



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 428 OF 2017**

**(Formerly Kisii ELC case No. 363 of 2016)**

DAVID ONYANGO OKWACH.....1<sup>ST</sup> PLAINTIFF  
EVAN OKWACH.....2<sup>ND</sup> PLAINTIFF  
MAURICE OKWACH .....3<sup>RD</sup> PLAINTIFF  
FREDRICK OKWACH.....4<sup>TH</sup> PLAINTIFF  
JAME OKWACH.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

ANDERICUS OTUOMA OPOLO.....DEFENDANT

**JUDGMENT**

1. By a plaint date 2<sup>nd</sup> November 2016 and filed on 4<sup>th</sup> November 2016 the plaintiffs namely, David Onyango Okwach, Evan Okwach, Maurice Okwach, Fredrick Okwach and Jane Okwach represented by Mugoye and Associates Advocates have sued the defendant, Andericus Otuoma Opolo for the following reliefs:-

**i. Declaratory Orders that the title number SUBA/WEST KUBIA/4671 belongs to the 1<sup>st</sup> plaintiff.**

**ii. A permanent injunction restraining the defendants either by itself, agents servants and/or employees from destroying, alienating, entering, trespassing and/or in any way interfering the quite enjoyment of possession of the 1<sup>st</sup> plaintiff's land known as Title number Suba/West Kubia/4671.**

**iii. Cost of this suit.**

**iv. Any other relief this honourable court may deem fit to grant in the circumstances.**

2. The plaintiffs' case as per the plaint is that they are the beneficial owners of the suit property known as title number Suba/West Kubia/4671 having been allocated the same by their late father Samwel Okwach Otima during the adjudication process. That their late father had inherited the suit property from his grandfather, Otima Arambe Mugomba. That his grandparent's and family have been living on the suit property for over fifty (50) years.

3. It is further alleged that in the year 2008, the 1<sup>st</sup> plaintiff surprisingly found the defendant and his brother removing boundary sisal of the suit property. That on 23<sup>rd</sup> April 2014, the dispute was deliberated before the area Chief and the elders who resolved that the defendant vacate the suit property.

4. The plaintiffs' also alleged that in the year 2016, the 1<sup>st</sup> plaintiff discovered at Homa-Bay Land Registry that the first registration of the suit property had been fraudulently carried out by the defendant to his own name as opposed to the plaintiffs. The defendant severally attempted to evict the plaintiffs thus provoking the instant suit.

5. The defendant was duly served as shown on affidavits of service sworn on 8<sup>th</sup> May 2018 and 11<sup>th</sup> January 2019. He neither filed defence nor appeared for hearing of the suit as scheduled. Thus, the suit was heard whereby the 1<sup>st</sup> plaintiff (PW1) relied on his statement dated 2<sup>nd</sup>

November 2016 and his list of documents dated 2<sup>nd</sup> November 2016 (PEXhibits 1 to 3, namely adjudication record, adjudication section map and Chiefs letter dated 31<sup>st</sup> May 2016 respectively). He called his witnesses namely LAWRENCE OCHIENG ADUOTI (PW2) AND CHARLES AKONDO TUBARE (PW3) to fortify his evidence.

6. In his submissions dated 20<sup>th</sup> February 2019, learned counsel for the plaintiff referred to the orders sought in the plaint and stated the plaintiff case in brief. He framed and analysed the following issues for determination:-

a) **Whether the defendant fraudulently and illegally registered the suit property in his name.**

b) **Whether the plaintiff has met the requirements for issuance of permanent injunctive orders.**

7. Counsel submitted that judgment be entered in terms of orders sought in the plaint. He relied on authorities including Black's Law Dictionary on the definition of the term "fraud" and the case of **Elijah Makeri Nyangwara –v- Stephen Mungai Njuguna and another (2013) eKLR** on the application of **section 26 (1) (a) and (b) of the Land Registration Act, 2016 (2012)**.

8. I have duly considered the plaint, the testimonies of PW1, PW2 and PW3 as well as the plaintiff's submissions. I am guided by the Court of Appeal decision in **Galaxy Paints Company Ltd –v- Falcon Grounds Limited (2000) 2EA 385** regarding issues for determination in a suit; see also **Independent Electoral and Boundaries Commission –v- Stephen Mutinda Mute an 3 others (2014) eKLR**. The two (2) issues for determination herein are set out in the plaintiff's submissions and I embrace them accordingly.

9. On the first issue, the plaintiffs alleged fraud on the part of the defendant and pleaded particulars of fraud at paragraph 12 of the plaint. In the case of **Abiero –v- Thabiti Finance Company Ltd and another (2001) KLR 496**, it was held, inter alia, that fraud must be specifically pleaded and particulars of fraud alleged must be stated on the face of the pleadings.

10. **Blacks's Law Dictionary 10th Edition** defines the term "Civil Fraud" as an intentional fraud which carries only a monetary, non-criminal penalty. That "fraud" is a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. That fraud is usually a tort but in some cases (especially when the conduct is wilful) it may be a crime.

11. It is trite law that any allegations of fraud must be pleaded and strictly proved to the standard of proof required in Civil cases which is obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilities but certainly not beyond any reasonable doubt as in criminal cases; see **Ndolo –v- Ndolo (2008) 1KLR (G & F) 742**.

12. It was the evidence of PW1 that upon search at Homa-Bay Land registry he discovered that the defendant had illegally acquired title to the suit property. PW3 confirmed the evidence of PW1 as he stated that the defendant illegally registered himself as the owner of the suit property as shown on PEXhibits 1 and 2.

13. Regarding the second issue it is discernable from paragraphs 5,13,14 and 15 of the plaint that PW1 and his family has lived on the suit property harmoniously and without interruption for more than fifty (50) years. That the defendant has severally attempted to evict them from the suit property. He is seeking that his quiet enjoyment of the suit property be permanently protected thereof.

14. It was the testimony of PW1 that the defendant was in illegal occupation of the suit property. He stated that :-

***" My family has lived on the suit land LR NO. SUBA WEST KUBIA/4671 over years. I did search of the land at Homa-Bay lands registry. I discovered that the defendant had illegally acquired title to the suit land"***

15. PW2 confirmed that the defendant lives on the suit property. It is quite evident that the defendant obtained title to the suit property irregularly and fraudulently as envisaged under **section 26 (1) of Land Registration Act, 2016 (2012)**; see also **Elijah Nyangwara case (supra)**.

16. It follows that the defendant is in unlawfully occupation of the suit property **Section 152 A of the Land Act 2016 (2012)** provides :-

***" A person shall not unlawfully occupy private , community or Public land. "*** (Emphasis added)

17. I am aware that this court is mandated to issue permanent injunctive remedies including injunctions in the manner sought herein as provided under **Section 13(7) (a) of the Environment and Land Court Act, 2015 (2012)**.

18. In the instant suit, the evidence of PW1 together with the evidence of PW2 and PW3 stand unchallenged. The plaintiffs have discharged the requisite burden of proof; see the Court of Appeal decision in the case of **Kirugi and another –v- Kabiya and 3 others (1987) KLR 347**.

19. It is therefore the finding of this court that this suit has been proved by the plaintiffs against the defendant on a balance of probability.

20. A fortiori, I enter judgment for the plaintiffs against the defendant for declaratory orders, a permanent injunction and costs of the suit as sought in his plaint dated 2<sup>nd</sup> November 2016.

21. It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 3rd day of JULY 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

The plaintiff's counsel aware of this date and absent

Tom Maurice – Court Assistant.