



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 162 OF 2017

FREDRICK WABWIRE MAKOBA.....1ST PLAINTIFF

PATRICK ODHIAMBO MAKOBA.....2ND PLAINTIFF

TARCISIUS ODUORI.....3RD PLAINTIFF

= VERSUS =

BARASA OWINO MAMBANGA.....1ST DEFENDANT

JUDGMENT

1. The plaintiffs brought a suit via a plaint filed in court on 20th September 2017 and later amended and filed in court on 1st November 2019. They prayed for judgment against the defendant for;

- a) Eviction order**
- b) Costs of this suit.**
- c) Any other relief this Honourable Court deems fit to grant.**

2. The plaintiffs averred that they are the registered owners of land parcel no. Bukhayo/Kisoko/10510 measuring approximately 0.7Ha which was created from a subdivision of Bukhayo/Kisoko/3295 and that they have been in occupation of the suit land for the last 7 years. The plaintiffs pleaded that they severally and jointly purchased a portion of land measuring 0.7 Ha out of land parcel no Bukhayo/Kisoko/3295 from the defendant at a consideration of Kshs.192,000/= which amount was paid in full pursuant to a land sale agreement entered on 12/12/2010. That immediately after the sale, the defendant left for Uganda before he recent return and without any colour of right trespassed upon the plaintiffs' suit land using the small house he had not demolished.

3. The defendant entered appearance and filed his defence and counterclaim on 15th June 2020. He averred that he is the legal proprietor and the registered owner of land registration Bukhayo/Kisoko/3295. He stated that it is strange that the plaintiffs are now the registered proprietors of L.R. Bukhayo/Kisoko/10510 and puts them to strict proof of the acquirement. He averred that the plaintiffs have acquired the suit title on sub-division without the defendant's consent, thus the acquisition was fraudulent. He listed down the particulars of fraud as follows;

- i) The plaintiff through the assistance of the land registry subdivided land parcel No. Bukhayo/Kisoko/3295 without the Defendant attending the land control board.*
- ii) The plaintiff fraudulently acquired the title deeds after filing of the suit.*
- iii) The plaintiff changed acquired the Title Deed No. Bukhayo/Kisoko/10510 not knowing that the land registration no. Bukhayo/Kisoko/3295 was intact in the names of the defendant.*
- iv) The plaintiff purportedly filed this suit not knowing that they had a title deed in place and there was no need of filing this suit if indeed they have a title deed.*
- v) It is clear evidence that the plaintiffs are NOT HONEST on their part and to this honourable court.*

4. On the counterclaim, the defendant sought an order of court that the subdivision which was purportedly done by the plaintiff at the land

registry on 1st August 2019 and any other alteration which may have been done by the plaintiff and registered in their names be cancelled and struck out. The defendant further pleaded that there is a criminal case no. 1357/2017 which is pending in court over the same subject matter. The defendant prayed that the plaintiffs suit be dismissed with costs and for judgment against the plaintiffs on the counterclaim for;

a) The title deed Bukhayo/Kisoko/10510 purportedly issued into the names of the plaintiffs be cancelled and reverted to the original status Bukhayo/Kisoko/3295 as per the early records produced in the Honourable Court and the suit be dismissed.

b) That the plaintiff pays menses profits to the defendant.

5. The matter was set down for hearing on 23/3/2021 with Fredrick Makokha, PW1, giving his evidence in chief. He testified that he is a resident of Nambale Township and he is a farmer. He adopted his witness statement filed on 25/2/2019 as his evidence. He testified that on 12/12/2010 together with the 2nd and 3rd plaintiffs, they entered into a land sale agreement with the 1st defendant. They purchased a portion of land measuring approximately 0.7 HA out of LR. Bukhayo/Kisoko/3295 measuring 1.77 HA at a considerate price of Kshs.192,000/= which they paid in full on the same date 12/12/2010. He produced the sale agreement as PEX1. At the time of the sale, LR. Bukhayo/Kisoko/3295 had a caution that was registered by Joseph Nabwire who is the brother to the defendant. They called Joseph Nabwire to inquire about the caution and he told them that they had settled the dispute amongst themselves and he was ready to remove the registered caution.

6. After they had paid the whole amount as agreed for the portion of land measuring 0.7HA, the defendant who was the seller agreed and accepted and signed all relevant documents for application of consent of subdivision and transfer of the sold portion to the names of the plaintiffs. He produced the letter of consent to transfer dated 4/4/2019 as PEX 2, application for Land Control Board dated 11/3/2019 as PEX 3. The sold portion of land had the defendant's houses that he had agreed to demolish immediately after he had relocated to Uganda where he was purchasing a land for his home. He stated that the defendant demolished other houses leaving a small grass thatched house which he requested them to allow him to demolish after his family and himself had settled in their newly relocated home in Uganda. The plaintiffs took possession of the suit land and started utilizing it. To their surprise the defendant came back and began to repair that small house that was almost collapsing in their purchased land and reoccupied it again with his family.

7. The plaintiff reported the defendant to the area assistant chief and he produced the letter as PEX 4. He testified that they tried to request the defendant to vacate but he refused and when he started building another house they sought the help of the police at Nambale Police Station who arrested him and charged him with a criminal offense. The witness also produced a copy of the search of LR. BUKHAYO/KISOKO/3295 as PEX 5 and the green card as PEX 6. That the defendant has refused to vacate the suit land and he prayed that the Honourable Court do issue an eviction order to the defendant to vacate the suit land and his counterclaim be dismissed.

8. On cross examination by the defendant, PW1 stated that it was the surveyor who prepared the sale agreement and the Liguru was not present during the sale as the land belonged to the defendant. He also stated that the defendant's wife and brother were present as his witnesses. On re-examination, the plaintiff stated that his witnesses were Fatuma and Michael and that it was not a must to have the Liguru attend for the agreement.

9. PW2 was PATRICK MAKOKHA who testified that he is a farmer and a business man and has his home in Kisoko within Nambale Township. He adopted his witness statement whose contents were similar to the evidence of PW1. He further averred that the defendant is a neighbour and he calls him an uncle within the clan. That they bought the land from the defendant in the presence of witnesses and they did not force him to sell the land. PW2 wanted the defendant evicted from the suit land.

10. On cross examination by the defendant, PW2 stated that it was the surveyor who prepared the sale agreement dated 12/12/2010. When shown an agreement by the defendant, PW2 stated that it is not the same as their agreement and the signatures on it is not theirs. The witness stated that the agreement he was being shown is between the defendant and Beatrice Anagoya. That the Liguru was not present during their transaction and it is not a must that a Liguru be present.

11. The defendant testified as DW1 stating that he comes from Kisoko. That the three plaintiffs who are brothers wanted land to plant sugarcane. He agreed that they pay him Kshs. 220,000/= instead they paid him Kshs. 192,000/= cultivating the suit parcel no. 3295 for 6 years. The defendant continued that the plaintiffs harvested cane seven times. While he was waiting for them to leave, the plaintiffs reported him before the chief where he denied selling the land. DW1 averred that the dispute was not resolved hence the chief sent him away. However, the complainants later reported him to the police station causing his arrest on 7/8/2017 and being charged with the offence of obtaining by false pretence. He stated that the plaintiffs are still using his land to date. He produced a sale agreement as DEX 1.

12. On cross examination, the witness stated that Michael Okeno and Joseph Wabwire are his brothers. He admitted that the agreement refers to buying and selling land. He also admitted signing the agreement except that he does not know how to read. He confirmed receiving Kshs.192,000/= from the plaintiffs. The defendant stated that the portion given had family houses but he denied demolishing any house. He has not lodged any complaints against the plaintiffs and he did not agree to vacate any portion. The defendant asserted that he did not know the truth about the plaintiffs' title documents since they got title while he was in prison. He further stated that he had not lodged a complaint about the title because he did not know they had obtained title deed.

13. DW2, FATUMA NALIKA, who is a wife to the defendant stated that the plaintiffs leased land but instead changed that they had bought the land. On cross examination, she testified that she was forced to sign the agreement by the plaintiffs and that the defendant was paid money for lease. That the plaintiffs have been using the whole land since 2010 and they have not lodged any complaints against them. DW2 stated that the surveyor also came to the land during the transaction between the defendant and the plaintiffs.

14. DW3, MICHAEL OKENO, in his testimony said that he comes from Nambale and he is a brother to the defendant. That his brother told him that he wanted to lease his land and he was present when he was paid. Later he heard through people that the defendant had sold the land and he was surprised with the information. On cross examination, DW3 admitted that he signed the sale agreement which was produced as PEX 1. With these evidence, the defendant closed his case.

15. The parties agreed to exchange written submissions but at the time of writing the judgment neither of the parties had filed any submissions. From the pleadings and evidence presented by the parties, the issue for determination before this court is whether the plaintiff is entitled to the prayers sought in the plaint.

16. From the evidence adduced, both the plaintiffs and the defendant admit that they executed an agreement between them. The only variation is the content of that agreement whereby the plaintiffs state that it was a sale agreement while the defendant insist that it was a lease agreement. For their part, the plaintiffs produced as Pex1 a sale agreement for Kshs.192,000/= dated 12/12/2010 duly executed by them and the defendant. On the other hand, the defendant produced as DEX1 a sale agreement dated 15/6/2010 which provided the consideration as Kshs.220,000/= and which according to the defendant was a lease agreement with the plaintiffs. The two agreements though prepared on separate dates both give the purpose as buying and selling L.R. number Bukhayo/Kisoko/3295. It is belated for the defendant to raise a defence of not of not knowing how to read and without any supporting evidence.

17. DW2 who witnessed the sale on behalf of the defendant confirmed that the surveyor was present when they entered into an agreement. The plaintiffs went further to produce the letter of consent to transfer and application for Land Control Board as part of their evidence that the defendants had sold the suit land to them. The plaintiffs evidence was corroborated by the documents produced and the defendants who confirmed that there was a land transaction which took place. I do find that the plaintiffs and the defendants entered into a sale agreement for land on 12/12/2010.

18. The plaintiff has in the amended plaint stated that the defendant's brother who they had earlier sued removed the caution he had placed on the title to LR. BUKHAYO/KISOKO/3295 and they were able to register the transfer documents and get a title deed issued in their name. Although the defendant has claimed that the issuance of the title in the name of the plaintiff was fraudulent he did not prove the particulars of fraud alleged. As regards standard of proof of fraud, the law is quite clear. In *R.G. Patel v. Lalji Makanji (1975) EA 314*, the former Court of Appeal for Eastern Africa stated thus:

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

19. The defendant in his evidence just stated that the title was acquired while he was in prison and that he did not attend the Land Control Board to transfer the suit land. DW1 did not however dispute his signature in the application for consent of land control board (PEX 3) and nor is there produced records from the respective Land Control Board to support that the letter of consent to transfer (PEX 2) was irregularly obtained. The plaintiffs have stated that they moved into the suit land immediately after the agreement and have been in occupation since then. The defendant, DW1, did not dispute the possession of the plaintiff during those years and one would wonder why if the land was leased then why did the plaintiffs to settle on it.

20. As the registered owners of the land and in occupation thereof, the plaintiffs are entitled to exclusive use and possession in accordance with section 24 & 25 of the Registration of Land Act. Consequently, I find no reason to deny the plaintiff the orders of eviction he is seeking. Accordingly, I enter judgment in the plaintiff's favour in the following terms:

- a) The defendant is granted 90 days to surrender vacant possession of the portion of land BUKHAYO/KISOKO/10510 he is occupying.**
- b) In default, the plaintiff is granted liberty to evict him using lawful means.**
- c) Costs of the suit is awarded to the plaintiff.**

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE