



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC CASE NO. 79 OF 2018**

**JOSEPH WANJALA ODUBA..... PLAINTIFF**

**= VERSUS =**

**PASCAL OKUMU KABURU.....1<sup>ST</sup> DEFENDANT**

**JAMES YAMO KABURU.....2<sup>ND</sup> DEFENDANT**

**JULIUS OUNDO WASIKE..... 3<sup>RD</sup> DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff vide a Plaint on the 22<sup>nd</sup> of April, 2016 impleaded the Defendants in the suit praying for judgement against the Defendants for:-

- a) **An order of cancellation of all titles created from Bunyala/Bulemia/188 being Bunyala/Bulemia/4164, 4165, 4166, 4167, 4168 and 4169 do issue and upon such cancellation the same revert back to Bunyala/Bulemia/188;**
- b) **A declaration order to the Plaintiff be given a portion of  $\frac{1}{3}$  of Land Parcel Bunyala/Bulemia; and**
- c) **Costs of this suit be provided for.**

2. The Plaintiff in the Plaint avers that he was a co-owner and registered proprietor of **L.R No. Bunyala/Bulemia/188 (the Suit Property)** measuring 3.6 hectares together with Peter Were and Oduba Ndubi (both deceased and the Defendants being their representatives. That the Defendants have caused his share of the suit property to be registered among their siblings namely: Wilson Okumu Kaburu, Roy George Jacob Adongo, Julius Oundo Wasike, Sara Fuja Were, James Kaburu and Moses Odunga Wasike. That due to this subdivision, he has been rendered landless.

3. The Defendants filed their defence on the 10<sup>th</sup> of November, 2020. The stated that the Plaintiff was erroneously registered as a co-owner of the suit property. That in fact the registration was done in favour of the Plaintiff to hold in trust for the family of the late Peter Were who was also a co-owner on the land.

4. The Defendants adopted the Plaint in ELC No. 82 of 2018, where the 1<sup>st</sup> Defendant sued the Plaintiff seeking rectification of the register of the Suit Property as their counterclaim.

5. This Court on the 9<sup>th</sup> of December, 2019 ordered the consolidation of BUSIA ELC No. 82 of 2018 with the present case. In the Plaint dated 1<sup>st</sup> October, 2018 the Defendant prayed for judgement against the Plaintiff:-

- a) **An order directing that the late ODUBA NDUBI alias PATRICK ODUBA NDUBI as represented by JOSEPH WANJALA ODUBA and together with JOSEPH WANJALA ODUBA to hold the joint interest of ownership of  $\frac{2}{3}$  of land parcel No. BUNYALA/BULEMIA/188 in trust for PETER WERE as represented by the Plaintiff;**
- b) **An order directing the County Land Registrar to strike out the names of ODUBA NDUBI alias PATRICK ODUBA NDUBI and JOSEPH WANJALA ODUBA from the register of land parcel BUNYALA/BULEMIA/188 on the 2<sup>nd</sup> October, 1985 and 25<sup>th</sup> August, 2002 and order to retain the name of PETER WERE as the sole proprietor in respect thereof;**
- c) **Costs of this suit; and**

**d) Any other or further relief.**

6. The Plaintiff filed a defence to the suit on the 10<sup>th</sup> April, 2019 stating that the subject matter of the suit has already been determined vide land case No. 98 of 2009. That the said order is still in force and has not been set aside.

7. The hearing commenced on the 8<sup>th</sup> of March, 2021 with the plaintiff **JOSEPH WANJALA ODUBA** testifying as **PW1**. He adopted his witness statement dated 17<sup>th</sup> September, 2018 and his further statement dated 9<sup>th</sup> July, 2020. PW1 also produced the documents on the List of Documents filed on the 17<sup>th</sup> of December, 2018 as PEx1 to PEx4. In the statement dated 17.9.2018, PW1 said that the defendants did not include his portion when they carried out succession causing him to lose his share in the suit land.

8. In his statement dated 9<sup>th</sup> July 2020, the plaintiff stated that the defendants are his neighbours. That the suit parcel was registered in his name and the names of Peter Were-deceased and Oduba Ndubi. Oduba Ndubi was the plaintiff's father and he is deceased. He stated that the defendants filed a case against him before the Bunyala Land Disputes Tribunal and the Tribunal found in his favour. However, his efforts to implement the award have been futile due to hostility by the defendants. He added that the defendants should inherit only their father's share. The plaintiff urged the Court to order cancellation of land title numbers 4164-4167 and 4169 created out of the suit title Bunyala/Bulemia/188.

9. On cross-examination, **PW1** stated he was born in 1932 in Bulemia and his father was called Oduba Ndubi who came from Abadegu clan. That he currently lives on land parcel No. 193 from the year 1961 which land is registered in the names of Amos, Daudi and Adoti. He stated that he has not lived on the suit property because it was already taken.

10. On re-examination, PW1 stated that he brought this suit in respect of LR No. 188 which was registered in the names of Peter Were, Joseph and Oduba Ndubi. That Peter was never sued but his children sued PW1 before the Land Disputes Tribunal.

11. The defence hearing commenced on the 23<sup>rd</sup> of June, 2021 with **WILSON OKUMU KABURU** testifying as **DW1**. He stated that he was a farmer living in Abamenya sublocation. He adopted his witness statement dated 22<sup>nd</sup> June, 2021 as his evidence in chief and produced his list of documents as DEX 1-7. In his statement he stated in part:-

*a) That the defendants all belong to the extended family of Fufu from the clan of Abamenya of the Banyala people while the Plaintiff is the son of Oduba Ndubi who together with his family, hailed from the Abadegu clan and resided at Nagoba village in Mundere sublocation of Bunyala subcounty as their original home;*

*b) That the Defendants' original family comprised of three brothers named YAMO, ODONYO and OLENDU who were the original occupants of the suit parcel. That they later moved out and spread out to different locations i.e., land parcels 190, 194 and 178 respectively;*

*c) That after moving out the land parcel was cultivated and used by the extended family members;*

*d) That the Plaintiff, his wife and father and other family members used to live at Nagoba area which area was located next to a swampy area near Sirindiwe River. In 1962, the Plaintiff's home flooded forcing the Plaintiff and the rest of his family to seek refuge at the Defendants' home;*

*e) That the Plaintiff's father Oduba Ndubi sought permission from ANYANDE YAMO and OGULA ODINYO to allow them to stay within Yamo's homestead which existed at the location within the now land parcel number 190, which request Yamo granted;*

*f) That when the floods failed to subside for one year, Oduba Ndubi requested Yamo for a piece of land to erect a home outside his homestead and Yamo directed them to the area where the present land parcel 193;*

*g) That Oduba Ndubi never went back to his village and he died and was buried in the land parcel 193 as was his widow and two sons. This is the land that the Plaintiff lives on to date;*

*h) That the said parcel No. 193 was registered in the names of Zaddock Adochi, Daudi Osimbo and Amos Ong'ang'a who all died and left the said land to their children who in turn never removed the Plaintiff from the suit parcel;*

*i) That the Plaintiff never sued the families of Zaddock, Daudi and Amos in an effort to claim the land that they are currently occupying; and*

*j) That the Plaintiff has never sued the Defendant or his uncles so as to claim any part of land parcel No. 188 and they never showed them that they had been registered as co-owners of the same.*

12. Upon cross-examination, **DW1** stated that the Plaintiff came to their land in the year 1962 when he was 3 years old and he was not aware what the elders decided upon to welcome the Plaintiff's family. He stated that he was aware of the case before the Tribunal whose award was adopted as an order of the Court. That they appealed against the award but he is not aware of the outcome of their appeal. That he did not give the Plaintiff land because they had no relations. In re-examination, **DW1** stated that the Plaintiff has no beneficial interest in the suit parcel and had only been welcomed by their father and Joseph Anyandia.

13. **JAMES YAMO KABURU** testified as **DW2**. He adopted as DW1's statement as his evidence in chief together with the documents. He urged the court to remove the Plaintiff's name from the suit title as he had no right over the land.

14. **DW2** was put to cross-examination by Ouma advocate. He stated that the Plaintiff came into the land in the year 1962. That the elders informed him that they welcomed the Plaintiff and he was registered on the suit parcel in 1974 as one of the original owners among them Peter Were, Oduba Ndubi and the Plaintiff, That the elders were not aware that the Plaintiff has registered himself as the owner of parcel 188 yet he was put on parcel 193. DW2 concluded by stating that the tribunal award was adopted by the Court and that they did succession in the estate of Peter Were and removed the plaintiff's name from the title as he was not their clan member.

15. On re-examination, **DW2** stated that when the Plaintiff and his family were welcomed, they were allowed to live on suit land 193 where they live to date. That as a family, they had no idea that the Plaintiff had been registered as the owner of parcel No. 188.

16. **JULIUS OUNDO WASIKE** gave evidence as DW3 and like the other defence witnesses adopted his witness statement dated 15<sup>th</sup> March, 2021 as his evidence in chief and urged this Court to dismiss the Plaintiff's suit with costs and allow the counter claim contained in ELC 82 of 2018. In his written statement DW3 stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are his uncles and were brothers to his late father JOHN WASIKE OLENDO while PETER WERE was his grandfather who died in the year 1977 before he was born. That the Plaintiff is the son of ODUBA NDUBI from Abadebu clan and are their neighbours on land parcel no. 193 where they have been staying since before, he was born despite it being registered in the names of ZADOCH ODOCH, AMOS WAMALWA and DAUDI WANJALA.

17. The witness asserted that land parcel No. 188 belongs to his grandfather PETER WERE passed to him by OLENDO and YAMO who were his great grandfathers. That the Plaintiff's father was allowed to build on the current land parcel no. 193 in the year 1969 and when land adjudication happened the suit parcel No. 188 was registered in the name of PETER WERE and that although Peter Were died in 1974, the 1<sup>st</sup> Defendant and Daudi Wanjala have been farming the suit land to date. That the Plaintiff and his father never made an attempt to claim the suit parcel because they knew that it never constituted their land forcing them to remain silent and that they have only resurrected their claims after the Defendants' father and paternal uncle had died.

18. On cross-examination, **DW3** stated that he had been sued with regard to land parcel 188 which was approximately 9 acres and was registered in three names in the year 1972. That there was no disagreement between the families because they were not aware of the registration. He confirmed that he was a witness to the Tribunal case in the year 2009 and he heard the award was adopted by the Court specifically that each registered owner had shares. That Peter's estate is administered by DW1 and that he (DW3) also got a share in the estate. That they need not agree with the award if the Tribunal because the Plaintiff had no right to get a share of the land. He concluded by stating that although they had not produced a copy of the appeal, they had filed an appeal at Kakamega but Tribunal was abolished and they decided as a family to remove the Plaintiff's name.

19. Upon re-examination, **DW3** stated that before the process of succession and Tribunal, they did not know that the Plaintiff had registered himself and they only learnt of his registration in 2008 when a person he had sold land came to fence the sold portion. That they filed an appeal but the tribunal was abolished before the appeal was heard.

20. **NAKOLA AGORO OPIYO** testified as **DW4** by adopting his witness statement as his evidence in chief. Mr Opiyo stated that he used to stay at a place known as Muusa on the Bulemia side while Oduba Ndubi and his son Joseph Wanjala used to stay at a place called Nagoba on the side of Mundere and their residences were separated by a stream that runs from River Nzoia. In 1962, floods came, forcing them to migrate to higher grounds and his family sought refuge at Bulemia on land held by their relatives. Oduba Ndubi and his son from the Abadebu clan sought refuge from the Defendants' side and were welcomed by YAMO, ANYANDE and OGULA where they built a house after being shown a space to do as much. The witness was surprised to learn that Oduba Ndubi and his son got themselves registered as owners of the land that belonged to the Defendants who are from the Abamenya clan and who had welcomed them only to save them from the calamity of serious flooding that had forced them out of their home. On cross-examination, **DW4** stated he did not know the Plaintiff nor the land he was occupying.

21. The defence closed their case and parties agreed to file their submissions within 14 days each. The Plaintiff filed his submissions on the 20<sup>th</sup> of July, 2021 submitting that the Defendants' actions to subdivide the suit land without his consent were illegal, null and void. That there is in existence a valid order that the Defendants ignored and still went ahead to subdivide the land without first appealing the order. That the Defendants can not sanitize the process by filing a fresh suit. The Plaintiff urged this Court to allow the prayers in the plaint and have parcel No. 188 reinstated and subdivisions 4164, 4165, 4166, 4167 and 4168 cancelled. The Plaintiff relied on the case of **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Limited (1989) eKLR** where the Court held that:

*"Jurisdiction is everything, without it a court has no power to take one more step, where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending the evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction."*

22. The Defendant filed their submissions on the 23<sup>rd</sup> of July, 2021 and they submitted that they had effectively proved that a customary trust existed hence the historical background that they had provided even after the inconclusive decision of the tribunal. They urged the Court to dismiss the Plaintiff's suit and allow their counterclaim in ELC Case No. 82 of 2018. They relied on the case of **Esther Nyamweru Waruhiu & another vs. George Kangethe Waruhiu (2019) eKLR**, where the Court dismissed the Order of the Trial Court and held that the issue of limitation of time does not occur when it comes to customary trusts.

23. It is not in that the suit title Bunyala/Bulemia/188 was registered jointly in the names of Peter Were, Joseph Oduba and Oduba Aduki. Peter Were is deceased and was succeeded by the defendants in this matter and who are the claimants in Busia ELC No. 82 of 2018. After obtaining[M1] a grant in the estate of Peter Were – deceased, the defendants proceeded and shared the land amongst them as shown in entries numbers 6, 7 and 8 of the green card. The plaintiff was aggrieved because the sharing did not involve him and his share was also taken up by the defendants. He brought this claim seeking cancellation of the illegal subdivision and the land revert to the three original names.

24. The defendants in countering the arguments by the plaintiff pleaded that the land belonged to them by virtue of customary trusts and they

were entitled to remove the plaintiffs name from the record. From the evidence presented, it is not disputed that the plaintiff as the co-registered owner of the suit land was not included in the sub-division of the suit land which sub-division took place on 26/6/2014 parcel numbers 4164, 4165, 4166, 4167, 4168 and 4169.

25. The total land area for the suit land is given as 3.6ha as per the green card. Entries numbers 1 – 5 of the green card shows that the three registered owners held  $\frac{1}{3}$  share each translated to 1.2ha or 4 acres each. In entry number 6 which registered the interests of the beneficiaries of Peter Were – deceased, Okumu Kabusu got 2 acres, Roy G. J. Adonyo 1 acre, Julius Wasike 2 acres, Sara Were 1 acre, James Kaburu 1 acre and Moses Odunga 1 acre giving total acreage of 10 acres. This was definitely more than the 4 acres that estate of Peter Were was entitled as by the register. Although the defendants claimed that they were entitled to the land in accordance with customary trust, no finding had been made on that claim.

26. Secondly, the defendants proceeded to partition the suit title to create new numbers without consent of the two previously registered owners. This was contrary to the provisions of section 91(6) of the Land Registration Act which provides thus:-

**“6. No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”**

27. On the basis of observations made in paragraph 25 and 26 herein, the plaintiff would be entitled to the orders he is seeking. However, the defendants have pleaded that his interest over the suit land has been extinguished and so the plaintiffs name as appearing on the record is in trust and for the benefits of the defendants. Customary trust is a question of fact that must be pleaded and proved through evidence. In proving their claim, the defendants called 4 witnesses all who confirmed that the plaintiff is not in occupation of the suit land.

28. From the narration contained in the summary of the evidence, it is clear that the plaintiff’s family were welcomed on to the area in 1961 before demarcation exercise was undertaken. They (plaintiffs) settled on a parcel of land which during adjudication was registered as Bunyala/Bulemia/193 while the land the defendants occupy was registered as Bunyala/Bulemia/188. The two sets of family have lived peaceful since 1961 until the year 2008 when the plaintiff sold a portion of the suit land. It is while this purchaser went to the fence his portion that the defendants learnt with shock that the suit land was registered in three names comprised of Peter Were, the plaintiff’s father and the plaintiff. The plaintiff does not deny in his evidence that he has never lived on or used the suit land. In my opinion going by the status of occupation as tendered in evidence, the registration of the plaintiff and his father could only have been done in trust for the defendants’ family.

29. In the case of **Isack M’Inanga Kieba Vs Isaaya Theuri M’Lintari & Ano (2018) eKLR**, the Supreme Court laid principles to be proved for a claim under customary trust to succeed. The set principles were:-

- 1) *The land in question was before registration, family, clan or group land.*
- 2) *The claimant belongs to such family, clan, or group.*
- 3) *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.*
- 4) *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5) *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

30. The plaintiff contested this claim by relying on the decision of the Land Disputes Tribunal in land case No. 98 of 2009 which according to him settled the matter. The Tribunal awarded that the land should remain registered in the three names and the government surveyor to assist them. However the question of trust was never for determination before the said Tribunal. Neither could the tribunal have had jurisdiction to entertain such a claim. An issue can only be declared as res judicata if it was heard and determined by a court of competent jurisdiction.

31. Consequently, in light of the analysis made herein, I am satisfied that the defendants have proved their claim over the suit land. I enter judgment in their favour as prayed in their plaint. The result of this decision draws the inference that the plaintiffs interest over the land parcel Bunyala/Bulemia/188 are extinguished and therefore no order of cancellation of entries in the register as earlier prayed can be granted.

32. The final orders of the court are as follows:-

- a) **The plaintiff’s (Joseph Wanjala Oduba) case in this file be and is hereby dismissed.**
- b) **An order be and is hereby made declaring that the late ODUBA NDUBI alias PATRICK OTUBA NDUBI as represented by JOSEPH WANJALA ODUBA together with JOSEPH WANJALA ODUBA held and continue to hold the joint interest of ownership of  $\frac{2}{3}$  of land parcel No. BUNYALA/BULEMIA/188 in trust for PETER WERE as represented by the plaintiff.**
- c) **An order directing the County Land Registrar to strike out the names of ODUBA NDUBI alias PATRICK OTUBA NDUBI and JOSEPH WANJALA ODUBA from the register of land parcel BUNYALA/BULEMIA/188, on 2/10/1985 and on 25/8/2002 and an order to retain the name of PETER WERE as the sole proprietor in respect thereof.**

d) Each party to bear their costs of the suit.

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

A. OMOLLO

JUDGE

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