



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL SUIT NO. 64 OF 2003

WYCLIFFE BIKETI WAKWABUBI.....PAINTIFF

VERSUS

ASMAN MALOBA.....1ST DEFENDANT

ISSA RAJAB WEPUKHULU..... 2ND DEFENDANT

HUSSEIN MALOB A WEPUKHULU.... 3RD DEFENDANT

IBRAHIM WEPUKHULU.....4TH DEFENDANT

WYCLIFFE BARASA BWOYI5TH DEFENDANT

J U D G M E N T

By an amended Plaint dated 9th February 2018 **WYCLIFFE BIKETI WAKWABUBI** (the Plaintiff herein) suing as the legal representative of the Estate of his father **FRANCIS WAKWABUBI BIKETI** (the deceased herein) sought Judgment against the defendants in the following terms:-

- 1. Eviction order from land parcel NO BOKOLI/KITUNI/169.**
- 2. Costs of the suit.**
- 3. Interest on (1) and (2) above.**
- 4. Any other alternative or suitable relief this Honourable Court may deem fit.**

The basis of the plaintiff's claim is that at all material time, the deceased was the registered proprietor of land parcel **NO BOKOLI/KITUNI/169** (the suit land) having validly acquired the same for valuable consideration and having been registered in 1969. He therefore seeks the eviction of the defendants from the suit land since they, or their agents, have no right in the same.

Together with the Plaint, the plaintiff filed his statement and those of his witnesses together with the list of documents.

By their amended defence and Counter – Claim, the defendants pleaded that the plaintiff acquired the title to the suit land illegally, through fraud and misrepresentation. The defendants pleaded further that the plaintiff has never occupied the suit land and his title has since expired. They therefore sought the dismissal of the plaintiff's suit with costs.

In their Counter – Claim, the defendants pleaded that the suit land was first registered in the names of the late **KIBERENGE WAOMOLA** (hereinafter **WAOMOLA**) who died on 4th October 1968 while still registered as the proprietor of the suit land where the defendants were residing as his beneficiaries. That unknown to the defendants, the plaintiff obtained registration of the suit land on 14th November 1969 one year after the death of **WAOMOLA** through fraud and misrepresentation particulars of fraud were pleaded in paragraph 5 of the counter – claim as follows:-

- 1. Presenting for registration a transfer form purporting it to have been signed by WAOMOLA when it was not.**

2. Purporting to have obtained Land Control Board Consent with WAOMOLA when he knew that to be false.
3. Presenting one JOSEPH KIBERENGE to the Land Control Board as WAOMOLA a fact he knew to be false.
4. Obtaining registration of the entire parcel of land measuring 26.5 acres when he had only purported to purchase 8 acres thereof.

The defendants therefore sought Judgment against the plaintiff in the following terms:-

1. Cancellation of the plaintiff's registration as owner of land parcel NO. BOKOLI/KITUNI/169.
2. Costs of this Counter – Claim.
3. Any other and/or further relief that this Honourable Court may deem fit.

The defendants also filed their statements and those of their witnesses as well as the list of documentary evidence.

In a reply to the defence and defence to Counter – Claim, the plaintiff denied having procured the registration of the suit land through fraud or misrepresentation or that his title has expired. He also denied that WAOMOLA died in 1968 while still the registered owner of the suit land adding that in 1980, the defendants filed BUNGOMA SPMCC NO 12 OF 1980 against the plaintiff and WAOMOLA which suit was dismissed. The plaintiff pleaded further that the defendants have no locus to urge the prayers sought in the Counter – Claim and a Preliminary Objection would be taken to strike it out. He therefore pleaded that the Counter – Claim be dismissed and Judgment entered as per the amended Plaintiff.

The hearing commenced on 2nd July 2018 with MR MURUNGA appearing for the plaintiff and MR OMUKUNDA for the defendants.

The plaintiff and his witness MATHIAS NYONGESA MEMBA (PW 2) testified on behalf of the defendants and also asked the Court to adopt their statements.

In his statement, the plaintiff confirms that he is the Administrator of the Estate of the deceased who was proprietor of the suit land. He adds that WAOMOLA was the first registered proprietor of the suit land but sold it to the deceased. That the defendants were not residing on the suit land and only invaded it in 1994. That there have been many cases involving the deceased and ASMAN MALOBA and WYCLIFFE BARASA which have been determined in favour of the deceased. These cases are:-

1. C.A CIVIL APPEAL NO 157 OF 2001 ASMAN MALOBA BIKETI & ANOTHER .V. FRANCIS WAKWABUBI.
2. LAND CASE NO 6 OF 1999 FRANCIS WAKWABUBI BIKETI .V. ASMAN WEPUKHULU MALOBA & ANOTHER.
3. BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION NO 225 OF 2000 ASMAN MALOBA WEPUKHULU .V. WYCLIFFE BARASA & OTHERS.
4. BUNGOMA SRM CASE NO 12 OF 1980 BARASA WAMAOLA & ANOTHER .V. JOSEPH KIBERENGE & ANOTHER.

The plaintiff added that the deceased was registered as the proprietor of the suit land on 14th November 1969 before WAOMOLA passed away having signed all the relevant documents and the defendants were aware of this transaction and are trespassers who should be evicted.

His witness MATHIAS NYONGESA MEMBA (PW 2) also adopted as his evidence his witness statement in which he has stated that he is a neighbour to the deceased who on 17th April 1967 asked him to be his witness in the purchase of a portion of land measuring 592 yards x 481 yards at a consideration of Kshs. 1,360/= of which Kshs. 200/= was paid leaving a balance of Kshs. 1,160/=.

On her part CAROLYNE MAMULUNDA MASINDE (DW 1) stated in her statement that she is the 3rd wife of AMAN MALOBA WEPUKHULU who was the original 1st defendant herein and that she and her co-wives obtained a limited grant for purposes of this suit in WEBUYE SPMC P & A NO 54 OF 2017. That the suit land was registered in the names of WAOMOLA who died in 1968 when her husband was only 14 years old. That when her husband attained the age of 18 years and went to file succession in respect of the Estate of his late father RAJAB WEPUKHULU, he found that the deceased had registered the suit land in his names alleging that he had purchased it from WAOMOLA. The witness added that the deceased could not have bought the suit land on 14th November 1969 when WAOMOLA the registered owner had died in 1968. The witness added that she has been living on the suit land since 1992 and her late husband never sold it to anybody.

ISSA RAJAB WEPUKHULU (DW 2) and who is the 2nd defendant also adopted as his evidence his witness statement dated 28th June 2018. In the said statement, he claims to have lived on the suit land since 1957 having been given 2 acres by his grandfather WAOMOLA who died in 1968 while still registered as proprietor of the said land. He adds that before his death in 1968, WAOMOLA had not sold the suit land to anybody and when his elder brother ASSMAN MALOBA WEPUKHULU went to the Lands Office for purposes of doing succession following their father's death, he found the suit land registered in the names of the plaintiff who claimed to have bought it from JOSEPH KIBERENGE yet the said JOSEPH KIBERENGE had no title to transfer to the plaintiff. This witness then makes the following statement which, in my view, holds the key to this dispute:-

“If my grandfather the registered owner died in 1968 and FRANCIS is being registered for the same land in the year 1969 did my grandfather come out from the grave and signed for him transfer. Is this not forgery. I pray to Honourable Court to cancel the registration of the said title deed to go back to the 1st registered owner so that we do succession.”

At the end of the trial, it was agreed by Counsel that submissions be filed on or before 9th October 2018. However, **MR OMUKUNDA** Counsel for the defendants did not file any submissions. I have therefore only had the benefit of the submissions by **MR MURUNGA COUNSEL** for the plaintiff as instructed by **J. O. MAKALI & COMPANY ADOVATES**.

I have considered the evidence by all the parties, their documentary evidence and the submissions by plaintiff’s Counsel.

It is not in dispute that **WAOMOLA** was the first registered proprietor of the suit land on 18th January 1967 before it was transferred to **WAKWABUBI S/o BIKETI** on 14th November 1969 and thereafter to the plaintiff on 7th August 1985. This is as per the Green Card. It is common knowledge that **WAKWABUBI S/o BIKETI** is the same person as **FRANCIS WAKWABUBI BIKETI** the deceased herein who is alleged to have purchased the suit land from **WAOMOLA**. At least that is what comes out of the statement of **MATHIAS NYONGESA MEMBA (PW 2)** who in paragraph 6 of his statement says:-

“KIBERENGE WAOMOLA sold FRANCIS WAKWABUBI BIKETI a portion of land measuring 592 yards x 481 yards at a consideration of Kshs. 1,360/=,he paid Kshs. 200/= and the balance was Kshs. 1,160/=”

Indeed when he was cross – examined by **MR OMUKUNDA**, this witness said:-

“I wish to say that I was present and I signed the agreement between KIBERENGE WAOMOLA and FRANCIS WAKWABUBI the original plaintiff in this case.”

As part of their documents, the defendants produced a Death Certificate No. 404415 issued on 14th June 2001 showing that **WAOMOLA** died at the age of 86 years on 4th October 1968. That certificate was not challenged and the Court has no reason to doubt it’s authenticity.

On the other hand, the plaintiff is currently the registered proprietor of the suit land whose title was issued under the repealed Registered land Act. Plaintiff’s Counsel has submitted, and rightly so, that by producing the title to the suit land, the plaintiff has demonstrated that he is the legitimate owner of the suit land. This is because **Section 28 of the repealed law** states that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a. __

b. __.”

However, **Section 143(1)** of the same Act provides that:-

“Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Similar provisions are found in **Sections 25(1) and 80 of the new Land Registration Act 2012**.

While the plaintiff claims that the deceased purchased the suit land from **WAOMOLA** in 1967 and got registered as proprietor on 14th November 1969, the defendants case is that **WAOMOLA** having died on 4th October 1968, any transfer of the suit land to the deceased in 1969 could only have been fraudulent. In the course of the trial, both the plaintiff and his witness insisted that **WAOMOLA** sold the suit land to the deceased in 1967. And as to the date when **WAOMOLA** died, the plaintiff insisted that it was in 1992. This is what he said when cross – examined by **MR OMUKUNDA**:-

“It is not true that KIBERENGE WAOMOLA died in 1968 as alleged by the defendants. He died in 1992.”

And in his witness statement dated 21st November 2016, the plaintiff states at paragraph 16 thereof as follows:-

“My late father FRANCIS WAKWABUBI BIKETI got registered as the absolute owner of land parcel NO BOKOLI/KITUNI/169, sometimes later before KIBERENGE WAOMOLA passed away, and the defendants were aware of each and every transaction my late father carried out with the said KIBERENGE WAOMOLA.”

On his part, **MATHIAS NYONGESA MEMBA (PW 2)** stated in his statement that on 17th April 1967, he was a witness to the sale agreement between **WAOMOLA** and the deceased over a portion of land measuring 592 yards by 481 yards at a consideration of Kshs.

1,360/= of which Kshs. 200/= was paid leaving a balance of Kshs. 1,160/=. Indeed a copy of that agreement is part of the plaintiff's documents. The suit land as per the title produced herein measures 26.5 acres and it is very un-likely that the plaintiff and his witness are referring to the same agreement. It is instructive to note that no sale agreement was produced with respect to the suit land yet by 18th January 1967, the said land had already been registered in the names of **WAOMOLA**. The fact that the plaintiff insists that **WAOMOLA** died in 1992 when there is cogent and un-rebutted evidence in the form of a death certificate that in fact he died on 4th October 1968 can only be a ploy by the plaintiff to mislead the Court that there was a valid agreement for sale of the suit land. This Court is satisfied that the truth of the matter lies in the assertion that **WAOMOLA** died in 1968 and could not have transferred the suit land to the deceased in 1969 and the purported transfer to the deceased was clearly fraudulent because, as captured in the statement of **ISSA RAJAB WEPUKHULU (DW 2)** **WAOMOLA** could not have **"come out from the grave and signed for him transfer."** Plaintiff's Counsel cannot therefore be correct when he submits as he has done on paragraph 3 of his submissions that:-

"The Land Control Board Consent was issued to KIBERENGE WAOMOLA on 7th August 1969 to transfer land parcel NO BOKOLI/KITUNI/169 to FRANCIS WAKWABUBI BIKETI."

As is now common knowledge, **WAOMOLA** had died one year earlier and if I may borrow the words of **ISSA RAJAB WEPUKHULU**, he could not have come from his grave to receive consent to transfer from the land Control Board. I don't think the members of the Board, however brave they may have been, would have been ready to hand over the consent to a ghost! I am satisfied that the defendants have proved that the plaintiff obtained registration of the suit land through fraudulent means. Therefore, whereas the plaintiff is the registered proprietor of the suit land, his title can be impeached for having been obtained through fraud. It must be remembered that where one's title to land is in dispute, it is not enough to simply produce it as proof of ownership. This is how the Court of Appeal addressed that issue in **MUNYU MAINA .V. HIRAM GATHIHA MAINA C.A CIVIL APPEAL NO 239 OF 2009 (2013 eKLR):-**

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

Clearly, the plaintiff's title to the suit land was obtained through fraud and cannot be upheld – held by this Court.

It is also instructive to note that the defendants have remained in occupation and possession of the suit land to-date. They have never relinquished it to the plaintiff. This is what **CAROLYNE NAMULUNDA MASINDE (DW 1)** said when cross – examined by **MR MURUNGA:-**

"I lived on the land subject of this suit since 1992."

On his part, **ISSA RAJAB WEPUKHULU** also said the following when cross – examined:-

"Apart from myself, there are other siblings living on that land."

And in her statement dated 28th June 2018, **CAROLYNE NAMULUNDA MASINDE (DW 1)** states as follows in the last paragraph:-

"When ASMAN married me, I found him living on this land and we have stayed on this land since I married him in the year 1992. He died leaving us on this land and he has never sold any piece of land to anybody."

On his part, **ISSA RAJAB WEPUKHULU (DW 2)** has recorded in his statement dated 28th June 2018 as follows:-

"That my names are ISSA RAJAB WEPUKHULU a male of sound mind. That I reside on land parcel number BOKOLI/KITUNI/169. That I have resided on the land since 1957 and utilize 2 acres of the said land. I was given the land by my grandfather KIBERENGE WAOMOLA. That the said KIBERENGE WAOMOLA died in the year 1968 and he had not sold to anybody the land."

The defendant's occupation of the suit land is not in dispute. Indeed the main order being sought against them is their eviction. It is not plausible therefore that **WAOMOLA** could have sold the suit land to the deceased in 1969 yet to-date, it is the defendants who are in occupation and possession of the same some fifty (50) years later. This lends credence to the defendant's claim that they have always resided on the suit land as legal beneficiaries being the family of **WAOMOLA** who was the first registered owner thereof. In **MWANGI & ANOTHER .V. MWANGI 1986 KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

Given those circumstances, I find that the plaintiff has not established his case against the defendants and to order for their eviction from the suit land would be a travesty of justice of monumental proportions. The plaintiff's claim is for dismissal.

The defendants in their Counter – Claim seek the cancellation of the plaintiff's registration as proprietor of the suit land. Having found that the plaintiff's registration of the suit land was obtained fraudulently, it follows that such registration must be cancelled. And although the defendants did not seek an order that the suit land reverts to the names of the original owner, that is the natural consequence that should follow the cancellation of the plaintiff's name from the register and title. I shall make appropriate orders at the end of this Judgment.

In an attempt to assail the defendant's Counter – Claim, Counsel for the plaintiff has submitted that the same is incompetent since it was not

accompanied by a Verifying Affidavit. In support of that submission, Counsel has cited the case of **PRISKA ONYANGO & ANOTHER .V. HENRY OJUANG NYABENDE 2018 eKLR** where **KIBUNJA J** struck out a Counter – Claim for failure to be accompanied by a Verifying Affidavit. Reliance was also placed on **TRANSAFRICA PORTIWAYS LTD .V. POSTAL CORPORATION OF KENYA 2006 eKLR** where **OMBIJA J** also took the same view. Both decisions are of course not binding on me. **Order 4 Rule 1 (6) of the Civil Procedure Rules** provides that:-

“The Court may of it’s own motion or on the application by the plaintiff or the defendant order to be struck out any Plaintiff or Counter – Claim which does not comply with sub rule (2) (3) (4) and (5) of the rule.” Emphasis added.

Sub – rules (2) (3) (4) and (5) of Order 4 provide, inter alia, that a Plaintiff shall be accompanied by a Verifying Affidavit and the same provision applies to Counter – Claims. However, the Court of Appeal in the case of **KENYA OIL COMPANY LTD .V. JAVANTILAL DHARAMSHI GOSRAMI CIVIL APPEAL NO 324 OF 2005 (UR)** held that although the Court has power to strike out a Plaintiff or Counter – Claim which is not accompanied by a Verifying Affidavit, such power is not mandatory but is permissive because of the phrase **“the Court may”** as used in **Order 4 Rule 1(6)**.

It is instructive to note that the prayer to strike out the Counter – Claim has only been raised at the end of the trial through submissions. However, even if it had been raised prior to the trial, and guided by the principles laid down in **D.T DOBIE & CO (K) LTD .V. MUCHINA 1982 KLR 1** that the power to strike out pleadings should be used **“very sparingly”**, the proper course to take would not be to strike out the Counter – Claim but rather, to give the defendants an opportunity to comply and file a Verifying Affidavit. As was held in **MICROSOFT CORPORATION .V. MITSUMI COMPUTER GARAGE LTD & ANOTHER 2001 KLR 470:-**

“Rules of procedure are the hand maids and not mistress of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it.”

There is ready no basis for the submission that the defendants’ Counter – Claim be struck out for being incompetent.

Counsel for the plaintiff has also submitted that the defendants have no locus to bring their Counter – Claim as they have no Letters of Administration in respect of the Estate of the late **WAOMOLA**. Counsel cited **ANGIMA J** in **JACOB NJERU NYAGA .V. MUSA NYAGA NJERU & ANOTHER 2018 eKLR**. It is of course true that an Administrator is not entitled to bring an action as Administrator before he has taken out Letters of Administration and if he does, the action is incompetent for lack of locus standi. The **JACOB NJERU NYAGA** case (supra) is distinguishable from this case in that there, as is clear from the Judgment of **ANGIMA J**, the plaintiff had filed the suit as a legal representative of the Estate of one **JOHN NJIRU KIMANI** before obtaining Letters of Administration. The suit was struck out. In this case, the defendants have not filed their Counter – Claim as Administrators or on behalf of the Estate of the late **WAOMOLA**. They have filed their Counter – Claim as persons residing on the suit property and who therefore have an interest in the same. The submissions that they lack the locus standi to prosecute their Counter – Claim cannot therefore be up-held and must be rejected.

Having considered the evidence by both parties, I find no merit in the plaintiff’s claim that the defendants are trespassers on the suit land and should be evicted therefrom. Instead, I am satisfied that the defendants have proved that the plaintiff obtained the registration of the suit land in his names fraudulently and that the said land has always been the property of **WAOMOLA**. Such registration is therefore liable to be impeached by cancellation so that the land reverts to the original owner.

Ultimately therefore, there shall be Judgment for the defendants as against the plaintiff in the following terms:-

- 1. The plaintiff’s suit is dismissed.**
- 2. The defendants Counter – Claim is allowed by cancelling the registration of the plaintiff as the proprietor of the land parcel NO BOKOLI/KITUNI/169. The same to revert to the names of KIBERENGE WAOMOLA the first registered owner.**
- 3. The costs of the dismissed suit and the Counter – Claim shall be borne by the plaintiff.**

Boaz N. Olao.

J U D G E

11th July 2019.

Judgment dated, delivered and signed in Open Court this 11th day of July 2019 at Bungoma.

Mr Murunga for plaintiff present

Mr Onyando for Mr Omukunda for defendants present

Plaintiff absent

2nd defendant present

3rd defendant present

4th defendant absent

5th defendant absent

Gladys – Court Assistant present

Right of Appeal explained.

Boaz N. Olao.

J U D G E

11th July 2019.