



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE NO. 334 OF 2014

YUANITA OUCHO OWINYO (Suing as the Administrator of the Estate of

DALMAS OWINYO ONYANGO.....PLAINTIFF

VERSUS

JECTONE ONGORO GUMBA.....DEFENDANT

JUDGEMENT

Long time ago, there was a man known as Dalmas Owinyo Onyango of Lower Kadongo who died domiciled in Kenya on the 31st March, 2013. It is claimed by Yuanita Oucho Owinyo (hereinafter referred to as the plaintiff) suing on behalf of this man as the administratrix of the estate, that at the time of land adjudication around 1974 the plaintiff and the deceased were resident in Tanzania and when the plaintiff returned, the deceased's elder brother one Walter Kisindo Ouko, handed over to her a chit of paper on which some land parcel numbers were written and he informed her that the parcels of land thereon belonged to her husband. Among the plots was the suit plot title No. Kisumu/Kadongo/77. During the land Adjudication around 1974 the plaintiff and the deceased were resident in Tanzania and it is his elder brother referred to above who walked around with the officers to identify their ancestral land.

The deceased died on 30th March, 2013 and the plaintiff went to the lands office to check on the land records. She found out that the other parcels had no problem except the suit parcel Kisumu/Dago/77 which was registered in the name of the defendant.

The defendant has land in the neighbouring area but he is in no way related to the deceased's family so as to make him entitled to a share of his land. The plaintiff will contend that the defendant obtained registration to the suit parcel Kisumu/Kadongo/77 by fraudulent means.

Particulars of fraud are stated as Impersonating the deceased to the adjudication officers. Getting registered as the proprietor of the suit parcel when he knew well that he did not belong to the family of the deceased. Lying that he purchased the land in 1962 by paying 7 goats to enable the deceased marry which is untrue because at the alleged time the deceased was a resident in Tanzania.

The plaintiff prays for orders cancelling the registration of the defendant as the proprietor of the parcel of land title No. Kisumu/Kadongo/77 and substituting therefore the name of the plaintiff herein and eviction of the defendant, his family members, servants and/or agents from the suit parcel Kisumu/Kadongo/77.

The defendant on his part denies that during adjudication the plaintiff's husband was in Tanzania. He claims that the plaintiff only learnt of the registration of the suit land in the defendant's name after her husband's death. He denies allegation of fraud. He is categorical that the land in issue did not belong to the plaintiff's husband.

The defendant avers that he bought the suit land from the deceased in 1962. He paid seven (7) herds of cattle as consideration. The sale was before adjudication. The defendant became the first proprietor in adjudication register. No objection was filed by the deceased. Adjudication took place in 1973 and 1974 when Dalmas Owinyo Onyango was present. Dalmas Owinyo Onyango never complained until he died. The defendant has gifted the land to his son Charles Nyaluk Ongoro who has developed the same. He prays that the suit be dismissed.

When the matter came up for hearing, ***PW 1, Yuanita Oucho Owinyo*** stated that Dalmas Owinyo Onyango now deceased was her husband. He died 31.3.2013 and she obtained a grant in Kisumu High Court Succession Cause No. 440/2014 and produced the copy MFI (1) as exhibit 1.

Her husband was the registered proprietor of Kisumu/Kadongo/910 and 880. He also owned land parcel Kisumu/Kadongo/77 which is currently in the names of Jackton Ongoro Gumba the Defendant. She produced a certificate of search for Kisumu/Kadongo/77. The land belonged to her husband's brother called Walter Kisinyo who had given it to her husband in 1976. Her family used to live in Tanzania from 1970 to 1992 and when they went back to their ancestral land they found the Defendant using it.

Walter is the one who had confirmed the family lands for adjudication and that is when parcels 880, 910 and 77 were registered. When they came back from Tanzania Walter showed them the three parcels and gave them their reference. Walter Kisinyo died on 8.5.2016 and had recorded a statement as one of my witnesses.

It was in the year 2013 that he discovered that parcel 77 had been registered in the names of the Defendant. Her husband was then alive and they had obtained certificates of official searches for the three parcels. They reported the matter to the chief who is the son to the Defendant.

PW 2 Alfayo Omoga Misala a farmer and a pastor, 78 years old at the time of testimony stated that Land parcel Kisumu/Kadongo/77 belongs to Dalmas Owinyo who is now deceased as he was son to Onyango who was the initial owner. The land was ancestral land. The defendant was a person from that area but not a family member of the Owinyo family. In 1948 when PW2 was about ten years he used to see Onyango cultivating the land with his three sons and one daughter. The land is now not being used by the Owinyo family. To his knowledge Owinyo never sold the land during his lifetime.

DW 1, Jectone Ongoro Gumba stated that the plaintiff is his in-law as her husband was a cousin. The land in dispute is in his name as per the title deed. He bought the land in 1962 from Dalmas Owino Onyango before land adjudication. He is the first registered proprietor of the land. He paid Dalmas seven (7) cows for the land and the transaction was witnessed by many people but they are now all deceased. The husband of the Plaintiff is Dalmas Owino Onyango who sold him the land. The Plaintiff had not been married by the time Dalmas sold the land to the defendant.

He prays that the Plaintiff's suit be dismissed with costs.

Cross examined by Mr. Amondi- he states that he bought the land in 1962. They did not write any sale agreement on the transaction but they had witnesses who have named in his statement. Oliech and Ndolo who were brothers to Dalmas were not called as witnesses to the transaction as they had already died by 1962. He does not know when Oliech and Ndolo died.

The purchase price for the land was seven (7) cows which Dalmas used to pay dowry for his first wife. The seven (7) cows came from his family herd. He does not know about Dalmas buying seven (7) cows for dowry.

On Re- examined by Mr. Orengo he states that nobody filed an appeal or objection against his registration with the land.

I have considered the evidence on record, the rival submissions of counsel and do find that the defendant is the registered proprietor of the suit property.

Section 24 of Land Registration Act provides:

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25

“25.(1) 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 privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26

“26.(1) The certificate of title 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 the 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.(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

The plaintiff's claim is based on fraud. The deceased Dalmas Owinyo Onyango never complained to the police when he allegedly came back from Tanzania that the defendant had converted his land during land adjudication period. Moreover, the said Dalmas Owinyo Onyango never filed any suit claiming the suit land or even writing a letter to the area chief in respect of the said property. The defendant is the 1st registered owner of the suit property

Section 80 of the Land Registration Act 2012 provides:-

“1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

This was first registration and therefore transfer of land was not applicable as the land was registered in the defendant’s name by virtue of adjudication.

The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where *Tunoi, JA. (as he then was)* stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See *Order 2 Rule 4 of the Civil Procedure Rules*.

As regards the standard of proof, The Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

The defendant states that he bought the land from the late Dalmas Owinyo Onyango before adjudication. The plaintiff had not married the late Owinyo before adjudication and hence she can’t attest to what happened at that time. It is the defendant word against the deceased who never complained or filed suit. The defendant was in possession of the suit property when the plaintiff and husband allegedly came back from Tanzania in 1992 and never filed a suit until he died in 2013. The plaintiff filed the suit approximately one year after the death of her husband and 12 years after they came back. I do find that the plaintiff has not met the threshold of proving fraud moreover there is unexplained delay in coming to court.

In conclusion, I do find that, the plaintiff has not proved that the property was fraudulently registered in the names of the defendant and therefore the plaintiff has not discharged his burden of proof on a balance of probabilities. The suit is dismissed with costs.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 29TH DAY OF JANUARY 2020.

In the presence of:

Plaintiffs: N/A

Defendant: N/A

Counsel: N/A

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE