



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 36 OF 2015**

**OSANO OSANO.....PLAINTIFF**

**VERSUS**

**YUNES KERUBO ORUTO.....1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR, KISII COUNTY.....2<sup>ND</sup> DEFENDANT**

**THE COUNTY SURVEYOR.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff instituted this suit by way of a Complaint dated 5<sup>th</sup> February 2015 seeking the following reliefs:

- a) A declaration that L.R No. NYARIBARI CHACHE/ BB/BOBURIA/7070 did not legally and lawfully originate from the sub-division of L.R No. NYARIBARI CHACHE/ BB/BOBURIA/3939.
- b) A declaration that the mutation form which created L.R No. NYARIBARI CHACHE BB/BOBURIA/7070 was a fraud, unlawful and irregular and the same ought to be cancelled or nullified.
- c) An order directing the 3<sup>rd</sup> Defendant to rectify the mutation form which sub-divided L.R No. NYARIBARI CHACHE/ BB/BOBURIA/3939 to remove parcel no. 7070 so that it can reflect exactly what is contained in the numbering register of 12/5/1989 and show that L.R No. L.R No. NYARIBARI CHACHE/ BB/BOBURIA/8136 extends up to the upper side of the road.
- d) A declaration that the 1<sup>st</sup> Defendant has no land to claim from the Plaintiff.
- e) A permanent injunction restraining the 1<sup>st</sup> Defendant by herself, her agents, servants or assignees from in any way or manner whatsoever claiming L.R No. NYARIBARI CHACHE/ BB/BOBURIA/7070 or any other land forming part of L.R No. NYARIBARI CHACHE BB/BOBURIA/3939.
- f) Costs and interest.
- g) Any other relief that this court may deem fit to grant in the circumstances of this suit.

2. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 18<sup>th</sup> March 2015 denying the Plaintiff's claim and stated that registered proprietor authorized the Registrar to add to the register L.R No. NYARIBARI CHACHE/BB/BOBURIA/7070 and that she acquired title to L.R No. NYARIBARI CHACHE/BB/BOBURIA/7070 on 8.3.1990 for valuable consideration.

3. The 1<sup>st</sup> Defendant denies the particulars of fraud attributed to her and states that her title is indefeasible as she is a bona fide purchaser for value who relied on the officers of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to survey and document the sub-division of L.R No. NYARIBARI CHACHE BB/BOBURIA/3939.

4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Defence dated 23<sup>rd</sup> July 2015 denying the Plaintiff's claim together with the particulars of fraud and stating that if the suit land was transferred to the 1<sup>st</sup> Defendant then the same was legally done with the consent of all the parties.
5. After the close of pleadings and having confirmed that the parties had complied with order 11 of the Civil Procedure Rules, the suit was set down for hearing on diverse dates between 10<sup>th</sup> December 2018 and 26<sup>th</sup> July 2021 when the parties testified.
6. The Plaintiff relied on his witness statement dated 5.2.2015. He testified that land parcel no. L.R No. NYARIBARI CHACHE/BB/BOBURIA/3939 belonged to his mother who sub-divided the land into two portions known as parcel 4486 and 4487 between her two sons. The Plaintiff was given parcel no. 4486 which was further sub-divided to give rise to parcels 8136 and 8137. He told the court that he did not know parcel no. 7070. He stated that he has constructed a house on a portion of his land while he has planted trees and bananas on the remaining portion.
7. In cross-examination he denied knowledge of parcel no. 7070. He told the court that his mother never sold parcel no. 7070 to the 1<sup>st</sup> Defendant. He confirmed that his parcel was fenced. He stated that he was utilizing his entire parcel of land. He produced the documents in his list of documents as his exhibits.
8. Although the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued in this matter they were summoned to come and testify at the request of counsel for the Plaintiff.
9. Mr Steve Mokaya the Land Registrar, Kisii County testified that land parcel no. L.R No. NYARIBARI CHACHE/BB/BOBURIA/3939 was first registered on 5<sup>th</sup> March 1983 in the name of Moraa Osano. On 8.3.1990 the said title was closed on sub-division into parcels no. 4486 and 4487. However, the mutation used to create these two numbers is altered to indicate that parcel no. 7070 was inserted. He told the court that parcel no. 7070 was not part of parcel no. 3939 and that it was merely planted in the mutation form. He stated that he invoked the provisions of the Land Registration Act to rectify the register and expunged parcel no. 7070 from his records.
10. Mr. David Lemayan, the County Surveyor testified that he had checked his records and confirmed that parcel no. 7070 did not exist. He told the court that parcel no. 3939 was sub-divided on 12/5/1989 and it gave rise to parcel 4486 and 4487. He produced a copy of the numbering register as an exhibit.
11. When it was time for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to testify, the Senior Litigation counsel stated that he would rely on the evidence of the Land Registrar and the County Surveyor which was already on record. The 1<sup>st</sup> Defendant did not attend court despite having been served with a hearing notice and her case was therefore marked as closed. Thereafter, the parties were given time to file their written submissions but only the Plaintiff filed his submissions which I have considered.

#### **ISSUES FOR DETERMINATION**

12. The issues that arise for determination are:

- i. Whether land parcel no. L.R No. NYARIBARI CHACHE/ BB/BOBURIA/7070 is a sub-division of land parcel no. L.R No. NYARIBARI CHACHE/ BB/BOBURIA/ 3939.
- ii. Whether title no. L.R No. NYARIBARI CHACHE/ BB/BOBURIA/ 7070 should be cancelled and expunged from the record.

#### **ANALYSIS AND DETERMINATION**

13. From the evidence of the Plaintiff, Land Registrar and County Surveyor it is clear beyond peradventure that land parcel no. L.R No. NYARIBARI CHACHE BB/BOBURIA/7070 does not exist and it was merely "planted" in the numbering register to make it look like it was a sub-division of title L.R No. NYARIBARI CHACHE/BB/BOBURIA/ 3939. The creation of the said title was therefore unlawful, fraudulent and unprocedural.
14. That being the position, and since the Plaintiff's evidence was uncontroverted, it goes without saying that title no. L.R No. NYARIBARI CHACHE/BB/BOBURIA/7070 ought to be cancelled.
15. In view of the foregoing, it is my finding that the Plaintiff has proved his case on a balance of probability and he is thus entitled to the reliefs sought in his plaint.
16. Consequently, I enter judgment for the Plaintiff and make the following final orders:
  - a) A declaration is hereby issued that L.R No. NYARIBARI CHACHE/BB/BOBURIA/ 7070 did not legally and lawfully originate from the sub-division of L.R No. NYARIBARI CHACHE BB/BOBURIA/3939.
  - b) A declaration is hereby issued that the mutation form which created L.R No. NYARIBARI/CHACHE/BB/BOBURIA/ 7070 was a fraud, unlawful and irregular and the same is hereby cancelled.
  - c) An order is hereby issued directing the 3<sup>rd</sup> Defendant to rectify the mutation form which sub-divided L.R No. NYARIBARI CHACHE BB/BOBURIA/ 3939 to remove parcel no. 7070 so that it can reflect what is contained in the numbering register of 12/5/1989 and show that L.R No. L.R No. NYARIBARI CHACHE BB/BOBURIA/8136 extend up to the upper side of the road.

d) A declaration is hereby issued that the 1<sup>st</sup> Defendant has no land to claim from the Plaintiff.

e) A permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant by herself, her agents, servants or assignees from in any way or manner whatsoever claiming L.R No. NYARIBARI CHACHE/BB/BOBURIA/7070 or any other land forming part of L.R No. NYARIBARI CHACHE/BB/BOBURIA/3939.

f) The Plaintiff shall have the costs of the suit which shall be borne by the Defendants jointly and severally.

**DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF NOVEMBER, 2021.**

**J.M ONYANGO**

**JUDGE**