



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

CIVIL CASE NO. 164 OF 2014

BEATRICE AWINO WOTSEMBO.....PLAINTIFF

= VERSUS =

DANCAN DAVID ODEKEYO.....DEFENDANT

J U D G E M E N T

1. The plaintiff brought this suit against the defendant vide a plaint dated 20th August 2014. The plaintiff pleaded that in September 2002 she entered into a sale agreement with the defendant over land title No. Marachi/Ebukhalalire/962. That upon execution of the sale agreement, the defendant paid her Kshs.100,000/= leaving a balance of Kshs.75,000/=. The plaintiff continued that on or about 11th August 2014 while visiting Busia Lands office she discovered that the defendant had committed a fraud by causing the land to be transferred to him without the plaintiff's knowledge.

2. The particulars of fraud are as per paragraph 7 of the plaint *inter alia*;

- (i) *Transferring L.R. No. MARACHI/EBUKHALALIRE/962 into his names without the consent and authority of the plaintiff.*
- (ii) *Transferring L.R. No. MARACHI/EBUKHALALIRE/962 into his names without him and the plaintiff attending the relevant area Land Control Board.*
- (iii) *Causing transfer of the suit land into his names without obtaining consent.*
- (iv) *Forging a letter of consent for transfer.*
- (v) *Forging the plaintiff's signature on both application for consent of land control board forms and transfer forms.*
- (vi) *Causing L.R. No. MARACHI/EBUKHALALIRE/962 to be transferred into his names without 1st completing purchase price.*
- (vii) *Being fraudulent per se.*

3. The plaintiff further pleaded that the sale between them was null and void for lack of Land Control Board consent and grant of letters of administration. She therefore prays for judgment to be entered against the defendant for;

- (a) ***That title deed issued to the defendant on 27/5/2004 in respect of L.R. No. MARACHI/EBUKHALALIRE/962 be cancelled and the same be reverted to the plaintiff.***
- (b) ***Costs of this suit.***
- (c) ***Any other relief deemed fit and just to grant.***

4. The defendant filed a statement of defence on 27th November 2014 through the firm of Ashioya & Co. Advocates denying the plaintiff's claim. The defendant pleaded that he obtained the suit land after following the laid down procedure. It is the defendant's case that the suit has been brought in bad faith and the same is barred by statute of limitations. The defendant urged the court to dismiss the entire claim with costs to him.

5. Kaniaru J allowed the law firm of Ashioya to cease acting for the defendant on 7th February 2019. The plaintiff's case was thereafter heard *ex parte* on 7th October 2019. The plaintiff opened her evidence by saying she is an accountant working at Turtle Bay resort in Kilifi.

PW1 said the defendant is her neighbour where she was born in Dadira village Butula, District. She continued that the suit land belonged to her late father and it is currently registered in the defendant's name.

6. **PW1** further states that a grant in respect of her father's estate was given to her mother in cause No. 110 of 1991 and she presented the grant as **Pex 1**. That after her mother's death, she approached the defendant to sell to him the land. The defendant agreed to buy and paid her Kshs.100,000/= leaving a balance of Kshs.75,000 to be paid on transfer. It is the plaintiff's case that she never transferred the suit land into her name. She produced the green card as **Pex 3**.

7. **PW1** stated that her copy of the sale agreement got burnt during the 2007 – 2008 post-election violence. She did a search in the year 2014 when she discovered the defendant had registered himself as the owner. The plaintiff asked the Court to revoke the transfer to the defendant. She also prayed for costs of the suit.

8. Odhiambo Sumba Obiero gave evidence as **PW2**. He is a teacher at Bukhwako Primary School. He said he knew both the plaintiff and the defendant. **PW2** confirmed that he is the one who drew the sale agreement between the two. **PW2** adopted as part of his witness statement he filed in Court on 19th May 2015. In the statement, **PW2** confirmed that he was one of the plaintiff's witnesses during the sale and that the defendant only paid Kshs.100,000 in cash. This marked the close of the plaintiff's case.

9. The plaintiff's advocate filed a detailed submissions on 12th November 2019. It is submitted for the plaintiff that the cause of action revolves around fraud. The plaintiff stated that in September 2002 when the agreement was drawn she had not succeeded her mother hence the purported sale was null and void ab initio. She also said that she never executed the transfer forms in favour of the defendant. In support of her submissions she relies on;

(i) Provisions of Section 26 of the Limitation of Actions Act on when she discovered the fraud.

(ii) Section 6 of Cap 302 on the absence of Consent of Land Control Board to transfer.

(iii) Section 45(1) of the Law of Succession Act on intermeddling with the deceased estate.

(iv) Nairobi HCC No. 711 of 1990 Mwaura Njoroge Vs James Thuo Waweru & another on forgery.

10. The plaintiff produced a green card which showed at entry No. 5 as at 8/9/1992 **Terry Achola Wotsembo of ID No. 1144176/64** was registered owner holding the title in trust for her daughter Beatrice Awino (Plaintiff) until maturity. Entry No. 6 shows the plaintiff as registered owner on 27/5/2004 under RL 7 and the same day a transfer registered in favour of the defendant.

11. The plaintiff also produced as **Pex 2** form **RL7** executed by the plaintiff on 26th May 2004 having Terry Achola transferring the property to the plaintiff. **Pex 1** is a Certificate of Confirmation of grant issued to Terry Achola on 29th July 1992 as the personal representative of Jonathan Nafaa Odongo. The plaintiff in her evidence admits that she succeeded her mother in the year 2004. It is therefore incorrect for the plaintiff to say she never registered the title in her name.

12. The provisions of Section 107, 108 and 109 of the Evidence Act Cap 80 imposes the burden of proof on he who alleges the existence of a fact;

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

13. This Court's duty is to determine whether the plaintiff has proved her case by establishing the fraud she levelled against the defendant. First the plaintiff did not produce a sale agreement to confirm that the balance of the purchase price was never paid. Her explanation that the agreement was lost is reasonable. The key activities that constitute the fraud alleged relates to the registration of the defendant as the owner thereof. For me this is part of the evidence that needed to be established other than that there was any balance outstanding or that the sale was executed without letters of administration.

14. The defendant pleaded in Paragraph 4 of defence that he transferred the land to himself following the laid down procedure. The defendant however did not call evidence to support this claim. I am alive to the requirement that he who alleges a fact has the burden to prove the existence of that fact. The defendant did not file any documents alongside his pleadings for the Court to contrast with the evidence adduced by the plaintiff. This leaves the evidence given by the plaintiff as unchallenged.

15. The standard of proof for fraud is higher than that of Civil Cases. However in an instance where the plaintiff's evidence is unchallenged, that she never signed a transfer to the defendant. This Court will abide by the evidence as presented. This is because our system is adversarial in nature which prohibits this Court from investigating the existence or otherwise a transfer document unless it was taken up during the trial.

16. Consequently, I find that the plaintiff has proved her case on a balance of probabilities and hereby enter judgment in her favour in terms of prayer (a) of the plaint. I order that the plaintiff shall meet her costs of the suit.

Dated, signed and delivered at BUSIA this 13th day of February 2020.

A. OMOLLO

JUDGE