



**REPUBLIC OF KENYA**

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

**ELC NO. 34 OF 2017**

**MARGARET NECHESA MUNALA.....PLAINTIFF**

**= VERSUS =**

**ALEX OKWARO OJOLE.....1<sup>ST</sup> DEFENDANT**

**ABISANSIO OJOLE.....2<sup>ND</sup> DEFENDANT**

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

1. By a Plaint dated 8<sup>th</sup> February,2017 the Plaintiff impleaded the Defendants in this suit and prayed for judgement against them for:

- a) **An order of permanent injunction restraining the Defendants whether by themselves, their agents, servants, employees and or anybody claiming through them from entering, staying, using and/or interfering with the Plaintiff's enjoyment of L.R NO. SOUTH TESO/ANGOROMO/999;**
- b) **An order directing the OCS Adungosi Police Station do provide security to the Plaintiff at the plaintiff's own costs during the fencing of the suit land;**
- c) **Costs of the suit; and**
- d) **Any other relief that this Honourable Court may deem fit to grant.**

2. The Plaintiff contends that although he is the absolute owner and registered proprietor of the land parcel known and L.R NO. SOUTH TESO/ANGOROMO/999 (the **Suit Property**) and that the Defendants have, without any colour of right, justifiable cause or permission unlawfully entered into the Plaintiff's land letting their animals into the land and destroying the Plaintiff's crops despite her protests and subsequent demands.

3. The Defendants first filed a joint Statement of Defence on the 11<sup>th</sup> of July, 2017 before later applying to file an amended defence and counterclaim which application was allowed by consent of the parties' counsels on the 24<sup>th</sup> of September, 2018. In their amended statement of defence and counterclaim filed on the 24<sup>th</sup> of October, 2018, the defendants denied the contents of the Plaint and in particular that the Plaintiff is the registered proprietor of the Suit Property. The Defendants averred that the Plaintiff had no good title and that what is purported to be a LR SOUTH TESO/ANGOROM/999 is a forgery and falsification of fraudulent land entries of what was never a genuine land transaction.

4. The Defendants brought a counter-claim against the Plaintiff seeking for the de-registration of the Plaintiff as the proprietor of the Suit Property and the rectification and restoration of the land back to the Original Title LR NO. SOUTH TESO/ANGOROM/226.

5. The Defendants prayed in the counter-claim for orders of:

- a) **Dismissal of the Plaintiff's suit;**
- b) **Cancellation of Title Nos. LR No. South Teso/Angorom/999 & 998;**
- c) **Restitution of LR No. South Teso/Angorom/226;**
- d) **Any other order the Honourable Court deems fit to grant; and**

**e) Costs.**

6. The hearing commenced on the 24<sup>th</sup> of September, 2020 with the Plaintiff, **MARGARET MUNALA** testifying as **PW1**. She stated that she lives in Makuo within Busia County and that Frank Emisiko was her husband. That her husband bought the suit property and at the time of his death the same had been registered in his name. PW1 adopted her witness statement dated 8<sup>th</sup> February, 2017 in which she stated inter alia, that her late husband, Francis bought land from Rose Bwire who was the registered owner of the land. Pw1 said that the sold portion was clearly demarcated on the ground and boundaries were planted in the presence of Rose Bwire and they took vacant possession thereof and have been using the land since.

7. The witness continued that on or about the 3/11/2004, Rose Bwire applied to the Municipal Land Control Board and obtained a letter of consent to transfer the portion which her late husband had bought. That when she tried fencing the land the Defendants came and disrupted the exercise forcing her to report the matter to the County Surveyor's office who upon visiting the land with a view of showing them the boundaries was unable to do so because the Defendants became violent. It is the result of this actions by the Defendants, she has been unable to properly utilize the land and the same is in danger of being wasted hence the prayer for permanent injunction and provision of security while she fences the land.

8. **PW1** stated further in her evidence that the Defendants claim that she had encroached on their land which allegation is false because the Surveyor went and marked the boundaries. That despite the set boundaries, the Defendants still denied her entry to the suit land and threatened to kill her if she entered the land. She concluded by stating that her husband bought the land from Rose Bwire and that they never had an issue over the land while her husband was alive.

9. **PW1** produced the following documents as exhibits in support of her case; certified copy of official search as PEx 1, application for Land Control Board consent as PEx2, Letter of Consent as PEx 3, Copy of the Title as PEx 4, Green Card as PEx 5, Letters of Administration as PEx 6, Death Certificate as PEx 7, Demand Notice as PEx 8, Land Surveyor's report as PEx 9 and Land Registrar's report as MFI P.10.

10. **PW1** was put on cross-examination by Ipapu learned counsel for the defendants and she stated that she does not live on the suit land as the Defendants chased her from it. That although she did not know the history of the suit land, Rose Bwire sold the land to her husband and Rose died in August, 2019 hence unable to testify in the present suit. She admitted that the application for the Land Control Board consent did not specify the purchase price nor the date. She confirmed that from the title one Francis was registered on 5/1/1999 as owner of the suit property.

11. On re-examination, **PW1** stated that the title to the property was issued on the 5/11/2007 and the letter of consent was issued on the 3/11/2004. She stated that Rose had no problems on how Francis got the land and even made a witness statement in this case before she died. She reiterated that the Defendants had chased her out of the suit land in 2014 and she was afraid to go back.

12. The defence hearing commenced on the 10<sup>th</sup> of June, 2021 with **ALEX OKWARO OJOLE** testifying as **DW1**. He stated that he comes from Alupe within Busia County. That land parcel South Teso/Angorom/ 226 was owned by Sylvester Ojole his grandfather who died in 1993. That his father did not sell or subdivide the land and as such the suit property was irregularly obtained. He adopted his witness statement dated 20<sup>th</sup> September, 2018 as his evidence in chief. In the written witness statement, **DW1** stated that his father Silvanus Ojole Osigwara never sold his land to anyone. It is alleged that the suit land was subdivided and one of the resultant titles given to Bibiana Okoth and the other to Rose Bwire for KShs.1.500 yet the green card indicates that it was sold for KShs.15,000/= That the transfers are forgeries in collusion with Land Registrar's clerks.

13. DW1 continued in evidence stating that if the Plaintiff purports that her deceased husband-FRANCIS EMISIKO OKONGO bought land from ROSE BWIRE, the question to be answered is what step are followed in getting a title. This because the Land Control Board consent from Rose Bwire to Francis Emisiko Okongo was granted or issued 3/11/2004 when the said Francis had already been registered as a proprietor on 4/1/1999. Secondly, the alleged land certificate issued to Rose Bwire for the suit land was at its proprietorship section showing Ojole Osigwara and Rose Bwire as proprietors. That taking into consideration all the above mischiefs committed in respect of his deceased's father's land it is his case that the purported L.R Nos. S. TESO/ANGOROM/998 & 999 be cancelled and or deregistered and an entry restoring the original parcel L.R NO. S. TESO/ANGOROM/226 be entered in the land register.

14. Upon cross-examination, DW1 stated that the suit property's register was first opened on the 14/1/1973 as a LR No. 226 and was registered in the name of Ojole Osigware, his father. That the suit property was registered in favour of Rose Bwire on the 14<sup>th</sup> of January, 1997 and subsequently registered in favour of Francis on the 4<sup>th</sup> of January, 1999. That the Plaintiff was registered as the owner on 20<sup>th</sup> December, 2016 after succeeding Francis' estate. He stated that subdivision of the original land was done on the 4<sup>th</sup> of August, 1976 when the land was subdivided into 999 and 998. That during his father's lifetime, he did not sue Rose Bwire and that when Rose came with the Plaintiff to the suit land, they had an agreement. That he has neither sued Rose nor the Land Registrar in relation to the title to their land.

15. In re-examination by Mr Ipapu advocate, DW1 stated that according to DEx2 the land was being transferred to Bibiana Akoth. He stated that although PEx3 was issued on 3/11/2004 Francis was already indicated as the owner in the year 1999. He wants the land title to revert to No. 226.

16. The Busia County Land Registrar, Mr. WILFRED NYABERI, testified as **DW2**. He stated that the register of LR No. SOUTH TESO/ANGOROM/226 was opened in the name of Ojole in November, 1973 and was subdivided on 14/01/1977 where one parcel was transferred to Bibiana Akoth and the other to Rose Bwire. That the transfer to Bibiana was declined but the one to Rose Bwire went through. He explained that in the 1990s parties used to apply for subdivision and transfer at the same time.

17. **DW2** continued to testify that from the application dated 11<sup>th</sup> August, 1976 the subdivision and transfer to Rose Bwire was 0.81Ha for K. Shs. 1,500 and a letter of consent issued to Bwire on the same date. He stated that the application to Bibiana was declined and as such the mutation would not have been registered. That the mutation he had did not specify whether it was for Rose or Bibiana and only the transfer

was specific. That after the subdivision the new numbers were 999 and 998.

18. DW1 stated further that from the records, Francis was registered as entry No. 5 on 4<sup>th</sup> January, 1999 and a title deed was issued on 5<sup>th</sup> November, 2007. He indicated that the consent should have come before registration and although an entry could have been made, there were no supporting documents and the Registrar could have insisted on fresh documents due to the time period that had lapsed. That the Registrar may have forgotten to cancel previous registration upon supply of fresh documents.

19. With respect to the mutation forms, DW2 stated that the DEx2 did not indicate the survey fees, the Surveyor did not sign the mutation forms and the same were not forwarded to the director of surveys because he had all the three copies. He concluded by stating that although LR No. 999 does not appear in the Director of Survey records, the survey office must be aware of the new numbers because they register numbers given to them by the survey office and in the event of any omission, they forward the details for RIM amendment to the County Survey who has the delegated powers of the Director of Survey.

20. Upon cross-examination of DW2 by Mr Otanga, learned counsel for the plaintiff, the witness stated that the current registered owner of the suit land is the Plaintiff who presented all documents to get registered as proprietor by transmission. He confirmed that LR 999 was a subdivision LR 226 done on the 14/8/1976 and Rose Bwire transferred LR No. 999 to Francis Misiko. That as a registrar he has powers to reject documents presented for registration if he has reasons to and that the application for Bibiana was rejected by the Land Control Board.

21. The Plaintiff filed her submissions on the 30<sup>th</sup> of June, 2021 raising two issues for determination i.e.: whether she has good title of the suit property and whether she is entitled to the prayers sought in the Plaintiff. She submitted that her title was protected under section 24 of the Land Registration Act and the Defendant have not provided this Court with sufficient evidence to have the said title revoked on the account of fraud on her part. She relied on the cases of **Kinyanjui Kamau vs. George Kamau Njoroge (2015) eKLR** and **Moya Prift Farm Limited vs. Theuri (1973) EA 114**.

22. The Defendants filed their submissions on the 26<sup>th</sup> of July, 2021, submitting that the evidence adduced in Court during trial was sufficient to prove that the Plaintiff did not have good title and prayed that the suit be dismissed with costs and their counterclaim be allowed.

#### **DETERMINATION**

23. Having considered the parties' pleadings, submissions and the applicable law, the issues which in my opinion arise for determination are as follows:

- a) *Whether the Plaintiff has established that the Defendants, or any of them, have trespassed onto the suit land and if so, whether permanent orders of injunction should issue.*
- b) *Whether the Defendants have locus standi to file and prosecute their counterclaim in their individual capacities;*
- c) *Whether the Defendants have proved their counterclaim; and*
- d) *Who pays for the costs of this suit and counterclaim?*

24. With regards to the first issue, the Plaintiff brought this suit against the Defendant's in their individual capacity for encroaching onto her suit land and stopping her from using the land. Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows:

***“Any unjustifiable intrusion by one person upon land in possession of another.” .... Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”***

25. PW1 stated that she obtained her title by transmission from her late husband Francis Emisiko who had bought the land from Rose Bwire and who had in turn purchased it for Ojole Osigware. She said that she had been using the land for tree planting until the year 2014 when the Defendants encroached onto the land and threatened to kill her. DW1 did not deny that they had encroached on to the plaintiff's land except they adopted a line of defence pleading that Rose Bwire acquired the land fraudulently and hence did not have good title to pass onto the Plaintiff or her deceased husband.

26. From the documents produced by the Land Registrar (DW2), the green card for L.R 226 shows that it was subdivided on 14<sup>th</sup> January 1977 and the suit title registered in the name of Rose Bwire. Although the defendants are alleging fraud, Dw1 stated that his father Ojole Osigware died in the year 1993. The documents presented show by this time, Rose had already been registered as owner of the suit portion. They did not plead in their defence when they discovered the alleged transfer. They also did not deny the plaintiff's assertion that she had been using the land peacefully and issues arose only after her husband died. So that if time runs from 1977 or from 1993 (when their father died) or in 2014 when Francis died then the claim under fraud is caught with the limitation of time. Besides not pleading time, the defendants chose to use analysis of the documents produced in order to prove the alleged fraud.

27. The standard of proof required for allegations of fraud is beyond the balance of probabilities. The plaintiff produced an undated application for Land Control Board consent form as Pex 2 (the copy produced by the land registrar was dated on 28<sup>th</sup> October 2004) and a letter of consent to transfer reference no 580/04 and issued on 3<sup>rd</sup> November 2004. The consent was for a transfer from Rose to Francis Emisiko. However, by this time, the land had been registered in the name of Francis in the year 1999. The defendant relied on this anomaly in challenging the plaintiff's title. The Land Registrar explained that the earlier entry may have been made without supporting documents and because of time period, the land registrar may have insisted on fresh documents but failed to cancel the earlier entry when supporting documents were subsequently presented.

28. The defence also took issue with the mutation form that was used to subdivide parcel number 226. In the documents produced by the Land Registrar from the parcel file, there was an application for consent to subdivide made by Ojole Osigware of ID no 4807EN and dated 11<sup>th</sup> August 1976. The consent was issued on the same date and the land subdivided one portion remained in Ojole's name and the suit parcel was registered in Rose Bwire's name. On the mutation document, there is a part indicated as signed by Ojole by thumbprint. The plaintiff was not a party to this subdivision process. They had no issues with Rose who sold them the suit portion. The defendants had never registered any restriction on the suit parcel to express their interest on the land and forewarn anyone who intended to purchase not to do so.

29. The defendants did not join the Land Registrar in their counter-claim to accuse them of the fraud of registering illegal documents. The court cannot infer fraud on any party without giving them a hearing. It is therefore my finding that the defendants have not proved any fraud committed by the plaintiff or that she/he was a party to the subdivision of the original parcel number 226. The defendants did not produce any evidence to confirm that the signature on the mutation or the application for consent to subdivide was not by Ojole. Their challenging the plaintiff's title falls short of the provisions of section 26 of the Land Registration Act.

30. Section 26(1) of the Land Registration Act provides that:

*'The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -*

*a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

31. Section 3 (1) of the Trespass Act, Cap 294 provides that:

*"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."*

32. In their evidence, the defendants did not deny encroaching and using the plaintiff's suit parcel. In light of the finding that the defendants have not proved any fraud against the plaintiff, it suffices to conclude that the Defendants have no authority to be on the suit property for whatever reasons. This was the holding in the case of **Joseph Kipchirchir Koech v Philip Cheruiyot Sang [2018] eKLR.**

33. With regard to the **second and third issue**, the Defendants brought a counterclaim against the Plaintiff for the deregistration of the Plaintiff's title and the rectification and restoration of the original title LR No. S. TESO/ANGOROM/226. In his evidence in chief, DW1 stated that *his father SILVANUS OJOLE OSIGWARE (deceased) died in 1993 and was the registered proprietor of what was the then L. R No. S.TESO/ANGOROM/226.*

34. DW1 confirmed to this Court during cross-examination stated that he had not taken out letters of administration of their father's estate. LR NO. S. TESO/ANGOROM/226 belonged to Silvanus Ojole and as such a counterclaim or a suit in respect of the land should be brought by the legal representative of the estate. The Defendants have not provided this Court with any document to prove that they are mandated by the estate of the late Silvanus Ojole to bring the counterclaim on behalf of the estate.

35. The issue of capacity cannot be downplayed. If a party to a suit is found to have no locus standi, then their suit and or defence is struck off without having to deal with any other issues arising in the suit. As held in the case of **Francis Mwangi Mugo Vs David Kamau Gachago [2017] eKLR.**

*"21. I do not think capacity is a technicality curable under Article 159 of the Constitution. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs..."*

36. In view of the observations and analysis made herein above, the parties' pleadings and submissions, I am persuaded that the Plaintiff has proved their case against the Defendant on a balance of probabilities. The defendants counter-claim fails for the reasons stated in the body of this judgement and is hereby dismissed.

37. In conclusion I enter judgement for the Plaintiff and hold that:

**a) A declaration is hereby issued that the Defendants are trespassers on the Plaintiff's land known as SOUTH TESO/ANGOROM/999;**

**b) The Defendants are hereby ordered to vacate L.R No. SOUTH TESO/ANGOROM/999 suit land within ninety (30) days from the date of delivery of this judgement.**

**c) The OCS Adungosi Police Station do provide security to the Plaintiff during the fencing of LR No. SOUTH TESO/ANGOROM/999 at the Plaintiff's own cost;**

**d) An order of permanent injunction be and is hereby issued against the Defendants, their family, servants, workers, agents, 3<sup>rd</sup> parties or any other person claiming through them from cultivating, planting crops, fencing off or any manner**

whatsoever interfering with the Plaintiff's use and occupation of Land Parcel No. SOUTH TESO/ANGOROM/999; and

e) The Costs of the suit are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.

A. OMOLLO

JUDGE