



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 36 OF 2018

KARIM OJIAMBO ABUDO.....PLAINTIFF

VERSUS

DOROTHY SIKADA OGOMBO BWIRE.....1ST DEFENDANT

ELIZABETH AKUMU WASIKE

(legal representatives of JOSEPH OGOMBO BWIRE).....2ND DEFENDANT

JUDGMENT

1. The plaintiff's suit filed via a plaint dated 7th May 2018 and was later amended on 16th October 2019 prayed for judgment against the defendant for;

- a. **Cancellation of title in respect of L.R. BUNYALA/BULEMIA/2426.**
- b. **An order be made for rectification and or cancellation of the register by removing the defendant's names and inserting thereof the plaintiff's name as the sole registered owner of L.R. BUNYALA/BULEMIA/2426.**
- c. **Costs of this suit.**
- d. **Any other alternative relief which this Honourable Court may deem fit to grant.**

2. The plaintiff averred that during the demarcation process in 1972 in Bulemia Adjudication Section he was the sole registered owner of L.R. BUNYALA/BULEMIA/358 in trust for himself and his brother who was still a minor. He impleaded that in August 1977, the late Joseph Ogombo Bwire approached him and asked him to sell to him part of L.R. BUNYALA/BULEMIA/358 which request the plaintiff replied to that he can only sell after ascertaining its size and after sharing it out with his brother. Unfortunately, in September 1977, the plaintiff while in Uganda was arrested and jailed for 20 years at Luzira Maximum Prison. He stated that in 1998 when he returned to Kenya, he discovered that the late Joseph Ogombo Bwire had settled on his land.

3. Consequently, the plaintiff protested by reporting to the area clan elder (Liguru) who summoned Joseph but Joseph refused to attend the barasa upon which refusal he was advised to report to the District Officer (Assistant Sub-County Commissioner). The plaintiff further contended that he discovered from the lands records in 2016 that the late Joseph Ogombo Bwire had fraudulently registered L.R. BUNYALA/BULEMIA/2426 in his name. He listed the particulars of fraud as;

- i. *The late Joseph Ogombo Bwire influenced the demarcation officer to reduce L.R. BUNYALA/BULEMIA/358 in size so as to create a separate parcel as L.R. BUNYALA/BULEMIA/2426 as if it did not come from the original parcel aforesaid.*
- ii. *The late Joseph Ogombo Bwire caused demarcation officer to give him land measuring 2.0HA in the absence as the plaintiff was away serving a jail term of 20 years in Luzira Maximum Prison.*
- iii. *The late Joseph Ogombo Bwire fraudulently obtained consent from Budalangi Land Control for correction of name from Joseph Bwire to Joseph Ogombo Bwire.*
- iv. *The defendant having known that the plaintiff was in jail influenced the registration of L.R. BUNYALA/BULEMIA/2426 in his name without any justifications as he does not belong to Abayie Clan.*

v. The plaintiff shall at hearing hereof content that the defendants hold the legal title in L.R. BUNYALA/BULEMIA/2426 in trust for the plaintiff.

4. The defendants entered appearance and filed their defence on 24th May 2018. The defendants averred that the suit is statute barred and the same should be struck out. The defendants further stated that the plaintiff sold to their late husband 2hectares of his land before the land was adjudicated and the defendants' husband registration as owner of the land was a first registration. The defendants denied that their husband was fraudulently registered as owner of land parcel no. BUNYALA/BULEMIA/2426 and put the plaintiff to strict proof thereof.

5. The matter was set down for hearing on 8/7/2020 for the plaintiff's case. PW1, KARIM OJIAMBO ABUDO, testified that he lives in Bunyala and he is 70 years old though his ID reads 68 years old. He stated that during the land adjudication process he was not at home. That his brother and himself were allocated land by their paternal uncles hence his registration was in trust for himself and his brother Benson. He stated that his uncle came with Joseph Ogombo Bwire requesting to buy land and he was agreeable to sell ½ acres after the land was measured and also with permission obtained from his brother. Subsequent to this conversation, he was arrested, charged and convicted to prison sentence in Luzira prison and was released in 1997.

6. PW1 stated that on his return, he found some people had entered into his land without his consent. He requested for a search from the lands office on 31/1/2017 and he produced the prison document as PEX 1 and the application for search as PEX2. Before filing this case, he took the matter to the Liguru but the defendant never came and he was referred to the chief who later referred him to the DO in 1998. He testified that the D.O referred him to the Tribunal Court and the respondents appeared before the Tribunal where the tribunal made an award in their favour. He produced a copy of the judgment as PEX3. He further testified that the chairman of the Tribunal died before the award was adopted as an order of the court. He stated that his land is L.R No.358 and for Joseph Ogombo is L.R No. 2426. The land which Ogombo is claiming as theirs neighbours his land. He had never known the existence of title L.R. No.2426. He prayed that the title No. Bunyala/Bulemia/2426 be rectified and his name be registered as the owner thereof. He produced the green card for L.R. No. 358 as PEX4. He also asked for costs of the suit.

7. On cross examination, PW1 stated he was never called Henry and that he never sold any land to Joseph Ogombo. He disputed the contents of paragraph 6 of the Land Disputes Tribunal proceedings produced as PEX 3 as being untrue. He stated that this suit was filed in 2018 but he started the case of land in 1998 at the village elder's office. He admitted that when he was released from prison he found people on his land who are still there and his brother Benson was living in Mombasa. He stated that PEX 4 shows that L.R. 358 is about 3 ½ acres yet people are on his land. He denied ever receiving Kshs. 2700 on 9/7/1975. He admitted that in 1975 Ogombo gave him Kshs. 50 and he is not aware that on 25/7/1976 Ogombo gave his mother Kshs. 460/=. The plaintiff conceded that the green card for 2426 does not show that it was curved from L.R 358 but he insists that it was taken from 358. On re-examination, he stated that according to him L.R No. 358 and 2426 was one parcel and he never participated in the sub-division process.

8. PW2, BENSON M. OKADO, testified on 30/11/2020 by adopting his witness statement filed on 30th June 2020. He stated that he comes from Mumbaka village in Bunyala sub-county and he is a farmer. That the plaintiff is his elder brother. Pw2 continued in evidence that during the demarcation period in 1972 the whole of their ancestral land was registered as BUNYALA/BULEMIA/358 in the name of OJIAMBO ABUDO (PW1). After fourth form, he went to Mombasa to look for employment and left his mother managing the home. In 1995, he came back home to see his mother and found the defendants' husband JOSEPH OGEMBO BWIRE using the land. When he demanded to know, he was informed that he bought the land from his elder brother.

9. The witness stated that in his knowledge he knew that even if the defendants' husband is registered against the title he is holding in trust for him and his elder brother. Upon investigations he reported the matter to a clan elder who called the defendants' husband and as it was a matter that was complex for the village elder so the elder recommended that PW2 reports to the District Officer (sub county commander). Pw2 stated that he visited the District Officer's office who advised him to lodge a dispute in the Budalang'i Land Dispute Tribunal. However, the tribunal was disbanded before they could file the award in court at Busia for adoption. It is his evidence that he does not know the defendant.

10. On cross examination, the witness stated that his written statement referred to parcel no. 358 where he lives on and that the plaintiff has no place to build on. He stated that the plaintiff currently lives in the home of his younger paternal uncle. He had sued the plaintiff and the defendant's husband before the Tribunal. The original size of parcel no. 358 was 20 acres and it was their land. He included the plaintiff in the suit because he had sold land to the people sued before the Land Disputes Tribunal.

11. On 13/4/2021 DOROTHY SIKADA BWIRE gave her testimony as DW1. She testified that she is the widow of Joseph Ogombo Bwire. She adopted her witness statement filed in court on 3/7/2020 inter alia stating that the 2nd defendant and her were issued with Grant of Letters of Administration Intestate of the estate of their late husband Joseph Ogombo Bwire. She stated that they reside in Mumbaka area, Budalangi constituency on Land parcel no. BUNYALA/BULEMIA/2426. That before her deceased husband purchased 6 acres of land from Henry Odhiambo Abudo they lived in Port Victoria.

12. Dw1 testified that their husband purchased the said 6 acres of land on 9th July 1976 before adjudication @Kshs. 600/= per acre and the whole amount was paid. She added that she was unable to trace all the documents to show the whole amount was paid because it has taken time. She stated further that it was Henry who sold the land to her husband and she was not aware that the plaintiff changed his name from Henry to Karim. Later on, the the sold portion of the land was registered in 1986 in the deceased name and became known as BUNYALA/BULEMIA/2426. That Joseph Bwire-deceased was issued with the land certificate on 3rd January 1986. She concluded her evidence stating that the plaintiff's family home neighbours their home and the brother Benson Mbwede resides in the home while the plaintiff resides on a different piece of land.

13. On cross examination, the witness confirmed that her husband bought land from Henry Ojiambo Abudo and the name of Karim Ojiambo Abudo was not there in the agreement. She stated that they are living on less than 6 acres as it was eaten by the road on the upper and lower parts. They have never had cases done before the chief or Land Registrar. DW1 said she was aware of the case before the Tribunal and the elders came on the land. That if there were other cases, they were handled by their husband. She stated that from the documents she got there

is no evidence of payment of Kshs. 300. She stated that the plaintiff later asked for a blanket and Kshs. 400 which they gave him but it was not recorded. This marked the end of the defence case.

14. The parties agreed to file written submissions with the defendants' filing their submissions on 21st May 2021 and the plaintiff filed his submissions on 9th June 2021. The defendants submitted that the plaintiff did not prove fraud and that the suit is time barred as it was filed 21 years later. They prayed that the suit be dismissed with costs as the plaintiff has not proved his case against the defendants.

15. The plaintiff submitted that it is difficult to patch up the pieces of the defendants' evidence and get an acceptable explanation as to how their late husband acquired the suit land otherwise than that it was illegally/fraudulently acquired and the plaintiff is not bound by an agreement of sale which he was not a party to. He further submitted that the suit is not time barred as the time started running when the plaintiff discovered the fraud which was on 31/1/2007 after conducting the search. He submitted that the plaintiff is entitled to have the register for L.R. BUNYALA/BULEMIA/2426 rectified by removal of the defendants' late husband name and insert therewith the plaintiff's name. He prayed that he be awarded costs for the suit.

16. Going by what is pleaded, the evidence adduced and the submissions rendered, I frame the following issues for determination;

- a. *Whether the plaintiff has proved that the registration of the defendants was fraudulent or*
- b. *Whether or not the defendant is holding the title to the suitland in trust for the plaintiff*
- c. *Whether the plaintiff is entitled to the prayers sought.*
- d. *Who should pay costs?*

17. On the first issue, the documents produced in evidence particularly the green cards for parcel numbers Bulemia/358 show the plaintiff as the first registered owner and Bulemia/2426 show Joseph Bwire-deceased as the first registered owner. The plaintiff's claim is that L.R 2426 formed part of parcel number 358 thus the defendant irregularly got registered. He admitted that the defendant had expressed interest to buy a portion of the land from him however he moved to Uganda in September of 1977 before selling.

18. The burden of proving the alleged fraud rested entirely on the plaintiff. Secondly, the standard of proof is required to be made on a scale higher than in civil cases. In **RG PATEL VS LALJI MAKANJI (1957) EA 314** the court expressed itself as follows:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"

19. The plaintiff pleaded the particulars of fraud inter alia that the deceased influenced the demarcation officer to reduce the size of his land no 358 and created a separate parcel being the suit parcel. In his evidence, the plaintiff did not inform this court the size of his land before or during adjudication. According to him, one of the reasons he did not sell the deceased land was because he needed to ascertain the size before selling. Pw2 stated that parcel number 358 was measuring 20 acres before the interference which evidence was unsupported since no records from the adjudication register was produced. Further the copy of register for 358 show is measuring 1.4ha while 2426 measure 2.0ha which added together does not translate to 20 acres.

20. The plaintiff pleaded that the late Joseph Bwire fraudulently obtained letter of consent from the Budalangi Land control board for correction of name. There was no evidence led on what was fraudulent on the process of acquiring the consent to correct the name or how the correction affected his interest in the land. In the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** the Court of Appeal expressed itself as follows:-

*"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."* In cases where fraud is alleged, it is not enough to simply infer fraud from **the facts.**"

21. **Section 143** of the Registered Land Act (repealed), which granted the court power to order rectification of the register provided as follows:

"143. (1) 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.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

22. In the case before me I find that none of the particulars of fraud alluded to have been proved. Further, the defendant holds the title as the first registered owners hence their title cannot be vitiated on account of fraud. This brings me to the next issue of whether or not the

defendant is holding title in trust for the plaintiff and his brother Benson (PW2). The plaintiff testified that he was agreeable to sell to the defendants ½ acres of land after consulting his brother and that he received Kshs. 50/= from Joseph Bwire. However, the sale never happened due to him being imprisoned in Uganda. The defendants on the other hand have stated that the plaintiff and their husband entered into an agreement for sale of land where their husband bought the six acres for Kshs. 600/= per acre and that the plaintiff was paid the entire purchase price. The defendant produced in evidence as Dex I(a)-(c) a sale agreement dated 9th July 1976; 25th July 1976 and 13th August 1976 and which referred to the plaintiff as Henry Ojiambo Abudo. The plaintiff insisted that he was always known as Karim because of his Muslim faith.

23. The dates given in the agreement are before sept 1977 when the plaintiff stated he was imprisoned. Besides the disputed first name of the plaintiff given as Henry, the plaintiff did not deny the signature appearing on those documents. During cross-exam, PW1 was referred to paragraph 6 of the report by the Tribunal court (pex3) which paragraph read thus; “*Accused no 1 Karim Ojiambo explained to the panel that the three buyers gave him little money in his business. Later he could subdivide with his young brother Benson his portion and the remaining share of his shamba to give the three and finish with remaining each balance*”

24. The rules of procedure in order 2 rule 10 of the Civil Procedure Rules requires a party basing his claim under the doctrine of trusts to give particulars of the trust in their pleadings. Secondly, trust is a question of fact which must also be proved by evidence. In the amended plaint, the plaintiff pleaded on trust thus, “*the plaintiff shall at the hearing hereof contend that the defendant hold the legal title Bunyala/Bulemia/2426 in trust for the plaintiff*” There was no particulars of the trust which followed this statement. The plaintiff has not led any evidence of how the trust claimed was created. The Supreme Court in the case of **Isack Minanga Kiebia vs Isaaya Theuri & Ano (2018) eKLR** stated that each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **James N. Kiarie v. Geoffrey Kinuthia & Another (2012) eKLR** that what is essential is the nature of the holding of the land and intention of the parties. The following were the principles set in the Kiarie v Kinuthia case;

a. *The land in question was before registration, family, clan or group land*

The claimant belongs to such family, clan, or group

b. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*

c. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*

d. *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

25. The plaintiff’s case has not met any of the principles laid out in the Isaack case *supra* since there is no iota of evidence adduced setting out the relationship of the defendant and the plaintiff. Further, the evidence of purchase demonstrated makes a case of the defendant being entitled to his land as of right. The defendant also raised the issue of the plaintiff’s claim being time barred which averment the plaintiff denied. In his evidence, the plaintiff stated that he returned to Kenya in the year 1998 and found the deceased and his family leaving on the portion he is claiming. According to the plaintiff time started running after the plaintiff discovered the fraud and that happened on 31.01.2007 and the plaintiff filed the suit within the 12 years’ limit. In my view, it’s the claim on fraud that its time could be calculated to run from 2007 when the search was made. If indeed the plaintiff learnt of the fraud in the year 2007 as submitted (at par 2 of p. 3) then his claim under fraud is equally time barred. Fraud is a tort whose claim must be brought before the lapse of three years from the date of discovery. This suit was filed on 7th May 2018 which is 17 years from the time of discovery of occupation by the defendant in the year 1998. Section 7 of the Limitation of Actions Act Cap 22 states that, “**an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person**”

26. Section 26 of the Land Registration Act provides that a title shall not be challenged unless it was obtained illegally, unprocedurally or through a corrupt scheme. While the plaintiff has not proved some of the particulars of fraud raised in the plaint, he has shown that the defendants title was obtained unprocedurally. I am not satisfied that the conditions provided for impeachment of the defendant’s title as per the provisions of Section 26 (1) (b) have been met.

27. The summary of my findings is that the plaintiffs have not made out a case against the defendants to be entitled to the orders sought. The consequence of this finding is a dismissal of the plaintiff’s suit for lack of merit. The costs of the suit is hereby awarded to the defendant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 19TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE