



**Okello v Esike (Environment & Land Case 82 of 2013)  
[2023] KEELC 636 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 636 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 82 OF 2013**

**BN OLAO, J**

**FEBRUARY 7, 2023**

**BETWEEN**

**WILLIAM ONGARIA OKELLO SUBSTITUTED WITH (AGRIPINA WAFULA  
ONGARIA) ..... PLAINTIFF**

**AND**

**BENGA EMOKOLI ESIKE ..... DEFENDANT**

**JUDGMENT**

1. Fraudsters come in many shapes and sizes. There are those who specialize in credit card scams and forgeries. Those who will get you a passport or identity card from River road. If it's love you are looking for, there are those who specialize in romance scams readily available in many established dating websites. Not to forget those who will promise to secure jobs for our children in Middle East, the Police and the Military at a fee. And they can also be seasonal. During the planting season, they will open kiosks selling fake fertilizer and seeds. And when a ship docks at Mombasa with hundreds of tourists, they will be in the bus heading to pitch tents at the Coast. The list is inexhaustible. When it comes to land fraudsters, the category in which Benga Emokoli Esike (the defendant herein) belongs to, you will find, inter alia, those who print fake title deeds and minutes of Land Control Boards. Then there are land brokers who specialize in selling non-existent land and those who sell one parcel of land to several purchasers and those who will forge land sale agreements. In Karen, they will take advantage of the elderly to claim their land by adverse possession while in Westland, they are on the look out for expired leases then pounce. At the Coast, there is the Headquarters of the "professional squatters".
2. William Ongaria Okello (the plaintiff) was at all times the proprietor of the land parcel No Bukhayo/ Kisoko/5851 measuring 7.50 Hectares (18.5 acres) as per the mutation form produced herein. Vide a "home made agreement" executed between him and the defendant on 8<sup>th</sup> May 1989, the plaintiff agreed to sell to the defendant 2 acres out of the said land at a consideration of Kshs.14,500 which was duly paid in cash. It is not clear what transpired thereafter with regard to the transaction. But from the



testimony of the plaintiff's daughter Agripina Wafula Ong'aria, the defendant facilitated the transfer process relating to the partitioning of the land parcel No Bukhayo/Kisoko/5851 including preparing the mutation. The transfer documents were prepared and on 28<sup>th</sup> March 2006, the defendant was registered as the proprietor of the land parcel No Bukhayo/Kisoko/6027 measuring 2.712 Hectares (6.69 acres) being a sub-division of the original land parcel No Bukhayo/Kisoko/5851. It is the plaintiff's case that the transfer of 2.712 Hectares (6.69 acres) to the defendant was done fraudulently.

3. Upon discovery of that fraud, the plaintiff moved to this Court vide his amended plaint dated 23<sup>rd</sup> April 2018 seeking against the defendant, judgment in the following terms:
  1. The cancellation of the defendant's name from the register of the land parcel No Bukhayo/Kisoko/6027 and the same to be registered in the plaintiff's name or payment for the illegally acquired 2.712 hectares at the current market value.
  2. Costs and interest from 8<sup>th</sup> May 1989 till full settlement.
  3. Any other relief that this Court may deem fit to grant.The particulars of fraud were pleaded in paragraph 6 of the amended plaint as follows:
  - a. Transferring 5 acres of land to himself without colour of right from the land parcel No Bukhayo/Kisoko/6027 without the consent of the plaintiff.
  - b. Obtaining title deed by way of fraud without the consent of the Land Control Board as per the law.
  - c. Misusing the process of registration of land.
  - d. Taking advantage of the negligence on the part of the Land Registry which issued the title deed for the land parcel No Bukhayo/Kisoko/6027.
4. On 17<sup>th</sup> December 2020 the plaintiff was substituted with his daughter Agripina Wafula Ongaria following an application dated 23<sup>rd</sup> November 2020 after she had obtained a Limited Grant of Letters of Administration in Busia Chief Magistrate's Court P&a Cause No. E21 of 2020. She then filed her statement dated 17<sup>th</sup> February 2022 in which she rehashed what her late father had pleaded in his plaint. She went on to add in that statement that her father had sold 2 acres out of the original land parcel No Bukhayo/Kisoko/5851 to the defendant vide an agreement dated 8<sup>th</sup> May 1989 at a consideration of Kshs.14,500 which was paid in full. That it was the defendant who facilitated the sub-division of the said land and through fraud, he transferred 5¼ acres into his name being land parcel No Bukhayo/Kisoko/6027 instead of 2 acres thus obtaining an extra 3¼ acres hence this suit.
5. The following documents were filed in support of the plaintiff's case:
  1. Certificate of official Search for the land parcel No Bukhayo/Kisoko/6027 in the name of Benga Emokoli Esike measuring 2.10 Hectares.
  2. Land sale agreement between the plaintiff and the defendant dated 8<sup>th</sup> May 1989 for purchase of 2 acres at a consideration of Kshs.14,500.
  3. Mutation Form.
  4. Limited Grant of Letters of Administration issued to Agripina Wafula Ongaria in Busia Chief Magistrate's P&a No E21 of 2020 on 23<sup>rd</sup> November 2020.
  5. Letters from Chief Nambale dated 5<sup>th</sup> August 2015 and 5<sup>th</sup> July 2015.



6. The defendant filed a defence to the amended plaint on 16<sup>th</sup> May 2018 in which he denied the allegations of fraud levelled against him. He conceded, without prejudice, that on or about 8<sup>th</sup> May 1989 he had entered into a sale agreement with the plaintiff for the sale of a parcel of land measuring 2 acres out of the land parcel No Bukhayo/Kisoko/5851 at a consideration of Kshs.14,500. He added, however, that the plaintiff did not transfer the said land immediately and that on or about 16<sup>th</sup> September 2004 when the surveyor came to sub-divide the said land, the plaintiff added him a further 3 acres at a consideration of Kshs.85,500 which he paid. That the land was then sub-divided into five portions namely No Bukhayo/Kisoko/6025, 6026, 6027, 6030 and 6031. He then obtained the consent of the Land Control Board of Nambale and consent was granted to transfer the land parcel No Bukhayo/Kisoko/6027 into his name. That the plaintiff executed the transfer and he obtained the title. He then took possession of the land, fenced it and is using the same to the exclusion of everybody else.
7. The defendant filed a list of documents dated 1<sup>st</sup> November 2013 listing the following documents:
  1. Mutation Form for parcel No Bukhayo/Kisoko/5851.
  2. Application for consent of the Land Control Board.
  3. Consent issued by the Nambale Land Control Board.
  4. Transfer of Land Form dated 20<sup>th</sup> March 2006.
  5. Certificate of official search for the land parcel No Bukhayo/Kisoko/6025.However, of the above 5 documents, only the Mutation Form, the Certificate of Official Search and the Transfer of Land Form were actually filed.
8. The defendant does not appear to have filed any witness statement including his own. That is really inconsequential because as I will show shortly, he did not turn up for trial.
9. The plenary hearing commenced before Omollo J on 20<sup>th</sup> June 2022 and although served personally following the withdrawal of his counsel Mr Bogonko from acting for him, the defendant did not turn up.
10. Agripina Wafula Ongaria (PW1) who had been substituted as the plaintiff in place of her deceased father testified and adopted as her evidence the contents of the statement dated 17<sup>th</sup> February 2022 contents of which I have already summarised above. She also produced the documents as per the lists filed.
11. Since the defendant had not attended court though duly served, MR Ashioya counsel for the plaintiff asked the Court to mark the defendant case as closed. He then filed his submissions.
12. I have considered the Plaintiff's case as well as the submissions by counsel.
13. It is clear from the plaintiff's uncontroverted evidence that he entered into a written agreement with the defendant for the sale of a parcel of land measuring 2 acres on 8<sup>th</sup> May 1989 at a consideration of Kshs.14,500 which was fully paid. That fact is indeed admitted by the defendant in paragraph 4 of his defence. He however adds in paragraph 5 of his defence that on or about 10<sup>th</sup> September 2004 when the surveyor came to sub-divide the land parcel No Bukhayo/Kisoko/5851, the plaintiff added him a further 3 acres for which he paid Kshs.85,500. The plaintiff's case is that infact the defendant is the one who facilitated the sub-division of the land parcel No Bukhayo/Kisoko/5851 and in the process, he fraudulently and through concealment transferred the whole land parcel No Bukhayo/Kisoko/6027 measuring 5¼ costs into his names.



14. This Court finds it rather strange that the plaintiff executed the sale agreement dated 8<sup>th</sup> May 1989 for the transfer of 2 acres to the defendant but did not execute any such agreement for the extra 3 acres on 16<sup>th</sup> September 2004. Infact the defendant does not state whether there was any oral/written agreement on 16<sup>th</sup> September 2004. He simply states at paragraph 5 of his defence that:

“...when the surveyor came to formerly (sic) sub-divide L.R No Bukhayo/Kisoko/5851, the plaintiff added to the defendant a further three acres at a consideration of Kshs.85,500 which amount was paid...”

It is also instructive that before filing this case, the plaintiff had complained to his chief at Nambale who subsequently wrote to the Assistant County Commissioner Nambale on 5<sup>th</sup> August 2013 reporting that the plaintiff had complained that although he only sold to the defendant 2 acres of land in 1989, he had recently discovered that the defendant had acquired 2.10 Hectares. The Assistant County Commissioner Nambale then wrote to the Registrar of this Court vide his letter dated 5<sup>th</sup> June 2013 which I shall reproduce in extenso:

“Ref No: Nam/Iso/vol Xiiv/89

The Registrar

High Court Of Kenya

Busia (k)

Re: Land Dispute Bukhayo/Kisoko – William Ong’aria Okello

The above parcel of land has a dispute the proprietor William Ong’aria Okello and buyer Behwa Omokol Ekisa who has apportioned himself more land than what was on the agreement. The owner Mr William Ong’aria Okello recently discovered that he has acquired 2.10 acres (sic) see attached agreement and certificate of official search. Note that the official search reads BENGA instead of Benwa.

Kindly advise Mr William Ong’aria Okello on the way for (sic) because our office has no mandate in cancellation of a Title Deed.

Mary Kisaka

Assistant County Commissioner

Nambale Sub-county.”

It is not clear whether that letter received any response from the Deputy Registrar. What is clear is that 3 months later on 14<sup>th</sup> October 2013, the plaintiff filed this suit originally acting in person until the firm of Ashioya & Company Advocates came on record for him on 19<sup>th</sup> August 2014. Of course the reference to “2.10 acres” in the said letter can only be a typing error because the land parcel acquired by the defendant which is Bukhayo/Kisoko/6027 is infact 2.10 Hectares as per the certificate of official search issued on 16<sup>th</sup> July 2012. The defendant, though personally served by one Elijah Okutima a process server of this Court to attend Court on 20<sup>th</sup> June 2022 for the hearing, he did not turn up and the trial proceeded in his absence.

15. The fact that the defendant chose not to attend court and rebut the plaintiff’s testimony can only lead to the inevitable and irresistible conclusion that if he had attended court, he would not have been able to dislodge the cogent evidence adduced by the plaintiff in support of his case. Since the sale agreement dated 8<sup>th</sup> May 1989 was for the transfer of only 2 acres as the defendant has readily admitted,



the registration of the defendant as proprietor of 2.10 Hectres (5.187 acres as per the certificate of search) could only have been acquired fraudulently as there is no other sale agreement between the parties after 8<sup>th</sup> May 1989. And in the absence of any such further agreement, the mutation form, Transfer of Land and any other documents purportedly executed by the plaintiff for the transfer of the land parcel No Bukhayo/Kisoko/6027 were therefore fraudulent. The defendant was only entitled to 2 acres and not 5.187 acres which is the acreage of the land parcel No Bukhayo/Kisoko/6027. The plaintiff has proved his case against the defendant. The fate of a fraudulent title is cancellation – Section 26 *Land Registration Act*.

16. As to the remedies sought, the plaintiff seeks either the cancellation of the defendant's title to the land parcel No Bukhayo/Kisoko/6027 or for an order that the defendant pays for the whole portion at the current market value. The plaintiff however did not place any evidence before this Court to suggest that the current market value of the land parcel No Bukhayo/Kisoko/6027 would be as at the time of the trial. This Court cannot pick a figure from the air. The most prudent order would be to cancel the title deed for the land parcel No Bukhayo/Kisoko/6027 and direct that it be sub-divided into two portions out measuring 2 acres to remain in the name of the defendant and the balance of 3.187 acres to be registered in the name of the plaintiff.
17. Ultimately therefore, there shall be judgment for the plaintiff in the following terms:
  1. The title deed to the land parcel No Bukhayo/Kisoko/6027 in the name of Benga Emokoli Esike is hereby cancelled for having been obtained through fraud.
  2. The defendant shall within 15 days of this judgment surrender the original title deed to the land parcel No Bukhayo/Kisoko/6027 to the Land Registrar Busia for cancellation.
  3. In default of (2) above, the Land Registrar Busia shall, notwithstanding the absence of the original title deed to the land parcel No Bukhayo/Kisoko/6027, cancel the same and issue, together with the County Surveyor Busia, two title deeds as follows:
    - a. One title deed measuring 2 acres in the name of Benga Emokoli Esike.
    - b. Another title deed measuring 3.187 acres in the name of Agripina Wafula Ongaria .
  4. Costs.
  5. Interests

**BOAZ N. OLAO**

**JUDGE**

**7<sup>TH</sup> FEBRUARY 2023**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2023 BY WAY OF ELECTRONIC MAIL. AND SINCE THE DEFENDANT HAS NOT BEEN ATTENDING COURT EVEN WHEN SERVED, THE DEPUTY REGISTRAR TO ARRANGE FOR A COPY TO BE SERVED UPON HIM BY THE PROCESS SERVER AND AN AFFIDAVIT OF SERVICE BE FILED ACCORDINGLY. RIGHT OF APPEAL.**

**BOAZ N. OLAO**

**JUDGE**

**7<sup>TH</sup> FEBRUARY 2023**

