



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 139 OF 2017

ANNAH GETRUDE OCHIENG (suing as a personal representative of the Estate of the Late

PAULO ENOS OCHENGA (DECEASED).....1ST PLAINTIFF

JOHN OTIENO 2ND PLAINTIFF

HENRY LIKOKO 3RD PLAINTIFF

ROSELINDAH NANJALA 4TH PLAINTIFF

BONFACE LESIKOMO OKWE 5TH PLAINTIFF

GILBERT OBULE OCHENGA 6TH PLAINTIFF

ANTON WAKHENDO OKHUNJA 7TH PLAINTIFF

VERSUS

FRANKLINE OPIYO MUGENA DEFENDANT

J U D G M E N T

1. The seven (7) plaintiffs brought this claim against the defendant vide their plaint dated 19th July 2017 seeking for orders:-

a) For a permanent injunction restraining the defendant either by himself, his agents, servant and assigns from entering, constructing, trespassing, cultivating or otherwise dealing with the land parcel No. Bukhayo/Bugengi/4813, 4814, 4815, 6914, 7060, 7061, 7062, 7063, 7064, 7579, 7580, 7581, 7582 and 7583 the properties of the plaintiffs.

b) The costs of this suit.

2. The plaintiff pleaded that they are the registered owners of parcels of land which were created from title No. Bukhayo/Bugengi/1530. That Bukhayo/Bugengi/1530 was purchased by David Enos Ochenga – deceased from Josephat Mugena in 1979 and the deceased acquired his title after the original parcel No. Bukhayo/Bugengi/1480 was sub-divided to create parcel Nos. 1529 & 1530.

3. The 1st Plaintiff pleaded that her deceased husband sub-divided L.R. No. 1530 into four (4) in 1996 which numbers are Bukhayo/Bugengi/4812, 4813, 4814 and 4815. That they lived peacefully with the defendant who is their neighbour until recently when the defendant committed acts of trespass. They pleaded with the court to issue the orders prayed for.

4. The defendant entered appearance on 3rd August 2017 and filed a statement of defence on 25th August 2017. The defendant stated that it is the plaintiff who has trespassed on the road of access during the sub-division of Bukhayo/Bugengi/4812 denying that parcels Nos 7060 – 7064 were excised from parcel No. 1530 stating that they were excised from L.R. no. 6913. The defendant allege that the parcel numbers claimed by the plaintiff were irregularly acquired. The particulars of fraud pleaded are;

(i) Merger of RIM sheet numbers 6 & 12.

(ii) Fraudulent closure of public road.

5. The defendant also counter-claimed against the plaintiffs pleading that his late father owned parcel No. Bukhayo/Bugengi/1480 which measured approximately 30ha before it was sub-divided in 1984 to yield parcel numbers 1529 measuring 25.75ha and 1530 measuring 4.25ha. The defendant pleads that the brace was absorbed into L.R No. 1529 to create a public road. He pleaded further that upon demise of his father, they sub-divided their parcel L.R No. 1529 into Nos. 6312 – 6331, 6429, 6560, 6561 and 6749 leaving out a portion of land approximately 0.94ha which was not given a number next to the portion numbered 6312.

6. The defendant avers that the unmarked portion was irregularly and illegally merged with the 1st and 6th plaintiff's portion. The particulars of illegality and fraud pleaded are:

(i) Illegally altering the RIM No. 6.

(ii) Encroaching on to a road reserve.

(iii) Encroaching on the unmarked portion.

(iv) Acquiring titles with exaggerated surface areas in a fraudulent way.

It is the defendant's further claim that the late David Ochenja fraudulently caused the subdivision of 1530 in a manner that altered the map sheet No. 6 leading to the issuance of title Nos. 4812 – 4815 and the subsequent numbers 6914, 7060-7064; 7579-7583 which interfered with his land parcel No. 12807.

7. He prayed to be granted:-

a) An order by way of permanent injunction be and is hereby issued restraining the defendants to the counter-claim whether by themselves, their servants and/or agents or through and other person(s) or authority from interfering with quiet user and possession of that land parcel No. Bukhayo/Bugengi/12807 owned by the plaintiff to the counter claim herein.

b) That a declaration be and is hereby made that the sub-division of land parcel Number Bukhayo/Bugengi/1530 and consequent issuance of title numbers Bukhayo/Bugengi/4813, 4814, 4815, 7060, 7071, 7062, 7063, 7064, 7579, 7580, 7581, 7582 and 7583 was irregular thus nullified.

c) Costs of the suit and counter claim.

d) Interest on (c) above

e) Any such other or further relief as this honourable court may deem fit and appropriate to order.

8. After the close of the pleadings, parties agreed to rely on the evidence of the Land Registrar and the surveyor and their reports pursuant to the consent recorded in court on 17th May 2008. Paragraph 7-8 of the said consent stated thus;

“7. The report made and filed be adopted as determination of the dispute between the parties herein and the suit be marked as settled with costs to be paid by the offending party.

8. That upon adoption of the report, any aggrieved party to have a right of appeal within 30 days from date of adoption of the same in court.”

9. The Land Registrar, Mr. Wilfred Nyandoro Nyaberi presented his report on 23rd March 2021. He stated that he was directed by an order of this court to determine the boundary between Bukhayo/Bugengi/7064, 6914 and 6312. They visited the ground, summoned both parties and heard their evidence before compiling his report. His report gives chronology of sub-divisions arising from L.R No. 1529 and the chronology for L.R No. 1530 subdivisions.

10. The Registrar summarized his report that L.R No. 1480 had a road of access passing through it and which still exists to date on the ground. Later 1480 was subdivided to create parcel No. 1529 and 1530 and with this sub-division on 1/2/1984 the brace was removed. However the later mutation for 6312 indicates it brought L.R No. 1529 & 1530 together as the mutation was super-imposed on the two parcels and it re-introduced the braces earlier removed. According to the Registrar, this sub-division was fraudulent since it created parcels Nos 12807-12817 yet L.R No. 12807 has no land on the ground. He produced his report as *Pex 1* and the mutations as *Pex 2(a) & (b)*.

11. On cross-examination by Miss Willy learned counsel for the defendant, the Land Registrar stated that he did not have mutation for parcel No. 7060 but it was a resulting sub-division from parcel No. 4812. From the mutation report of L.R No. 4812, it bore numbers 6913 and 6914. Then 6913 gave rise to 7060-7064. That L.R No. 4812 is on RIM No. 6 and it measures 3.85ha.

12. The Busia County Surveyor Mr. Geoffrey Kamadi also presented his report dated 15/10/2019 on the same date 23/3/2021. He stated that the sub-division of L.R. 1480 into 1529 & 1530 canceled the braces. The road of access respected the boundaries between 1529 and 1530. The surveyor stated that the sub-division of 6312 was erroneous because it re-introduced the braces this is what caused the problem as it was sub-divided into 7060-7064. He also said that parcel No. 12807 is on the ground position occupied by parcel No. 1530 thus encroaching by

0.94ha. The witness produced his report as *Pex 3* and the mutations attached as *Pex 4-11*.

13. In cross-examination by Ms. Willy for the defence, the witness stated that 1529 measured approximately 25.75ha while 1530 was approximately 4.25ha. As per the mutation, 4812 is measuring approximately 3.85ha and it was sub-divided into 6913 and 6914. The area for 6913 is given as 3.32ha sub-divided into 7060-7064. That the mutation for 7061-7064 added together sums up to a total area of 4.84ha. The surveyor admitted this was erroneous. Further on cross-examination, the witness agreed that mutation for 7060 which was sub-divided to produce L.R. Nos. 7579-7583 shows L.R No. 7060 is on map sheet 6 & 12 which he said was an oversight on the part of the licensed surveyor. Mr. Kamadi stated that his report gives three subdivisions which were erroneous. In re-examination, the witness stated that the 6th sub-division which re-introduced the brace was also erroneous.

14. From the survey report, he recommended the parcels of land that need to be resurveyed to correct the anomalies captured in his findings. The parcels to be re-surveyed are; L.R No. 4812 which created parcel Nos. 6913 and which was subsequently sub-divided to create 7060-7064 as well as the subdivision of Bukhayo/Bugengi/7060 that created 7579-7583.

15. From the documents exhibited by the two land officers, it is evident that the first sub-division which created parcel Nos. 1529 and 1530 had no issue. The dispute arose from the subsequent sub-division of 1529 and 1530 respectively. For instance, the mutation for 4812 indicate it measured 3.85ha before it was sub-divided into 6913 and 6914. However, the resultant subdivisions from 6913 gives a higher acreage of 4.84ha. The County Land Registrar and County Land Surveyor stated that the public road of access separating L.R Nos 1529 and 1530 are still in place. In my opinion, this means that the difference in acreage on the mutation have been created by the licensed surveyors who carried out the sub-divisions but it did not encroach on the defendant's original parcel No. 1529. The resurvey proposed by the County Surveyor would most likely correct the anomaly.

16. On the other hand, both the County Land Registrar and County Land Surveyor agreed that there was a problem of sub-division of L.R No. 6312 because it re-introduced the brace. Secondly, they established that one of the sub-divisions from L.R 6312 being number 12807 was in ground position on the side that belonged to L.R No. 1530. This is further corroborated by the defendant's pleading that during sub-division of L.R No. 1529, a portion measuring 0.945ha was left out and which portion was next to L.R No. 6312. The defendant did not explain how this portion originally was left out when parcel No. 6312 was created and the process he undertook to merge with his parcel No. 6312 so that it comprised part of L.R No. 6312. It is after the merger that the same was sub-divided to create parcel Nos. 12807-12817. The illegality committed by the defendant is clearly displayed by the chronology given by both witnesses and supported by the documents produced.

17. In light of the foregoing analysis, I am satisfied that the plaintiff's case is proved on a balance of probabilities that the defendant's land parcel No. Bukhayo/Bugengi/12807 has encroached onto the plaintiffs' side of the land (originally Bukhayo/Bugengi/1530). Further, it is my considered opinion and I so hold that the defendant's counter-claim has not been proved. The allegation of fraud required to have been proved on a scale higher than in civil cases. The evidence from the two Land Officers showed a variance of sizes on what is on the ground and what was on some of the plaintiff's title. However, there was no interference of the defendant's land on the ground. Thus the anomalies are merely administrative mistakes that can be corrected by an order of this court. Consequently, the counter-claim is hereby dismissed. I enter judgment for the plaintiffs on the following terms:

a) A permanent injunction restraining the defendant either by himself, his agents, servant and assigns from entering, constructing, trespassing, cultivating or otherwise dealing with the land parcel No. Bukhayo/Bugengi/4813, 4814, 4815, 6914, 7060, 7061, 7062, 7063, 7064, 7579, 7580, 7581, 7582 and 7583 the properties of the plaintiffs.

b) The defendant's title Bukhayo/Bugengi/12807 be cancelled to avoid further disputes arising in the future.

c) (i) There be and is hereby ordered a resurvey of what

was parcel No. 4812 so as to conform with the ground position.

(ii) The resurvey include the resulting sub-divisions of

(i) above in respect of Bukhayo/Bugengi/6913 and 7060 to conform with the physical sizes on the ground and place the boundary marks.

(iii) The plaintiff to meet cost of resurvey.

(iv) The nearest police station to provide security to

the County Surveyor during the exercise.

d) Each party to meet the respective cost of the suit.

Dated, signed & delivered at BUSIA this 20th day of September, 2021.

A. OMOLLO

JUDGE