



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 283 OF 2018

PETER OMOLO AMOKE & 4 OTHERS.....PLAINTIFFS

VERSUS

REBECCA OKEYO & 9 OTHERS.....DEFENDANTS

JUDGEMENT

The Plaintiffs herein have come to court claiming to be sons of Paul Amoke Mbede and Shadrack Adum Mbede and therefore grandsons of the late Mbede Ochieng who was the original owner of the all that parcel of land stretching all the way from Kahajo to Kojuok and then lengthened upto Aira Diere. They claim to be the beneficiaries of the suit land.

The Plaintiffs claim that during land adjudication, the 2nd, 6th and 7th Defendants secretly, wrongfully and fraudulently caused the said land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 to be registered in the names of the Defendants or their relatives or proxies or surrogates and the same are now being illegally occupied by Mama Rebecca Okeyo (Alexander Okeyo_ - parcel No. 1; Gedion Oyugi Anya – parcel No. 3; Ongong’a Anya (sylvester Ouma Anya) – parcel No. 6; James Olang’o Anya – parcel No. 14; Alice Omondi j(Abuya Olang’o) – parcel No. 11; James Ndewyi Oyola – parcel Nos. 7 & 531; Peter abuya Mikeke (Aristariko Ochieng’) – parcel No. 533; Fed Amolo Ndweyi (Ndewi Agik) – parcel No. 533; James Oluoch Mikeke (Samwel Mikeke) – parcel No. 10.

The registration of the Defendants as proprietors of the said land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 was wrongful and fraudulent and has caused the Plaintiffs to be deprived of their rightful inheritance.

The Plaintiffs also aver (i) that the Defendants could only have been registered as proprietors of the said land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, (“yago” land), 14, 509, 512, 517, 520, 521, 531 (“Legio” land) and 533 as trustees for and on behalf of the Plaintiffs, (ii) that the registration of the Defendants as proprietors was in breach of that trust, and (iii) that the Defendants are therefore holding the said titles in trust for and on behalf of the Plaintiffs.

The registration of the Defendants as absolute proprietors of the said “yago” land and “legio” land and all the other pieces of land now registered as land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 has caused great loss and damage to the Plaintiffs for which they hold the Defendants liable to them jointly and severally.

The Plaintiffs pray for a declaration that the said “yago” land and “legio” land and all the other pieces of land now registered as land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 was registered in the names of the Defendants as proprietors only as trustees for and on behalf of the Plaintiffs, and that the defendants are therefore holding the title to the said land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 in trust for the Plaintiffs.

The plaintiffs further pray for an order that the register for land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 be rectified by cancelling the registration of the defendants as proprietors thereof and by registering the said parcels of land in the names of the Plaintiffs.

Moreover, an order that the 1st and 2nd defendants by themselves, their families, their servants, or agents, or proxies or any of them do vacate all portions of land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 forthwith or be vacated therefrom forthwith, and a permanent order of injunction restraining the said defendants by themselves or their families or their servants or agents or proxies or any of them from entering, occupying, remaining on, cultivating, developing or in any other way using the said land parcel Nos. KISUMU/NGERE/1, 3, 5, 6, 7, 10, 11, 14, 509, 512, 517, 520, 521, 531 and 533 or any portion thereof. Lastly, the plaintiffs pray for costs of this suit plus interest thereon.

In the joint statement of defence, the defendants admit that the Plaintiffs are grandsons of the late Mbede Ochieng and aver that Mbede Ochieng and brothers enjoyed communal ownership and right of access to and use of all that area in dispute and lived in love and tranquillity.

That during adjudication process of the land in dispute, Paul Amoke Mbede the father to eh 1st -4th plaintiffs were the chairperson of

Komundo clan in assisting the adjudication offer. The adjudication exercise was completed and plaintiffs were allocated parcels number 2, 12, 13, 524, 526, 527, 528, 529 and 330. The Defendants deny the allegation of fraud and the claim based on trust. The defendants pray that the suit be dismissed with costs.

When the matter came up for hearing, the PW1, Peter Omolo Amoke son of Paul Amoke testified that the land in West Ngare belonged to his grandfather. The 2nd plaintiff and 3rd Plaintiffs are his brothers whilst the 4th Plaintiff is his step brother. The 5th plaintiff is a 1st paternal cousin. He states that the defendants' grandfather or father was a brother to their grandfather. He relied on the evidence in the statement dated 15/10/2013 and filed on the 16/10/2013. On cross-examination he states that he does not understand the process of demarcation and adjudication.

PW2, Pascal Otieno Amoke states that he was told by his father Paul Amoke Mbede that their grandfather owned the land in dispute. The Defendants are descendants of the brothers of their grandfather. Their great grandfather had two wives. They are claiming the land from the defendants because their grandfather gave them land to use temporarily but not to own. On cross-examination he states that in 1984 he was member and was allocated land parcel number 529. His father was a member of the land adjudication committee dealing with the clan land. He admitted that all the defendants had lived and utilized the land before and after adjudication. The defendants were registered as owners of the suit land after adjudication.

PW3, Thomas Oyoo Amoke relied on his statement and confirms that he is a brother to PW1 and PW2. He states that his father was not represented during adjudication process. On cross-examination he states that during adjudication process he was not at home as he was working at West Kisumu Beach. He was registered as proprietor of Parcel number 52 without his presence. He also registered the other brothers.

He was given a paper and asked to sign. He was eventually registered.

The Plaintiffs closed their case and the defence opened its case with DW1 Gedion Shadrack Oyugi Anyah 80 years old stated that the plaintiffs and defendants lived cordially while they were young on the suit parcel of land. He was present during adjudication in 1981 and was elected to help the clan members during adjudication.

The Plaintiffs' father was also elected as a committee member to help in adjudication process. On cross examination by Mr. Orengo learned counsel for the Plaintiffs, he states that the plaintiffs and defendants belong to the same clan. The father of the plaintiffs was the clan representative. Some of the plaintiffs were present during adjudication process except the 1st and 5th plaintiffs.

DW2 James Neri Ogola, a retired Civil Servant relied on his statement and relied on the record. He was not present during adjudication but he knows that the process was never subjected to objection. Titles have never been challenged. Their land was never given to them by the Plaintiffs grandfather.

I have considered the pleadings, evidence on record and submissions filed and do find that on the 20th day of December 1982, the District Land Adjudication officer Kisumu District under Ref No. LND/ADJ/253/71 gave notice under Section 25 (c) and 26 (1) of the Land Action Act Cap 284 Laws of Kenya that the adjudication register for Ngare Adjudication Section had been completed. He gave directions on how the register could be inspected. Interested persons were given 60 days from the date of notice to file any objections. None filed the objection within the 60 days or at all.

The Plaintiffs claim is based on fraud. The particulars of fraud were pleaded in the plaint but the plaintiffs did not prove that the 2nd defendant ever abused his position as a member of the Land Control Board Kombere Division. If anything, the Land was not allocated to the defendants by the Land Control Board Kombere.

Moreover, it was not the 2nd Defendant allocating land to the defendants but it was a whole demarcation and adjudication process where the plaintiffs' father participated and was a member of the committee and caused part of the land to be allocated to some of the plaintiffs. The plaintiffs never, adduced any evidence of conspiracy between the defendants and the Land Adjudication officials to defraud the plaintiffs.

Allegation of the defendants being registered secretly has no basis as the record shows that the land adjudication officer Kisumu gave a 60 days' notice for any objection but none was forthcoming.

Allegation of fraud should be strictly pleaded particulars given and evidence produced. As to allegations of fraud and or misrepresentation, the law has been laid clear by several decisions of courts.

In the case of Gichinga *Kibutha Vs Caroline Nduku (2018)eKLR*

“The Black’s Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

11. *Fraud is essentially a common law tort of deceit and its essentials are:-*

- a. *false representation of an existing fact;*
- b. *with the intention that the other party should act upon it;*
- c. *the other party did act on it; and*
- d. *the party suffered damage.*

13. *It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th 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”

20. *Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that;-*

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

22. *The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the case of Koinange and 13 others – Vs - Koinange [1986] KLR 23 where the court restated the cardinal precept of the law of evidence that he who alleges must prove it”.*

The plaintiffs have failed to establish fraud against the defendants. Equally, allegations of the existence of trust are not proved by the plaintiffs. To begin with the plaintiff's father was present during adjudication process and therefore it was not possible that the suit properties were registered in the names of the defendants in trust for the plaintiffs. The allegations are watered down by the fact that some of the plaintiffs were allocated land during the adjudication process and that the 1st to 4th defendants father was an allocating member. The upshot of the above is that the suit lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE