



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. CASE NO. 65 OF 2019

ANDREW ANYIKO ASINDI.....PLAINTIFF

VERSUS

MOSES GIMUNYE.....1ST DEFENDANT

CONSOLATA GANDI ASINDI.....2ND DEFENDANT

MOSES MAINA.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiff has filed a suit against the Defendants vide a plaint dated 9th October 2019 for;

- a) **An order of permanent cancellation and/or revocation of all the new entries made on land parcel No. BUKHAYO/MUNDIKA/2250 and same to revert back to the original registered owner ASINDI OBORA.**
- b) **An order of permanent injunction restraining the defendants, their agents, assignees, employees from interfering with land parcel No. BUKHAYO/MUKINDA/2250.**
- c) **Costs of the suit.**
- d) **Any other relief the court may deem fit to grant.**

2. The 2nd Defendant filed a Defence where she denied the allegations in the plaint and stated that the plaintiff has maliciously maligned her name and character and listed the particulars of malice as follows;

(i) Alleging that the 2nd Defendant fraudulently and in cohort with other defendants fraudulently transferred and/or subdivided land parcel No. Bukhayo/Mundika/2250 to herself and other defendants knowing so well the said allegations are false and untrue.

3. The 3rd Defendant filed a Defence where he denied the allegations in the Plaint and averred that he is an innocent purchaser for value and holds the title to suit land. he also stated that the plaintiff has maliciously maligned his name and character and listed the particulars of malice as follows;

(i) Alleging that the 3rd Defendant fraudulently and in cohorts with the other defendants fraudulently transferred land parcel no. Bukhayo/Mundika/2250 to himself knowing so was the said allegations are false and untrue.

4. The 2nd and 3rd Defendant prayed for orders of permanent injunction against the plaintiff and costs of the suit.

5. On 29th January 2020, the plaintiff, 2nd and 3rd defendant filed a consent and the same was adopted as an order of court on 27th February 2020. the consent was as follows;

- a) **That by consent of the plaintiff, 2nd defendant and 3rd defendant this court be pleased to issue an order of permanent cancellation and/or revocation of all the new entries made on land parcel no. BUKHAYO/MUNDIKA/2250 and the same to revert back to the original registered owner ASINDI OBORA.**
- b) **That by consent of the plaintiff, 2nd defendant and 3rd defendant this court be pleased to issue an order of permanent**

injunction restraining the defendants, their agents, assignees, employees from interfering with land parcel no. BUKHAYO/MUNDIKA/2250.

c) That the entire suit between the plaintiff and the 2nd and 3rd defendants be and is hereby marked as withdrawn wholly.

d) That each party to bear their own costs.

6. That the matter was then set down for hearing on the claim against the 1st defendant. On 3rd February 2021 it proceeded with one witness, the plaintiff who stated as follows; that he comes from Busia airstrip where he was born. He was nominated by his family to be the administrator of the estate of their deceased father who died in 2000. He did the succession in 2010. After succession, he visited the lands office and found LR. No. Bukhayo/Mundika/2250 is in the names of other people.

7. He reported to the lands office and was referred to the Director of Criminal Investigations (DCI). The Director of Criminal Investigations (DCI) wrote a letter to the Director of Public Prosecution (DPP) stating that their investigations revealed there were fraudulent transactions made during the transfers from Asindi Obora. That some of the people involved were either dead or could not be reached. The Director of Public Prosecution wrote to the lands office advising them to revert the title to my father's name. That the Land Registrar advised the plaintiff to get an order from court for cancellation hence the reason he has filed the case. That the 1st defendant is a Ugandan so he does not know how he got himself registered as owner of suit land. Further when the 1st defendant got registered his Identity Card shows he was one (1) year old. He prayed for the orders prayed in the plaint to be granted against the 1st defendant.

8. The suit has not been contested by the 1st defendant and therefore the Plaintiff's evidence remains uncontroverted and unchallenged. However, the Plaintiff is still required to prove his case on required standard of balance of probability. From the above, the issues for this court to determine are;

(i) Whether the plaintiff should be granted an order of cancellation and or revocation of all entries that changed the title from Asindi Obora – deceased.

(ii) Whether the plaintiff should be granted an order of permanent injunction restraining the 1st defendant or his agents from interfering with the suit land.

(iii) Who should bear the costs?

9. On the 1st issue, the Land Registration Act 2012 provides that the Land Registrar can rectify the land register as provided under Section 79. In this instant, the Land Registrar did not exercise its powers under section 79 instead directing the plaintiff to file suit. The court is also given power under section 80 to order for cancellation of title if satisfied that the registration was obtained by fraud or mistake. Section 80 provides thus;

“80 (1) Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2)The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act neglect or default.”

10. The plaintiff in his evidence in chief stated that he found out that the suit land was registered in the defendants' names after he took out the succession proceedings in respect of his father's estate. Upon further investigation, he found that the 1st defendant was registered as the title owner in 1984 yet the 1st defendant was born in 1983. Further the documents relied on in the proceedings for Environment and Land Case No. 136 of 2013, the records obtained from the lands office does show that the Identity Card number listed besides the 1st defendant's name belonged to the advocate who helped them with the land transaction. This shows on the face of the documents that the transfer from the first proprietor to the 1st defendant did not follow due process. **The letter from the Directorate of Criminal Investigations dated 28th June 2019 stated that investigations done found that indeed there were fraudulent transactions which were made during the transfer and advised that the Land Registrar do revoke the registration of the defendants and restore the possession to the initial owner ASINDI OBORA – deceased.**

11. **When a person's ownership of property is challenged and evidence is presented as in this case that there was fraud, the burden shifts to the holder of the title to show that he/she legally and procedurally acquired the property. In this case there is no contradiction of the evidence given by the plaintiff which stated that the suit property belongs to estate of his deceased father who never transferred ownership. The Court is satisfied that there was misrepresentation of facts and possibly fraud in how the 1st Defendant acquired the title to the suit property. The registration having been obtained fraudulently, the court therefore impeaches the 1st Defendant's title. The court in exercise of powers under Section 80 of the Land Registration Act hereby orders rectification of the register of the suit land by directing that the registration of the 1st defendant be cancelled.**

12. The plaintiff has satisfied the court that the suit land belongs to the estate of Asindi Obora – deceased and the said estate and its beneficiaries are thus entitled to exclusive use and occupation thereof under the provisions of section 24 of the Land Registration Act. These rights ought to be protected by issuance of orders of permanent injunction against the defendants jointly or severally; the agents and all persons claiming through them.

13. In conclusion, I make a finding that the plaintiff has made out a case against the 1st defendant and forthwith enter judgement in his favour as per plaint. Since the suit is undefended, no costs is awarded against the 1st defendant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF APRIL, 2021.

A. OMOLLO

JUDGE