



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 37 OF 2014

JARED ODHIAMBO OGUTU.....PLAINTIFF

- VERSUS -

WASHINGTON WANYAMA.....DEFENDANT

J U D G M E N T

1. The Plaintiff impleaded this suit against the Defendant vide a Plaint dated 27th February, 2014 praying for:

- a. Cancellation of the names of the Defendant from the register to the names of the Plaintiff JARED ODHIAMBO OGUTU on land comprising SAMIA/WAKHUNGU ODIADO/99 and the same be substituted to land comprising SAMIA/WAKHUNGU ODIADO/121 where he ordinarily resides;**
- b. Any other reliefs that this Honourable Court may deem fit to grant; and**
- c. Costs of the suit.**

2. The Plaintiff avers that their late father Simeon Kete was the sole owner of land parcels No. SAMIA/WAKHUNGU ODIADO/121 and SAMIA/WAKHUNGU ODIADO/99 and that sometime before the demise of their father, the Defendant transferred SAMIA/WAKHUNGU ODIADO/99 to himself without their knowledge. He listed the particulars of fraud on the Defendant's part as:

- a. Transferring the whole of SAMIA/WAKHUNGU ODIADO/99 to himself without the knowledge of the other family members;
- b. Transferring L.R parcel SAMIA/WAKHUNGU ODIADO/99 to himself while he ordinarily knows that he resides on SAMIA/WAKHUNGU ODIADO/121 measuring 1.30Ha;
- c. Having prime knowledge that their late father had two wives and each was left on their own land in peaceful possession.

3. The Defendant filed his Statement of Defence and Counterclaim dated 3rd March, 2014 on the 6th of October, 2014 denying all the allegations in the Plaint. He denied that he transferred land parcel SAMIA/WAKHUNGU ODIADO/99 to himself and that he was registered as the 1st Proprietor on the first registration.

4. In his counterclaim, the Defendant avers that he is the absolute registered owner of SAMIA/WAKHUNGU ODIADO/99 and that he only allowed the Plaintiff to stay on his land as his step-brother but when he requested him to vacate the Plaintiff declined. That his claim against the Plaintiff is **for an eviction and an injunction barring him from re-entering the land. He urged this Court to issue an order removing the caution placed on the land by the Plaintiff.**

5. The hearing commenced on the 22nd of June, 2016 with the Plaintiff, **JARED OJIAMBO OGUTU** testifying as the only witness. He stated that he lives in Odiado and is a farmer. That the Defendant is his step-brother who was brought up by the Plaintiff's mother. That the suit land belonged to their father Simeon Ogutu who was even buried on the land in the year 1995. He continued in evidence that the Defendant moved from the suit parcel to land parcel no. 121. PW1 stated further that the Defendant fraudulently acquired the title to the suit parcel during their father's lifetime. PW1 added that the same was fraudulent because the Defendant had been given his own parcel number 121 which he left to live on the parcel No. 99. He urged the Court to direct the Defendant to share the land with all the family members as he had brought the present suit on behalf of all his siblings, including the Defendant.

6. **PW1** was put to cross-examination by Onsongo, learned counsel for the defendant. He stated that the Defendant registered himself

illegally on the land in the year 1984 because their father was uneducated and did not know what was happening. That LR No. 99 was given to his mother while LR 121 was given to the Defendant. That their father died in the year 1995 without being aware how the Defendant acquired the land parcel as succession was not done. That land parcel No. 121 is now registered in his name after succession was done. That he did not involve the Defendant in the succession because he had already sold parcel No. 99.

7. The defence also relied on his sole evidence testifying as **DW1**. He stated that it was not true that land parcel No. 121 and land parcel 99 belonged to their father. He testified that the green card for land parcel No. 99 was opened on 11/1/1972 in his name with only a name correction done in 1984. That the land parcel No. 121 belonged to their father but the Plaintiff had it transferred to his name in 2017 after the succession of their father's estate. He continued in evidence that his father asked him to collect the title for land parcel no. 99 in 1984 and he had no objection to his registration. He concluded by urging this Court to evict the Plaintiff from parcel 99 as he has no interest in land parcel No. 121.

8. On cross-examination, **DW1** stated that he was not present when their father was buried and that the Plaintiff's mother was buried on the suit land. He stated further that his mother was the first wife and he was her first born. That parcel 99 is his and he is not in agreement that their parents' remains have to be exhumed from land parcel 99 for burying them on land parcel 121.

9. The Plaintiff filed his submissions on the 30th of June, 2021 submitting that he has lived on the suit parcel for the last 66 years and that according to the Luhya customs, it will be fatal to have him evicted from his ancestral land. He submitted further that the Defendant took advantage of the Plaintiff's arrogance and age to cause the transfer without even taking letters of administration which meant that the title was obtained fraudulently. He urged this Court to cancel the Defendant's title deed.

10. The Defendant filed his submissions on the 21st of July, 2021. He submitted that the Plaintiff had failed to prove the fraud he had pleaded and alleged. That the fraud was allegedly committed in 1972 and section 7 of the Limitations of Action Act stops the Plaintiff from pleading the same. That the plaintiff's suit should therefore be dismissed and his counterclaim allowed with costs.

11. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

- i. Whether the Defendant obtained the Suit Property fraudulently;
- ii. Whether the Defendant has proved his counterclaim; and
- iii. Who bears the costs of the suit?

12. The Plaintiff having pleaded fraud was duty bound to prove the said allegations. In the case of **John Mbugua Gitau v Simon Parkoyiet Mokare & 6 others [2014] eKLR**, the Court held that;

'The petitioner having alleged fraud and irregularities on the part of the 2nd and 3rd Respondents was duty bound to provide proof to the required standard. The burden of proof rests with whoever alleges. In the present petition the legal burden to prove fraud, discrimination, unfair procedure and breach of the constitution provisions pleaded ... lies with the petitioner.

The burden of proof on the person who alleges fraud is on a standard higher than on a balance of probabilities adopted in ordinarily civil cases but lower than proof beyond a reasonable as in criminal cases. It is somewhere in between.'

13. PW1 testified that the Defendant illegally registered himself as the owner of the suit parcel of land in 1984. That the Defendant took advantage of their father's illiteracy and transferred the land to himself without their father's knowledge. The Plaintiff did not render evidence to substantiate corroborate this statement. The green card of the suit title produced as DEx. 2 indicates the Defendant was the first proprietor of the SAMIA/WAKHUNGU-ODIADO/99 on the 11th of November, 1972. This was during the lifetime Simon Ogutu Akete and the plaintiff did not elaborate why their father (who died on 30.5.1995) took no steps to have the registration of the defendant cancelled for being fraudulently obtained.

14. The Defendant's title is protected under the section 25 of the Land Registration Act, CAP 12 of 2016. It provides thus:

"The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all the privileged and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject...."

15. In the case of **Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moijo ole Keiwa & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that: -

"Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in

relation to ownership of property in Kenya would be placed in jeopardy.”

16. In light of the foregoing, it suffices to state that, although Plaintiff has alleged fraud on the part of the Defendant, he has not provided any evidence to prove the said allegation of fraud and thus it fails.

17. On the second question, the Defendant, in his counterclaim has asked for an order that the Plaintiff and his agents be evicted from the suit parcel. DW1 stated that both he and the Plaintiff live on suit parcel No. 99 while the Plaintiff exclusively owns land parcel 121 which he transferred to himself in the year 2017. From the evidence of both sides, they were born and brought up on Samia/Wakhungu-Odiado/99. The plaintiff stated that his mother and their father were all buried on this land a fact the defendant admits and states he does not intend to have those bodies exhumed. The plaintiff was

18. In a document titled preliminary objection dated 6th March 2014 in response to the statement of defence filed the plaintiff stated that he had lived on the suit land since birth so he was entitled to the land by virtue of adverse possession. He submitted also on being entitled to the land for having lived on it for 66 years. The plaintiff had stated that he brought this suit on his own behalf and on behalf of his nine siblings whom he did not give their names. The claim for adverse possession would make sense except the plaintiff did not prove what size of the land he is in occupation of. In addition to lack of proof of size occupied, the plaintiff argued that the Defendant acquired his title irregularly thus questioning the validity of the title held. The twin issues make it impossible to make a finding in favour of the plaintiff under the heading of adverse possession.

19. Consequently, the defendant’s title as at now remains unchallenged. Until proven otherwise, the Defendant’s use and possession of the suit land is protected from interference by the plaintiff. In view of the observations and analysis made herein above, parties’ pleadings and submissions, I am persuaded that the Plaintiff has not proved their case against the Defendant on a balance of probabilities and is hereby struck out.

20. In conclusion I enter judgement for the Defendant and hold that:

a. An order be and is hereby issued to County Land Registrar to lift the caution placed on Land Reference Number SAMIA/WAKHUNGU-ODIADO/99;

b. The Plaintiff is hereby ordered to give the Defendant vacant possession of the suit parcel of land known as SAMIA/WAKHUNGU-ODIADO/99 within 180 days of this judgement failure to which eviction shall issue;

c. Once vacant possession is surrendered or eviction issued in (b) above, an order of permanent injunction be and is hereby issued against the Plaintiff and his family from interfering with, encroaching into or in any way disturbing the Defendant’s use and occupation of SAMIA/WAKHUNGU-ODIADO/99; and

d. Each party to meet their Costs of the suit and counterclaim

DATED, SIGNED AND DELIVERED AT BUSIA THIS 2ND DAY OF DECEMBER, 2021

A. OMOLLO

JUDGE