



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO. 132 OF 2014**

**JOSEPH NYONGESA OUMA.....PLAINTIFF**

**= VERSUS =**

**FABIANO ODUORI WALIERA ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK ODUORI ODHIAMBO .....2<sup>ND</sup> DEFENDANT**

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

1. By a re-amended Plaintiff dated 5<sup>th</sup> November, 2020, the Plaintiff brought this suit against the Defendants for prayers that:-

**(a) An order directing the County Land Registrar and the County Land Surveyor and or their representatives to re-establish and fix the boundaries of Land Parcel No. Samia/Bukangala 'A'/96 and between it and Land Parcel No. Samia/Bukangala 'A'/95 and 97;**

**(b) An orders of permanent injunction against the Defendants jointly and severally from interfering with, encroaching into or in any way disturbing the Plaintiff's use and ownership of Land Parcel No. Samia/Bukangala 'A'/96;**

**(c) Costs of this suit;**

**(d) An order for mesne profits.**

2. The 1<sup>st</sup> Defendants did not file a defence but on the 2<sup>nd</sup> day of June, 2015 the Plaintiff and the 1<sup>st</sup> Defendant entered into a consent which was adopted as an order of this Court on the 30<sup>th</sup> of June 2015 as below:

*(a) An order is hereby issued to direct the District Land Registrar and the District Land Surveyor and or their agents to re-establish and fix the boundaries of Land Parcel No. SAMIA/BUKANGALA "A"/96 and 95 respectively; and*

*(b) A permanent injunction is hereby issued to the 1<sup>st</sup> defendant from interfering with or encroaching into or in any way disturbing the plaintiff's use and ownership of Land Parcel No. SAMIA/BUKANGALA "A"/96.*

3. The 2<sup>nd</sup> Defendant filed his amended Defence on the 25<sup>th</sup> of November, 2020 denying the contents of the amended Plaintiff and in particular;

*(a) That the Plaintiff was the registered owner of the Land Parcel No. Samia/Bukangala 'A'/96;*

*(b) That the said parcel of land is sandwiched between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with all the parcels sharing a common border;*

*(c) That he has encroached into the Plaintiff's land and interfered with the boundary features that were existing including trees and the live fence;*

4. The hearing commenced on the 26<sup>th</sup> of November, 2011 with the Plaintiff relying on his sole testimony. The Plaintiff testified that his land is BUKANGALA A/96 and that of the 2<sup>nd</sup> Defendant's is BUKANGALA A/97. He adopted his witness statement filed on the 6<sup>th</sup> of November, 2020. In the witness statement he testified that he is the registered owner of the Land Parcel SAMIA/BUKANGALA 'A'/96 which shares a common border with Land Parcels No. SAMIA/BUKANGALA 'A'/95 and 97. That he has lived on the land since 2006 and the boundaries are clearly marked with trees, sisal plants and other natural vegetation and shrubs until sometime in the year 2011, when the 2<sup>nd</sup> Defendant started cutting down the trees that were on the boundaries claiming that the land in issue was his and despite protesting the 2<sup>nd</sup>

Defendant did not stop.

5. He visited the surveyors' offices in Busia and a survey visit date set and the notices and summons issued for the visit on three occasions but the surveyors failed to turn up. That upon inquiry, he was informed that the 2<sup>nd</sup> Defendant had objected to the survey and threatened violence requiring him to obtain a court order and that the 2<sup>nd</sup> Defendant has extended threats to him causing him to live in fear. **PW1** also adopted his list of documents produced as plaintiff exhibit 1 to 4. He urged this Court grant him the orders he prayed for as he lived on the land.

6. Upon cross examination by the 2<sup>nd</sup> Defendant, **PW1** stated that although he was not born in that area, he bought the Suit land from Camil Wandera Wangwe and nobody complained during the transaction. He continued further that it was the 2<sup>nd</sup> Defendant who uprooted trees from his land and that he reported the matter to the forestry department. When questioned where the grave of John Wangwe was, **PW1** stated that he did not know since he was not born on the land. He also confirmed that he had not seen the power of attorney dated 18<sup>th</sup> July, 1995 (Dex). On re-examination, **PW1** stated that Camil showed him the boundaries when he bought it as they were in place then, although the boundaries are not there at the moment. The Plaintiff then closed his case.

7. The 2<sup>nd</sup> Defendant called two witnesses with himself testifying as **DW1**. He stated that he relied on the pleadings he filed together with the documents now defence exhibits 1-3. In the affidavit **DW1** swore that:

(a) *The 2<sup>nd</sup> Interested party/Defendant was his father and that he had the power of attorney dated 4<sup>th</sup> February, 2016 to represent him in the present suit;*

(b) *At the time of the land adjudication in their area, their ancestral land was shared amongst the families of Wangwe, Afula Waliera and Ogube Waliera whose sons were the 2<sup>nd</sup> Defendant's father, Manuel Wanyama Ogube and Mark E. Ogube;*

(c) *From the Wangwe family one son JOHN WANGWE went to Uganda and was left landless because his brother KAMILI WANDERA took over his parcel of land forcing OJIAMBO OGUBE, the 2<sup>nd</sup> Defendant's father to split a portion of his land and set it aside for John for when he decided to come back;*

(d) *In July, 1995 John came back from Uganda and signed a power of attorney for OJIAMBO OGUBE to take over his parcel of land number SAMIA/BUKANGALA 'A'/96;*

(e) *However, KAMILI WANDERA secretly carried out succession over the estate of JOHN WANGWE and transferred it to a third party JOHN NYONGESA OUMA, the Plaintiff;*

(f) *The Plaintiff thereafter went and settled forcefully on the land which actions caused a breach of peace and have left the 2<sup>nd</sup> defendant and his entire family to suffer irreparable loss as the plaintiff grabbed their land which had been used for agricultural purposes for many years;*

(g) *That the transfer to the Plaintiff by KAMILI WANDERA was fraudulent since there was a suit in the Busia Senior Principal Magistrates' court Civil Suit No. 402 of 1995 before KAMILI secretly transferred to the Plaintiff; and*

(h) *He urged this Court to dismiss the Plaintiff's suit and evict him from the suit parcel.*

8. On cross-examination, **DW1** stated that he filed his defence on the 26<sup>th</sup> of November, 2020 where in paragraph 3 (a) he challenges the Plaintiff's title. He stated further that he had not particularised the allegation of fraud. He testified further that Ojiambo Ogumbe who was his father died in 2016 and nobody knew when John Wangwe died because he left home and never returned. He confirmed that the Certificate of Grant issued in case No. 149 of 2008 issued to Kamili Wandera Wangwe indicated that the suit land was issued to the Plaintiff. He stated that he never reported to the police that the grant was obtained fraudulently.

9. **DW1** continued further to state that he had no idea how Busia CMCC No, 402 of 1995 between **Ojiambo Ogumbe vs. Kamili Wandera** was concluded. **DW1** admitted that a boundary existed between parcels no. 97 and 96 but denied the averment that he did not destroy the boundary. According to him, it was the Plaintiff who brought a tractor that destroyed the boundary.

10. **FELESTA NABWIRE ODHIAMBO** testified as **DW2** by adopting her written statement dated 1<sup>st</sup> February, 2021. **DW2** stated that the late WALIERA SIKHIRA and her husband, the late OJIAMBO OGUBE WALIERA were brothers and that the 2<sup>nd</sup> Defendant is her son. It is her evidence that Kamili Wandera took John Wangwe's portion of land when the latter was in Uganda and proceeded to secretly transfer it to the Plaintiff, John Nyongesa Ouma. That her family is the rightful owner of the suit land and that KAMILI fraudulently transferred the same to the Plaintiff. **DW2** referred a suit against KAMILI before the Senior Principal Magistrate in Busia Law being Civil Suit No. 402 of 1995.

11. Upon cross-examination **DW2** stated that Kamili Wandera was a child to Wandera-Wangwe who was the elder son to her husband. That L.R Samia/Mukangala A/718 belonged to three brothers and each of them had their own parcel of land. That the land was occupied by Kamili and that a grandson cannot sell his grandfather's land. Upon re-examination, **DW2** reiterated that Kamili was the grandson to Wangwe and that he sold the land that was not his. She concluded that the land belonged to Ogube who was her father in law.

12. The Plaintiff filed his submissions on the 10<sup>th</sup> of March, 2021 submitting that he brought the present suit to court because despite the fact that issues of boundaries should be handled by the office of the Land Registrar, he had not received any assistance from the said office. That

he bought the land from Kamili Wandera Wangwe who had been appointed the administrator of his late father's estate vide Busia High Court Succession Court No. 149 of 2008. He submitted further that the 2<sup>nd</sup> Defendant had not provided a plausible explanation as to why the court should not grant the orders sought in the Plaintiff. He sought to rely on the case of **Cecilio Murango Mwenda & 6 others vs. Isaac Kimathi Ikunga (2019) eKLR.**

13. The 2<sup>nd</sup> Defendant filed his submissions on the 19<sup>th</sup> of April, 2021. He submitted that the Plaintiff bought the suit land from Kamili despite his family warning him of the history of the land and that the same was obtained fraudulently. That the suit land is ancestral land and the Defendant's family has been living there since time immemorial and there have never been boundaries between the parcels of land. That the issue of boundaries ought to be sorted out by the Land Registrar and not the Court and as such the suit should be dismissed.

14. The 2<sup>nd</sup> Defendant further submitted that the Plaintiff cannot be awarded mesne profits as the suit land does not belong to the Plaintiff but the Defendants who have been in legal occupation of the same. That Kamili being a nephew is not allowed to take out letters of administration for his father's estate when his uncles are alive. He concluded stating that the Plaintiff should not be allowed to stay on the suit land and he should look for other channels of recovery of his purchase price.

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

(i) *Whether the Plaintiff is entitled to orders directing the County Surveyor and the Land Registrar Busia to determine the boundary between the two parcels Nos. 96 and 97;*

(ii) *Whether or not the Plaintiff is entitled to orders of permanent injunction against the 2<sup>nd</sup> Defendant*

(iii) *Whether the Plaintiff is entitled to mesne profits; and*

(iv) *Who bears the costs of the suit?*

16. The 2<sup>nd</sup> defendant's evidence and submission is that the plaintiff is not entitled to the orders sought because he acquired the title fraudulently. Immediately the 2<sup>nd</sup> defendant alleged fraud against the plaintiff title, the burden shifted upon him to establish the fraud. First, the 2<sup>nd</sup> Defendant did not plead fraud nor give the particulars in his statement of defence. The allegation of fraud is not one that can be taken lightly. At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition** quoting with approval the cases of **Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489** it is stated that:-

*"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (I). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice"*

17. **In the case of Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and indefeasibility of title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moiwo ole Keiwa & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that:-

*"Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."*

18. The allegation that a son cannot undertake administration of his late grandfather's estate while his father's brothers are alive is quite farfetched. It is evident that the succession of the Suit Property was undertaken by one Kamili Wandera who then later sold the same to the Plaintiff. The issue of the succession proceedings being illegal should be taken up in the Succession court because this Court has no jurisdiction to determine the illegality or otherwise of the grant. There was no evidence to prove that the Plaintiff obtained the title fraudulently or participated in the fraud thus the court cannot impugn his title.

19. The Plaintiff is the current registered owner of the Suit Property which neighbours the 2<sup>nd</sup> defendants parcel of land SAMIA/BUKANGALA 'A'/97. Although the 2<sup>nd</sup> defendant denies interfering with the boundary, he states that there is no boundary separating the two parcels of land. From the evidence produced by the plaintiff, it is not in doubt that the ownership of the two parcels of land vested in two different people i.e. John Wangwe and Ojiambo Ogube Waliera. Although John Wangwe appointed Ojiambo as his donee of power of attorney, the power ceased on the demise of both the donor and the donee. The 2<sup>nd</sup> defendant produced a copy of certificate of death for Ojiambo as *Dex 2*. The green card for suit title no SAMIA/BUKANGALA 'A'/96 was transferred to Camilli Wandera through transmission also signifying the death of John Wangwe.

20. The plaintiff has thus demonstrated that the two parcels have different identities which identity ought to be established on the ground

following the interference by the 2<sup>nd</sup> Defendant. Secondly, the plaintiff has shown that before filing this suit, he approached the lands officers but he did not get any assistance. He is therefore entitled to the orders directing the Land Registrar and County Surveyor Busia to perform their mandate of identifying and establishing the boundaries between the two parcels of land.

21. Mesne profits being special damages have to be proved for an award to be made. The Plaintiff did not provide this Court with evidence of the accrual of the mesne profits or proof of how the profits accrued. In the case of **Peter Mwangi Mbuthia & Another vs. Samow Edin Osman (2014) eKLR** where the Court of Appeal stated that;

*“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”*

22. In the case of **Fredrick Korir vs. Soin United Women Group (sued through Eunice Towett, Jane Mwolomet and Lucio Chebocho) 2018 eKLR**, Hon. Justice J.M Onyango held that:

*“It is my humble opinion that the Plaintiff has not tabled evidence before this Court to enable the Court make a determination on the same.”*

23. On the last limb of prayer for a permanent injunction, I also find for the plaintiff going by the evidence of the 2<sup>nd</sup> defendant that he does not recognize the plaintiff as the owner of the suit land. The 2<sup>nd</sup> defendant want to continue using the land yet he is not legally entitled to the same.

24. In conclusion I find the plaintiff’s case against the 2<sup>nd</sup> defendant as proved and I hereby enter judgement in the following terms:

**(a) (i) An order be and is hereby made directed at the County Land Registrar and the County Land Surveyor to re-establish and fix the boundaries between Land Parcel No. Samia/Bukangala ‘A’/96 and No. Samia/Bukangala ‘A’/97;**

**(ii) The OCS of the nearest Police Station to the parcels of land do provide security.**

**(b) An order of permanent injunction be and is hereby issued against the 2<sup>nd</sup> Defendant, his family and agents from interfering with, encroaching into or in any way disturbing the Plaintiff’s use and occupation of Land Parcel No. Samia/Bukangala ‘A’/96;**

**(c) Costs of this suit awarded to the Plaintiff and payable by the 2<sup>nd</sup> defendant.**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF JUNE, 2021.**

**A. OMOLLO**

**JUDGE**