



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 74 OF 2018

JUSTUS ATSIENO ODHIAMBO.....PLAINTIFF

= VERSUS =

PETER ONYANGO ACHIENG'.....DEFENDANT

J U D G E M E N T

1. The Plaintiff vide a plaint filed 29th August, 2018 impleaded the Defendant in this suit and pray for judgement against the Defendant for:

a) Rectification of Land Register by cancelling the registration of the Defendants as proprietor of MARACHI/ESIKOMA/1199 and inserting the name of ODHIAMBO DIAMERI MUSUNDI as proprietor;

b) Order of injunction restraining the Defendant, his agents or those claiming through him from entering, transferring, and charging or in any way dealing with land parcel MARACHI/ESIKOMA/1199 until the hearing and final determination of this Suit; and

c) Costs.

2. The Plaintiff pleaded that one ODHIAMBO DIAMERI (deceased) was the registered owner of a parcel of land known as L.R No. MARACHI/ESIKOMA/606 measuring eighteen (18) acres. That the Deceased agreed to sell to the Defendant two (2) acres of the said land at a consideration of K.Shs.4,000/= where the Defendant paid a deposit of K.Shs.2,000/= and was left with a balance of equal amount. That due to the balance the Deceased failed to demarcate the two (2) acres to the Defendant/

3. The Plaintiff further pleaded that sometime in the year 1982 the Defendant fraudulently and without the knowledge of the Deceased's family caused himself to be registered as an owner of six (6) acres of land out of the Deceased's parcel of Land. The particulars of fraud on the Defendant's part were listed as:

a. Causing himself to be illegally registered as owner of Land parcel MARACHI/ESIKOMA/1199 measuring 2.43 hectares or six (6) acres;

b. Causing himself to be so registered without paying any price for the said land;

c. Taking advantage of the deceased's ill health to be registered as owner of six (6) acres instead of two (2) despite not having paid the agreed full price for the two (2) acres;

d. Failing to follow the laid down procedures for partitioning and transferring of Land; and

e. Stealing the deceased's six (6) acres of land.

4. The Defendant through the firm of Obwoge Onsongo & Company Advocates filed his Defence and Counterclaim on the 30th of October, 2018 where he denies that he bought the Suit Property at K.Shs.4,000/- and that he bought only two acres of land. He also denies all the allegations of fraud levelled against him.

5. In his Counterclaim, the Defendants claims that the Deceased demarcated for him the six acres of the Suit Land in 1978 and that he obtained title in 1982 before the Deceased died. The Defendant prays for an eviction of the Plaintiffs from the suit land and a permanent injunction restraining the Plaintiff, his family members, relatives and all persons working under him or under his instructions from tilling,

planting, occupying, using, trespassing and/or in any manner whatsoever interfering with the Plaintiff's land parcel no. MARACHI/ESIKOMA/1199.

6. The Plaintiff file a Defence to Counterclaim on the 5th of November, 2018 reiterating the contents of his plaint, confirming that he is the administrator of the estate of Odhiambo Diameri Musundi and disputing the plaintiff's claim that the principle of *res judicata* applies in this present case fails because the Court in Judicial Review No. 4 of 2015 held that the proceedings before the Butula Land Disputes Tribunal were a nullity.

7. During the hearing, the Plaintiff called two witnesses, the Plaintiff, **JUSTUS ATSIENO ODHIAMBO** who testified as **PW1**. He stated that the deceased Odhiambo Dienya was his father and he is the administrator of his late father's estate. He stated further that he was informed by his mother that his father had sold two (2) acres of LR MARACHI/ESIKOMA/606 to someone and those two acres were to be transferred upon payment of the full purchase price.

8. **PW1** further explained that his mother had been desirous to sell the land and it was only when they got a buyer and did a search that they discovered that the original title of LR MARACHI/ESIKOMA/606 had been subdivided into MARACHI/ESIKOMA/1198 and 1199 and the latter was registered in the name of the Defendant. He continued in evidence that the Defendant had registered himself as the owner of six (6) acres and not the two were agreed upon with the deceased. He urged the Court to return four (4) acres of the Defendant's six to the estate of the deceased and for the Defendant to finalise the payment of the balance of the purchase price for the two acres he bought.

9. Upon cross examination, **PW1** confirmed that he had not been born when his father sold the land to the Defendant and that all the evidence that he testified he had been told. He went further to confirm that his mother did not show him a sale agreement and that the purchase price was K.Shs.4,000/- which the Defendant stated that he paid half and the other half paid to Faustin Odhiambo who was his late brother. **PW1** replied in the negative when asked whether he had confirmed with the Land Registrar if there was any fraud by the Defendant when obtaining his title to the Land. He finalised by stating that he did not know whether his father appeared before the Board.

10. **ROSA ADIPO ODHIAMBO** testified as **PW2** and stated that the Plaintiff was her son and that the Defendant bought 2 acres of land but he did not complete the payment and he was paying in instalments. She further stated that her husband had informed her not to give the Defendant land unless he completes payment of the balance of K.Shs.2,000/-.

11. Upon cross examination **PW2** stated that she could not remember whether there was an agreement for sale between her husband and the Defendant but was aware of the sale due to the visitations by the Defendant to the Land. She further stated that she witnessed the last signing by her husband before he died and he had confirmed that the Defendant had only paid him K.Shs.2,000 leaving a balance of K.Shs.2,000/-. That she did not recall her husband going to the Land Control Board. That before her husband died The Defendant had brought some surveyors to the Land.

12. Upon re-examination, **PW2** stated that her husband was seeking treatment after something hit his eye and it got swollen.

13. The Defence called only one witness. **PETER ONYANGO ACHIENG'** testified as **DW1** stated that he was a police officer and knows the Plaintiff as the son of Odhiambo from whom he bought land in 1978. He testified that he had an agreement with the deceased for K.Shs.25,200/- which amount he paid in instalments. He stated that he did not remember when Mr. Odhiambo died but he had paid the purchase price in full. He continued in evidence that the deceased took him to the Lands office and transferred the land to him after executing the transfer documents. He further stated that they obtained consent from the Land Control Board before the transfer and that **PW2** was always present when he made the payments. He urged the Court to allow him to continue using the land as he is using it to plant sugar cane in as per an agreement he has with Busia Sugar Company Limited.

14. Upon cross-examination **DW1** stated that the agreed purchase price was K.Shs.25,200/-. He stated further that he did not have the executed transfer form for the land parcel no. 1199 neither did he include the Land Control Board Consent form in his list of documents but he confirmed that he went to the lands office with the Deceased. He continued further that the witness to the agreement for sale was one Joseph Okora Wanyama but their names were not recorded in the agreement. That since the Deceased did not sign the agreement but put his thumbprint.

15. **DW1** stated further that the survey he had conducted was from the Land office and that the Deceased had been aware that he was giving him six acres. He confirmed the existence of the case before the Butula Land Disputes Tribunal.

16. On re-examination, **DW1** stated that the witness Joseph Okwaro was also deceased but **PW2** who was the deceased's wife was aware of all the transactions. He confirmed that upon payment of the purchase price of K.Shs.25,200 he went to survey together with the deceased Odhiambo Diameri and they signed the paper, he paid the requisite fees and was given a title.

17. After the close of the hearing, parties agreed to file their respective submissions within 15 days. The Plaintiff filed his submissions on the 7th day of December, 2020 restating the facts pleaded in his Plaint and stating that the receipts produced by the Defendant indicating the payments for the transaction of the Suit Land are a forgery and were prepared solely for the present case. The Plaintiff submitted that the Defendant took advantage of the deceased's illiteracy to steal his land and never paid the balance of the purchase price. It is the Plaintiff's submission that the parties in the transaction did not attend the Land Control Board and the Defendant bypassed the requirement hence getting him illegally registered as the owner of six acres of the deceased's land illegally and unprocedurally. Therefore, the Defendant's counterclaim should be dismissed and the Plaintiff's case allowed as he has proved his case on the required standard.

18. The Defendant did not file his submissions despite the time allocation given to him by this Court to do so.

19. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

a. Whether the Defendant acquired 4 extra acres of the Suit land fraudulently;

b. Whether the Defendant's title to the Suit Land should be cancelled and the same reverted to the deceased's estate; and

c. Who bears the costs of this suit?

20. With regards to the **first issue**, both PW1 and PW2 allude to the fact the deceased ODHIAMBO DIAMERI sold only two (2) acres of land to the Defendant yet he somehow managed to register 4 extra acres in his name causing him to have six (6) acres of the Deceased's land. It is trite law that an allegation for fraud has to be substantially proved beyond a balance of probabilities. That places the onus on the Plaintiff to present to this Court documentation and witnesses who will assist him in proving the allegation of fraud. The Black's Law Dictionary, 10th edition defines fraud as,

'As knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his/her detriment.'

21. Although the Plaintiffs have alleged fraud, they have failed to substantially prove the same. They have not provided any documents to confirm the alleged fraud and neither did they summon the Land Registrar as a witness to either confirm or disregard the Defendant's documents as forgeries. The Court of Appeal stated in the case of **Elizabeth Kamene Ndolo George Matata Ndolo [1996] eKLR**, thus, *"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."*

22. Both PW1 and PW2 confirmed to this Court that indeed a sale transaction occurred between the deceased and the Defendant. They stated that the Deceased informed them that he was selling two (2) acres but they have not provided this Court with any evidence to substantiate that hence making that hearsay.

23. The Plaintiff cannot simply say that fraud occurred or that the Defendant forced the Deceased to transfer the land to him or that the Defendant fraudulently transferred the land to himself. All these allegations have to be proved with evidence. Fraud is an allegation that has to be proved as held in the **Paul Muira & Another vs. Jane Kendi Ikinyua & 2 Others(2014) eKLR** where the court cited with approval the Court of Appeal case of **Musonga vs. Nyati (1984) KLR 425** and in **Koinange and 13 Others (1986) eKLR 23** where it was observed:

"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."

24. With regards to the **second issue** of cancellation of the Defendant's title, the Section 26 (1) of the Land Registration Act provides that,

"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 the 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 the 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.

25. The Plaintiff have not provided this Court with evidence of fraud on the part of the Defendant or that he colluded with any other person to fraudulently acquire the Suit Property and neither have they satisfactorily proved the allegations of fraud against the Defendant although the same have been pleaded in the Plaintiff. The Defendant on the other has provided this Court with evidence as to how he acquired the Property and from the official search filed by the Plaintiff it was evident that the Title was issued to him on the 24th of August, 1982. The Plaintiff and PW2 should have taken the appropriate steps to get the title revoked as soon as possible.

26. In the case of **Vijay Morjaria vs NANSINGH MADHUSINGH DARBAR & Another (2000) eKLR**, Tunoi JA on proving fraud said thus, *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.* Did the plaintiff in this case distinctively prove the acts of fraud he alleged against the defendant? I think not.

27. Section 80 of the Land Registration Act (a replica of section 143 of the Registered Land Act cap 300 (*repealed*)) empowers this Court to order the rectification of the register. The said section provides that,

(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.

28. Despite the foregoing provisions the Plaintiff has not proved fraud, omission or mistake on the Defendant's part and thus making it difficult for this Court to make an order for rectification of the suit title. In fact, ALL witnesses have confirmed that there was indeed a sale of land transaction between the deceased and the Defendant and the only contention is on the acreage of the land and on whether the Defendant finalised the payment of the purchase price. The plaintiff not being a party to the said agreement had a burden to discharge to prove that the land sold was two and not six acres. Unfortunately, he failed.

29. In view of the above analysis and observations, I have no option but to reach a finding that the Plaintiff has failed to prove his case on the balance of probabilities. On the other hand, I am satisfied that the Defendant has ably laid evidence to support his prayers in the counterclaim.

30. In conclusion, I hereby make the following final orders:

a. The Plaintiff has not proved his case against the Defendant and it is hereby dismissed;

b. Judgement be and is hereby entered for the defendant as per the counter-claim that;

i. A permanent injunction do issue to the Plaintiff, his family members, relatives and all persons working under him or under his instructions from interfering, occupying, using, trespassing and/or in whatever manner interfering with the Defendant's parcel of land parcel No. MARACHI/ESIKOMA/1199.

ii. The Plaintiff to surrender vacant possession of the suit land within sixty (60) days of this judgment. In default, eviction shall issue

c. The costs of this case awarded to the Defendant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF APRIL, 2021.

A. OMOLLO

JUDGE