of Oudo Opondo by which time Oudo was already deceased. That his claim was limited to parcel no 6222 allotted to his father George Ogutu. **PW1** said he did not consent to the removal of the restriction as indicated in the letter of the chief dated 11/9/2015. He denied that they have land in Uganda.

7. The 2<sup>nd</sup> Plaintiff associated himself with the evidence of the 1<sup>st</sup> Plaintiff and adopted his statement dated 26/3/2019 as his evidence in chief. In the statement, **PW2** stated that he was a brother to George Ogutu and their father Oudo Opondo owned land parcels No 1362 and 42/Bukhayo/Bugengi. That Oudo gave Parcel 1362 to their brother Alex Otieno while parcel 42 was to be shared amongst the rest of the brothers. That parcel 6222 curved out of parcel 42 was given to George who had two wives. It is his evidence that the 1<sup>st</sup> wife (1<sup>st</sup> Defendant) has disinherited the younger wife therefore her registration should be cancelled.

8. During cross-examination by Mr. Ipapu learned counsel for the Defendants, Pw2 confirmed that the 1<sup>st</sup> plaintiff lives in Malaya within Bukhayo West location. That the 2<sup>nd</sup> defendant is also the son of George Ogutu Oudo. Pw2 further confirmed that they had a meeting on 30/1/1997 at home regarding land parcel Bukhayo/Bugengi/42 of Mzee Oudo Opondo. The agenda of the meeting was to have every child of Oudo Opondo to know their portion. **PW2** said that he is the eldest son of Oudo Opondo. By 1997, George Ogutu was already deceased having passed on in 1989 therefore the meeting resolved to apportion the land into five pieces. It was agreed that George's share goes to the 1<sup>st</sup> Defendant because she was the 1<sup>st</sup> wife of George. According to him, she was to share the land with George Ogutu's children. That the deceased share was in number LR.6222. in accordance with how their father shared the land before his death in April 1984 by planting sisal.

9. As at 1997, the family of Oudo Opondo had not done succession hence the survey created the suit title pursuant to the meeting of 30/1/1997. **PW2** stated that it is the meeting of 30/1/1997 which said the suit land should be registered in the name of the 1<sup>st</sup> defendant. That they did everything as per the meeting of 30/1/1997 and it was in order. They did not record that the 1<sup>st</sup> defendant was to hold the land in trust for the children of George Ogutu. It is not true that the case is for 'fitina' to create chaos in the household of George Ogutu-deceased.

10. The 2<sup>nd</sup> Defendant in examination-in-chief stated that he comes from Esikulu village and he is a farmer. The 1<sup>st</sup> defendant is his mother and the 1<sup>st</sup> plaintiff is his step-brother. That his father was called George Ogutu and the 2<sup>nd</sup> plaintiff is his uncle. He adopted his statement dated 17/10/2019 as his evidence in chief and his list of documents dated 17/10/2019 as his exhibits. **DW1** said his grandfather Oudo Opondo died in 1984 while his father died in 1989. His grandfather owned LR. No. 42. **DW1** continued that he is aware of the meeting of 30/1/1997 which was chaired by the 2<sup>nd</sup> plaintiff to share the land in dispute.

11. That pursuant to that meeting, a mutation was drawn to divide the land into five parts and that they were given Bukhayo/Bugengi/6222. The 1<sup>st</sup> plaintiff was present in the meeting but was not given a share in LR. No. 42 because he was given the land in Bugiri District. Last year when the plaintiff applied for grant of letters of administration, LR. No. 42 had been subdivided in 1997. It was thus not available for administration. He prayed that the plaintiff's case be dismissed with costs.

12. During cross-examination by Mr. Fwaya, he stated that the suit land was registered in their names as at 6/2/2001. As per the green card, they got the transfer from Oudo Opondo who died on 9/10/1984. DW1 said that it is the administrator (2<sup>nd</sup> plaintiff) who signed the transfers giving them the land. He did not have the transfer documents because they remained at the lands office. He did not know the legal requirement that you cannot transact in the estate of a deceased person. According to him, the agreement of 30/1/1997 gave the 2<sup>nd</sup> plaintiff authority to sign the transfers.

13. The witness stated that he appeared before the Land Control Board although he does not have copies of the application in his list of documents. That the land in Uganda is in the name of the 1<sup>st</sup> plaintiff but it does not have a number. He has other brothers; Kevin, Milton, Odongo and 1<sup>st</sup> plaintiff. That his step brothers are not entitled to get a share in the suit land as they have their shares in Uganda. That the property being shared was for their grandfather; not their father's property. **DW1** said that the transfer form showing the transfer to George Ogutu is wrong/a lie. He admitted getting the title after the death of Oudo Opondo. He also agreed it was not right because succession had not been done but blamed the mistake on the administrator. That the title can be returned to Oudo Opondo's name as long as he gets his share as discussed. In re-exam, **DW1** said he does not agree to rectification of the register.

14. The 1<sup>st</sup> defendant adopted the evidence of **DW1**. Upon cross-examination she confirmed attending the meeting of 30/1/1997 to share the parcel LR. No.42. amongst 5 people listed therein. That her husband George Ogutu – deceased was not in the list of sharing. That the 2<sup>nd</sup> plaintiff who was distributing said that since George was deceased his share was to come to me. She did not know the number which was finally allotted to her but knew it is the number in dispute. That when they got the title, Oudo Opondo was already dead. **DW2** said she was being escorted during the process of title acquisition.

15. The parties filed their submissions on 11<sup>th</sup> December 2020 and 29<sup>th</sup> January 2021 respectively. The plaintiffs submitted that the defendants have admitted transferring the suit title without undertaking succession proceedings in the estate of Oudo Opondo-deceased thus the particulars of fraud pleaded have been established. The defendants on their part submitted that the defendants did not participate in the subdivision of Bukhayo/Bugengi/42 and that the meeting of 30<sup>th</sup> January 1997 amounted to intermeddling of the deceased estate. The defendants went on to submit that out of an evil cause, there is no cause of action. Further that the legal maxim of where two parties are at fault, better is the condition of the defendant or possessor. He urged the court to dismiss the plaintiffs' suit as he who comes to equity must do equity.

16. The question for determination is whether or not the plaintiffs have proved the particulars of fraud they levelled against the defendants. The standard of proof required for fraud is higher than the standard in civil cases. See the Court of Appeal decision in the case of *Kinyanjui Kamau Vs George Kamau (2015) eKLR* which held thus; **"it is trite law that any allegations of fraud must be pleaded and strictly proved. .... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."** The same court in *Vijay Morjaria Vs Nansingh Madhusing Darbar and Ano (2000) eKLR* held thus as per Tunoi JA (as he then was), **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett (1878) 7 Ch. D 473 at 489. In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed."***

17. The title to the suit parcel Bukhayo/Bugengi/6222 was registered in the defendant's names on 6<sup>th</sup> February 2001. The copy of green card produced as **Pex 3** shows the suit parcel resulted from a sub-division of plot No. 42. Its register was opened on 15<sup>th</sup> August 1997 in the name of Oudo Opondo. The defendants stated that they did not participate in the process of subdivision of plot No. 42 to create the current title. The defendants however relied on the family meeting held on 30/1/1997 which allotted them the suit title.

18. None of the parties before the court have challenged the manner in which the plot No. 42 was shared amongst the five (5) sons of Oudo Opondo. Secondly none of them disclosed who signed the mutation form sub-dividing the plot No. 42 into 5 portions. The defence submitted that the meeting of 30/1/1997 amounted to intermeddling of Oudo Opondo's estate. Since the mutation for subdivision of plot 42 was not in issue before this court; making orders without hearing whoever signed for the sub-divisions would go against the principles of natural justice of condemning a party unheard. I will therefore restrict my determination to the issues relating to parcel No. Bukhayo/Bugengi/6222 which is before me.

19. Section 26 of the Land Registration Act provides 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.**

**2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."**

20. The plaintiff had a legal burden to prove that the defendants were party to or contributed to the fraud/misrepresentation alleged. The 1<sup>st</sup> defendant stated that she was escorted to the lands office during the process of acquisition of the title. She did not disclose who escorted her and the role of that person. The 2<sup>nd</sup> defendant stated that it is the administrator of Oudo's estate who signed the documents of transfer to them. As at 2001, the 2<sup>nd</sup> plaintiff was not the administrator of the estate of Oudo Opondo. The plaintiffs took steps to establish how the land was registered into the names of the defendants by writing to the Land Registrar to supply them with records held at their office. The Registrar only provided documents prepared to transfer the suit parcel to George Ogutu Oudo (**Pex 4; 5 & 6**) but which were never registered. The same documents were also produced by the defendants as **Dex 6 & 7**.

21. The defendants had also not obtained letters of administration of the estate of Oudo Opondo. Therefore, the plaintiffs have demonstrated that the defendants got themselves registered as owner of Bukhayo/Bugengi/6222 in a questionable manner. The court would hesitate to cancel their title if they explained themselves which in this case they have failed to do. Instead they invited the court to apply the legal maxim that where two parties are at fault, better is the condition of the defendant or possessor.

22. This maxim is reversed by the provisions of section 25(2) of the Land Registration Act which provides thus **"Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee"**.

23. Secondly, the circumstances of this case is distinguishable to the extent that the 1<sup>st</sup> plaintiff and the defendants are claiming interests in the suit parcel by virtue of their relationship to George Ogutu Oudo who was apportioned the suit land. Given that their shares have not been determined, applying the maxim is equal to putting the cart before the horse in asking the court to determine the shares of the beneficiaries of the estate of George Ogutu Opondo based on who is on the land. Unfortunately, this court lacks jurisdiction to go that route.

24. In light of the foregoing I reach a finding that the plaintiffs' claim is proved. Accordingly, I enter judgement for the plaintiffs against the defendants jointly and severally;

**(a) An order of cancellation of title and Registration of the defendants in respect of land parcel L.R Bukhayo/Bugengi/6222 and restoration of the said title in the names of Oudo Opondo (the deceased).**

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

Dated, signed & delivered at BUSIA this 10<sup>th</sup> day of March, 2021.

**A. OMOLLO**

**JUDGE**