



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 116 OF 2014 (FORMERLY HCC 15/2009)**

**BELIS EVAYO OLAKA..... PLAINTIFF**

**= VERSUS =**

**HOSKIN INDIMULI OLAKA .....DEFENDANT**

**AND**

**LAWRENCE OJIAMBO MUGENI..... INTERESTED PARTY**

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

1. The outcome of this matter rests on the determination of only one issue agreed upon by the parties on 23/1/2017. The issue is this: Whether Hoskin Indimuli Olaka had capacity to sell and transfer Plot No. BUSIA/TOWNSHIP/125 to Lawrence Ojiambo Mugeni. In the same consent, it was also agreed that this suit (ELC No. 116/2014 which was formerly HCC No. 15 of 2009) be the lead or main suit while another suit, formerly KISUMU HCC No. 151 of 2009 be treated as a counter-claim. This second consent is essentially about arrangements relating to handling of the matter in a feasible way. It is not of much concern at this stage.

2. The main suit was originally brought vide a plaint dated 18/5/2009 filed in court on the same date. That plaint had the 1<sup>st</sup> Plaintiff – **BELISI EVAYO OLAKA** – as the only Plaintiff while **HOSKIN INDIMULI OLAKA** was the only Defendant. The complaint then was that the Defendant had purported to own Plot No. BUSIA/TOWNSHIP/125, also elsewhere called Plot No. 7983/125 (the plot), and started collecting rent from structures standing on it. He had also threatened to dispose of the plot.

3. The plaint was later amended and filed on 16/8/2010. The amendment saw another Plaintiff – **JOHN KAYELI OLAKA** – added as 2<sup>nd</sup> Plaintiff while another party – **LAWRENCE OJIAMBO MUGENI** – was enjoined as an Interested Party. Some new pleadings were also included, with the 2<sup>nd</sup> Plaintiff now emerging as the alleged registered owner of the plot while the complaint against the Defendant also changed from allegations of being a meddler or trouble-shooter to that of being a fraudster who had illegally sold the plot to the Interested Party.

4. In the amended plaint, the Plaintiffs prayed for the following orders:

a. Abandoned.

b. An order that any illegal dealings and/or conveyancing on Plot No. BUSIA/MUNICIPALITY (township?)/125 be nullified and the same be registered in the name of 2<sup>nd</sup> Plaintiff – **JOHN KAYELI OLAKA**.

c. A permanent injunction against the Defendant and the Interested Party by themselves, their agents, servants, employees, assignees or any other person claiming under them from occupying, selling, leasing, ceding or in any other manner whatsoever from tampering with Plot No. BUSIA/MUNICIPALITY (sic)/125.

d. Costs of this suit together with interests thereto.

e. Any other suitable alternative relief this honourable court may deem fit and just to grant.

5. The counter-claim was yet another suit – HCC No. 151/2009, KISUMU – filed by the Interested Party as Plaintiff against the Defendant –

HOSKIN INDIMULI OLAKA. The pleadings show the Interested Party claiming that the Defendant had sold the plot to him for Kshs.3,000,000, two million of which had already been paid, with an undertaking to pay the balance upon the Defendant giving vacant possession of the plot to the Interested Party.

6. The Defendant was accused of failing to give vacant possession and persisting to keep tenants on the plot and collecting rent from them. He was also accused of failing to transfer the plot to the Interested Party. The Interested Party prayed for the following orders:

a. A permanent injunction against the Defendant, his family members, agents, servants, and/or agents restraining them jointly and/or severally from interfering with the Plaintiffs use and enjoyment of rights on LR. BUSIA MUNICIPALITY 7983/125.

b. Any other relief this honourable court may deem fit and just.

7. The Interested party's suit appears to have been compromised and/or settled vide a consent dated 16/10/2009 in which the Defendant agreed to transfer the plot to the Interested Party, with the relevant office holders – Town Clerk, Busia Municipal Council, Provincial Land Officer, and Commissioner of Lands – being roped in to make the transfer a success. The consent also granted a permanent injunction on the terms prayed for in the plaint. The plot was ultimately transferred to the Interested Party. But the Plaintiffs threw a spanner into the works when they emerged and alleged that both the sale and transfer were fraudulent and/or illegal.

8. According to the Plaintiffs, the Defendant could not possibly transfer the plot to the Interested Party, it not having been his, and them being the true owners who had not relinquished ownership. It is against this background that the issue now for consideration was arrived at by counsel and parties on record.

9. It is worth appreciating that there were other cases relating to the same plot filed in this and other courts by the parties involved. Some of these cases were **BUSIA PMCC No. 453 of 2008, BUSIA HCC No. 7 of 2010, BUNGOMA HCC No. 40 of 2010, BUNGOMA CMCC No. 35 of 2009, and BUSIA CMCC No. 433 of 2011**. All these and other suits however were consolidated with this suit pursuant to a court order to that effect. It is plain that this suit has had a twirling and protracted history, with the ownership wrangle spawning various suits in different courts in this region until finally the parties decided to have it settled vide the consent entered here on 23/1/2017.

10. The kernel of the dispute therefore is ownership of the plot, with the Plaintiffs claiming original, registered, and un-relinquished ownership while the Interested Party, the current registered owner, avers he is the true legal owner by dint of lawful purchase and transfer from the Defendant. The Defendant himself comes in for the alleged role he played in change of ownership. He is the common denominator in all suits consolidated.

11. Evidently, the Defendant is a step-son to 1<sup>st</sup> Plaintiff and a son to the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup> Plaintiff's claim to ownership is said to arise by virtue of her marital nexus to the 2<sup>nd</sup> Plaintiff and an alleged contribution to the purchase of the plot. The Defendant on the other hand was said not to be entitled to the plot, his own mother, and by extension himself, having been allocated a different plot.

12. It appears clear that the 2<sup>nd</sup> Plaintiff, the original owner of the plot was declared bankrupt in the year 2003 but was later discharged from such bankruptcy sometimes in the year 2010. According to Plaintiff's evidence, the Defendant and the Interested Party are said to have entered into a sale agreement on 25/8/2009 during the subsistence of the bankruptcy order, with the Defendant being said to have derived his purported power to sell from an invalid power of attorney which was not registered and which the alleged donor, the 2<sup>nd</sup> Plaintiff, could not lawfully give as he was an undischarged bankrupt at the time. Further, the Plaintiffs averred that the alleged power of attorney was ordered cancelled vide a court order dated 18/11/2013 issued in CMCC No. 433 of 2011 because the alleged donor, the 2<sup>nd</sup> plaintiff, lacked capacity to donate it.

13. The Interested Party on the other hand traced the legality of his acquisition of the plot from an alleged transfer of the same by the original owner, 2<sup>nd</sup> Plaintiff, to the Defendant prior to that owner becoming bankrupt. The plot was then transferred to the Defendant who in turn sold and transferred it to him. He said that the issue of transfer first arose in his counter-claim herein where he had sued the Defendant at Kisumu seeking various orders. He and the Defendant reached a consent in that case wherein the Defendant consented to the transfer. That consent is said not to have been set aside. The consent is part of the records here (marked LGW-002 in the Interested Party's witness statement). Further, the Defendant is said to have written a letter (availed as LGW-003) to the court here confirming sale of the plot to the Interested Party.

14. In his statement, the Interested Party denied that his lease certificate is forged; denied also that the 2<sup>nd</sup> Plaintiff has a genuine lease certificate for the plot; or that he bought the plot from the Defendant on the strength of a limited power of attorney allegedly possessed by the Defendant and which did not give the Defendant power to sell the plot. He emphasized that the plot was duly and legally sold to him by the Defendant. He availed the sale agreement (LGW-004) and pointed out that the Defendant's own father, 2<sup>nd</sup> Plaintiff in the amended plaint, was a witness to the agreement. He stated that the 2<sup>nd</sup> plaintiff cannot turn around and claim ownership of a plot whose sale he witnessed.

15. The Interested Party availed various documents to back-up his averment that the plot was transferred to the Defendant by 2<sup>nd</sup> Plaintiff. Some of such documents are LGW-005, which is application for transfer to Defendant by 2<sup>nd</sup> Plaintiff, LGW-006 – a receipt showing payment of transfer fees, LGW-007 which is a demand notice to Defendant to pay rates and rents after the plot had already been transferred to him, and LGW-008 (a), (b) and (c) – which shows payment of rates. This party emphasized that he did not buy the plot on the strength of any power of attorney given to the Defendant but rather on the strength of the Defendant's registered ownership of the plot.

16. All the parties filed submissions. The Plaintiffs submissions were filed on 25/7/2017. According to the Plaintiffs, the alleged transfer of the plot by the Defendant to the Interested Party was neither procedural nor lawful. The position taken is that the Defendant used an alleged power of attorney donated by 2<sup>nd</sup> Plaintiff to transfer the plot to the Interested Party. The 2<sup>nd</sup> Plaintiff was said to have no capacity to donate such power as he had already been declared bankrupt. Any transaction relating to his property was supposed to take place through the

official receiver. The said power of attorney was also said not to have been registered and this, it was submitted, further contributed to its illegality. Further still, the same power was said to have been declared null and void in CMCC No. 433/2011, Busia.

17. The submissions of the Defendant were filed on 12/2/2018. He submitted that he has never been the registered owner of the plot and he therefore never had the capacity to sell and/or transfer it. He also submitted the power of attorney he is said to have had was null and void, its donor, the 2<sup>nd</sup> Plaintiff, being an undischarged bankrupt who lacked legal power to donate it.

18. The submissions of the Interested Party were filed on 31/1/2018. He submitted, *inter alia*, that vide a consent order on record in his case at Kisumu – **HCC No. 151/2009** – entered into between himself and the Defendant the plot was ordered to be transferred to him. That consent, he said, has not been set aside and is still valid. On the issue of whether the Defendant had capacity to transfer the plot to him, the Interested Party submitted that the plot was already the Defendant's property when he transferred it to him. It became his property long before its previous owner, who is the Defendant's father, was adjudged bankrupt. The basis of the transfer was said not to be the impugned power of attorney but rather the fact of ownership vested in the Defendant by the previous owner before bankruptcy proceedings took place.

19. The 1<sup>st</sup> Plaintiff was said not to be precise or clear as to how her claim to ownership comes about. According to the Interested Party, the 1<sup>st</sup> Plaintiff's claim of ownership seems to be through her husband, who was the previous owner, but who, according to the Interested Party, is not a party in these proceedings. The Interested Party reiterated that he has availed evidence to show that the previous owner of the plot had transferred it to the Defendant by the time the Defendant decided to sell it to him.

20. I have considered the presentations made by each side by way of statements and/or submissions. I have also endeavoured to read the file in order to have some understanding of the antecedents and history surrounding these proceedings. The issue before me is straightforward. I am called upon to determine whether the Defendant had capacity to transfer the plot to the Interested Party. The Defendant is party to the issue. He submits that he did not transfer the plot to the Interested Party. The Interested Party has already pointed out that the issue is not whether the Defendant has transferred the plot to him but rather whether he had capacity to transfer it. I agree with the Interested Party.

21. The consent on the issue as entered into implies that the defendant transferred the plot to Defendant. The only question that arises is whether he had capacity to transfer it as he did. The issue to be determined therefore does not admit of the submission made by the Defendant that he didn't transfer the plot to the Defendant. But even assuming that the issue would admit of such, there is evidence which the Defendant has not displaced showing that he did it. Such evidence is contained in a consent he entered into with the Interested Party in case No. HCC No. 151/2009, Kisumu. It is further shown in a letter that he wrote to the court here in Busia clearly pointing out that he had sold the plot to the Interested Party. That letter, together with the consent, form part of the records availed by the Interested Party. It appears to me that the virtue of honesty is alien to the character of the Defendant. He is at the heart of all the disputes herein and whether one is talking of allegations against him by the 1<sup>st</sup> Plaintiff or the Interested Party, one notices a cunningness and dishonesty on the part of the Defendant that cannot co-exist with truth. The submissions of the Defendant miss the point and are of no value to the issue at hand. I reiterate that the issue is whether the Defendant had capacity to transfer the plot, not whether he transferred it.

22. I now turn to the issue of whether the Defendant possessed capacity to do what he did. The premise of the Plaintiffs case is that the transfer was done by the Defendant on the basis of a faulty and illegal power of attorney which could not vest capacity in the Defendant to transact the way he did. The premise of the Interested Party's case is that the transfer was not based on any or alleged power of attorney. It was based on the actual ownership of the plot by the Defendant pursuant to a transfer done to him by the previous owner before that owner was declared bankrupt.

23. I have to make a choice as to which one of these conflicting versions I should accept. And I believe the Interested Party, not the Plaintiffs. Here is why: There is abundant documentary back-up showing that the previous owner of the plot applied to have the plot transferred to the Defendant sometimes prior to him being adjudged bankrupt. It is shown well that when he was the owner, he was paying rates to the relevant authority but when he ceased to be such owner, the new owner, the Defendant started paying rates.

24. Further, in the agreement of sale entered into between the Defendant and the Interested Party, the previous owner, who is the Defendant's father and 2<sup>nd</sup> Plaintiff here, is shown to have been a witness. You do not become a witness to sale of something you own. You can either conduct the sale yourself or decline the sale. In the statement of the Interested Party, one notices commendable effort to back the averments made with the necessary documents. And the flow of the arguments made in the submissions is both logical and credible. One would expect that in face of such strong showing by the Interested Party, the Plaintiffs, or even the Defendant for that matter, would mount a strong and cogent rebuttal which would displace the Interested Party's case. Well, it didn't happen. It simply didn't happen. At the end of it all, the response of the other parties remained puny, abject off the mark, and rather jumbled.

25. The Interested Party has therefore persuaded me that when the plot was transferred to him by the Defendant, the Defendant was its owner, having become so after the plot had been transferred to him by its previous owner, the 2<sup>nd</sup> Plaintiff in this case.

26. But I also have another reason for not believing the Plaintiffs. And the reason is this: The amended plaint filed by them (see para 5b) founded their case on fraud. They plead that the Defendant "**unlawfully and fraudulently**" sold the 2<sup>nd</sup> Plaintiff's plot to the Interested Party. If one looks at the provisions of Order 10 Rule 1(a) of Civil Procedure Rules, 2010, particulars of fraud need to be pleaded. During trial, such particulars are supposed to be strictly proved. Infact, the law takes the obligation to prove fraud very seriously. Always, proof of fraud has a standard higher than the usual balance of probabilities that usually applies in Civil Cases (see **R G PATEL Vs LALJI MAKANJI [1957] EA 314**). The Plaintiffs therefore failed to comply with the law. They seemed to imply that the Defendant, alone or with other actors, perpetrated fraud but they were unable to prove it. In particular, they did not demonstrate that the Interested Party was involved. They needed to prove fraud very well, that is, on a standard higher than a balance of probabilities.

27. But I would like, as an aside, to explore the possibility whether the Interested Party would be divested of ownership even had the impugned or outlawed power of attorney been used. First, the authorship of that document is not attributed to him. In all appearance and expression, it seems to be an affair between the Defendant and the 2<sup>nd</sup> Plaintiff. If the Defendant then used the document and represented to

the Interested Party that he was mandated to sell the plot, and the Interested Party, believing it, decided to buy the plot, it seems to me unreasonable that it is the Interested Party rather than the Defendant who should lose. The person really to be questioned is the Defendant. The other person to be questioned is the 2<sup>nd</sup> Plaintiff as the alleged donor of the power.

28. I am fortified in this position by the fact that the same document was not registered but when presented to the very office supposed to register it before facilitating or causing a transfer, that office accepted and caused the transfer. It seems to me that the Plaintiffs can only blame the Defendant and the office that facilitated the transfer. I would be persuaded otherwise if the Interested Party is shown to have influenced or compromised the Defendant or that office in one way or the other. But that is not the position here. The innocence of the Interested Party in the whole affair should be construed in his favour. He should not be made to suffer because of machinations or shenanigans not attributable to him.

29. In simple terms, I am saying that the Interested Party can easily be treated as an innocent purchaser for value without notice of defects of title. He can be afforded the protection spelt out in Section 80(2) of the Land Registration Act 2012, which protects an innocent purchaser, while the Plaintiffs, if proved to be aggrieved owners, can seek indemnity and/or compensation from the Defendant or the office that allowed the transfer. Such is the recourse or remedy afforded to them by Section 81(I) of the same ACT. I reiterate that I have stated all this as an aside. My position is that the plot had already been transferred to the Defendant by the 2<sup>nd</sup> Plaintiff when the Defendant transferred to the Interested Party.

30. My finding is that the Defendant had capacity to transfer the plot to the Interested Party. He transferred a plot whose ownership had already been vested in him and he did so for valuable consideration. I therefore allow the Interested Party's counter-claim and dismiss the Plaintiffs suit. And under prayer (c) in the counter-claim (that prayer seeks for any other fit and just relief), I grant the Interested Party an order of eviction to be enforced in accordance with the law and only if his ownership rights are hampered by people not authorised by him to be on the plot. I do this because in one of his matters ordered consolidated with this suit – specifically HCC No. 40/2010, Bungoma – he had precisely sought such an order. I also grant a permanent injunction to prevent re-entry.

31. On the issue of costs, I feel that the Plaintiffs and the Defendant should pay costs to the Interested Party. The two Plaintiffs and the Defendant are closely related. The Defendant is a son to one and a step-son to the other. To the Defendant, the Plaintiffs are father and step-mother. A reading of the proceedings makes one have a feeling that they could be working in cahoots to take away the plot from the Interested Party. And yet even as they seem to be doing so, nobody is mentioning the fate of the 3,000,000 paid as the purchase price. I order that the Plaintiffs and Defendant pay costs to the Interested Party.

32. I would like to sound a word of caution in this matter. And the word is this: The judgement herein only relates to suits in which the parties named in the judgement – the Plaintiffs, Defendant and the Interested Party – are the only parties. This matter is essentially a consolidation of many suits, some of which involve different parties and possibly relate to the same or different parcels of land. These are not covered by this judgement and the parties involved are still at liberty to pursue a trial if interested.

**Dated, signed and delivered at Busia this 8<sup>th</sup> day of July 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiffs: Absent

Defendant: Absent

Interested Party: Absent

Counsel for the Plaintiffs: Present

Counsel for the Defendant: N/A

Counsel for the Interested Party: Present

Court Assistant: Doreen Karani