



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 476 OF 2017

(Formerly Kisii High Court Civil Case No. 351 of 2015)

**PETER OCHIENG ORANDO (Suing on behalf of the estate of
ORONDO OMUONO –Deceased.....PLAINTIFF**

VERSUS

THOMAS RANDIGA AWITI.....DEFENDANT

JUDGMENT

A) Introduction

1. The property in dispute is land reference number Suna East/Kakrao/385 measuring approximately 4.6 hectares in area (Hereinafter referred to as the suit land). It is situate in Migori County.
2. The plaintiff, Peter Ochieng Orando is represented by learned counsel, Mr. Agure Odero.
3. The defendant is represented by learned counsel, Mr. H. Obach.
4. The instant suit was initially filed at Kisii Environment and Land Court. On 15th March 2017, John Mutungi J, sitting at the said court ordered the suit transferred to this court for hearing and determination.

B) The plaintiff's case

5. The plaintiff initiated the present suit by way of a plaint dated 17th July, 2015 and filed in court on even date seeking the following reliefs;-

i. An order of injunction restraining the defendant by himself, agents or servants from cultivating, interfering with and or alienating or sub-dividing parcel LR. No. Suna East/ Kakrao/385, (the suit land) ratification of the title to reflect the names of the plaintiff herein through National Land Commission/County Land register.

ii. A declaration that the plaintiff is the rightful owner of the suit land.

iii. Cost of this suit.

iv. Any other relief as court shall deem fit to grant.

6. It is the plaintiff's claim that sometimes in the year 1964, the plaintiff's father Orando Omuono (deceased) offered the defendant's father, Awiti Nyangoje (deceased), the suit land, LR NO. Suna East/Kakrao/385 measuring approximately 4.6 hectares to occupy and cultivate as the latter indicated that he would find land in Tanzania. After five (5) years, the plaintiff's deceased father chased him away. On 9th May 1985, the plaintiff's father died and it emerged that the defendant's deceased father had fraudulently registered the land in his name before he moved away to Karachuonyo. He pleaded particulars of fraud at paragraph 10, of the plaint.
7. On 19th September 1997, the defendant transferred the suit land to his name and sold it to a 3rd party. The area chief attempted to resolve the dispute in vain hence precipitating the present suit.

8. The plaintiff (PW1) adduced evidence in court on 11th February 2019, and called no witness. He relied on his statement filed on 17th July, 2015 as part of his testimony. He also relied on his list of documents of even date namely;

- a) *Green card* - *LR NO. SUNA EAS/KAKRAO/385 (PExhibit 1)*
- b) *Green card* - *LR NO. SUNA EAST/KAKRAO/442(PExhibit 2)*
- c) *Search dated* - *18/11/2014 (PExhibit 3)*
- d) *Search dated* - *12/09/2014 (PExhibit 4)*
- e) *Search dated* - *25/09/2014 (PExhibit 5)*
- f) *Search dated* - *14/05/2015 (PExhibit 6)*

9. Learned counsel for the PW1 filed submissions dated 19th March 2019 wherein reference was made to the orders sought in the plaint, the statement of PW1 and PExhibits 1 to 6. Counsel submitted that the plaintiff's case is unchallenged and urged the court to find in favour of PW1.

C) The Defendant's Case

10. By his statement of defence dated 14th September 2015 and filed in court on 15th September 2015, the defendant denied the plaintiff's claim and sought its dismissal with costs. He stated that his late father, Omuono Orando who was a casual worker with Kenya Forest Service acquired the suit land while the plaintiff's deceased father acquired LR NO. Suna East/Kakrao/442. That the two land parcels border each other and that their respective proprietors had no dispute between them prior to their death.

11. The defendant also stated that it is the plaintiff who has been having ill motives of claiming ownership of the suit land and had no idea that the land was registered in the name of the defendant's deceased father. That he (defendant) took necessary legal procedures to have the suit land registered in his name and that any sale he made to a 3rd party is not illegal in the circumstances.

12. The defendant was duly served on 23rd November 2018 for hearing of the suit as shown in affidavit of service sworn on 11th February 2019 by the plaintiff's counsel. Hearing proceeded ex-parte as the defendant was fully aware of the matter and the hearing date in the spirit of **Article 159 (2) (b) of the Constitution of Kenya, 2010**.

13. The defendant failed to offer any submissions in this suit.

D. Points for Determination

14. I have duly considered the pleadings of the respective parties, the evidence of PW1 and submissions of the plaintiff's counsel. I am guided by the decision of the Court of Appeal in **Galaxy Paints Company Limited –vs- Falcon Grounds Limited (2000) 2EA 385** that issues for determination in a suit generally flow from either the pleadings of the parties or as framed by the parties for the court's determination.

15. On 10th May 2018, learned counsel for the plaintiff filed agreed issues 1 to 4 dated 9th May 2018 which I approve accordingly. Simply put, the issues or points are whether;-

- a) *Fraud is pleaded and proved against the defendant to the requisite standards*
- b) *The plaintiff is entitled to the suit land and the reliefs sought herein*
- c) *The plaintiff has locus standi in the suit*

E. Analysis and determination

16. As regards the first point, PW1 stated that the defendant's father fraudulently registered the suit land in his name and that the defendant transferred the same in his name on 19th September 1997. He distinctly pleaded fraud at paragraph 10 (a) to (c) of the plaint as recognized in the case of **Ndolo –vs- Ndolo (2008) 1 KLR (G & F) 742**.

17. In the case of **Vijay Morjaria –vs- Nansingh Madhusingh Darbar and another (2000) eKLR**, it was held that fraud and misrepresentation are grounds for impeaching a certificate of title and the same be distinctly pleaded and proved; see also **Kuria Kiarie and 2 others –vs- Sammy Magera (2018) eKLR**.

18. PW1 also stated that on 24th September 2014, he discovered that the defendant and his late father had fraudulently registered and transferred the suit land in their names. It is so discerned at paragraphs 6 and 7 of the plaint, paragraph 30 of the plaintiff's statement and PExhibit 5. The testimony of PW1 stands firm. The first point be resolved by or after the third point for determination as discussed hereinbelow.

19. On the second point, I consider orders (a), (b), (c), (d), and (e) sought in the plaint. PW1 referred to them in his evidence and submissions. He filed a caution on 18th September 2014 claiming beneficiary interest in respect of the suit land as disclosed in PEXhibits 1 and 5 bearing in mind **sections 71 to 75 of the Land Registration Act, 2016 (2012)**.

20. PEXhibits, 1 and 5 reveal that the suit land was registered in the name of Awiti Nyangoje on 10th May 1973. By way of transmission, the same was registered in the name of the defendant on 17th September 1997.

21. **Section 26 (1) of the Land Registration Act (supra)** 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 of proprietorship. The title is subject to, inter alia, encumbrances and shall only be subject to challenge as provided at paragraphs (a) and (b) thereunder:-

22. In respect of the third point, it is discernable from PEXhibits 1 and 5 and the heading of the plaint that the dispute concerns the estate of deceased persons Awiti Nyangoje and Orondo Omuono. So, do the plaintiff and defendant have locus standi to sue and be sued herein?

23. This court is quite conscious of the meaning of **“legal representative”** under **Section 2 of the Civil Procedure Act (Cap 21)**. The duties of personal representative are set out under **sections 79 and 82 (a) of the Law of Succession Act (Cap 160)**.

24. In **Omari Kaburu –vs- ICDC (2007) eKLR**, Wanjiru Karanja, J (as she then was) took a stand point which I endorse regarding locus standi and she held that :-

“ The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.”

25. It is trite law that the estate of the deceased is vested in the personal representative as provided at section 79 of the Law of Succession Act; see the case of **Troustik Union International and another –vs- Jane mbeyu and another (1993) eKLR**.

26. Notably, the defence statement was not substantiated by the defendant who adduced no evidence herein. However, it is evident that PW1 is not the legal representative of the deceased, Orondo Omuono and that the defendant is not the legal representative of Awiti Nyangoje (Deceased). **Section 45 of the Law of Succession Act (Cap 160)** prohibits them from intermeddling with the property of the deceased person.

27. Be that as it may, it is trite law that the burden is always on the plaintiff to prove his case on a balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see **Kirungi and another –vs- Kabiya and 3 others (1987) KLR 347**.

28. In the instant suit, the case was heard by way of formal proof. I find that the suit offends **Order 4 Rule 4 of the Civil Procedure Rules, 2010**. Quite clearly, the plaintiff has no locus standi to mount the suit which is rendered incompetent and has not proved to the requisite standards.

29. Thus, I strike out the plaintiff's entire suit commenced by way of a plaint dated 17th July, 2015 and filed on even date.

30. No orders as to costs.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this 5th day **NOVEMBER 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. P. Ochwangi holding brief for Mr. Agure Odera learned counsel for the plaintiff.

Tom Maurice – Court Assistant