



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 190 OF 2014

FRANCISCA NAROCHO EGESA

LEONARD WANDERA EGESA

GEORGE OKUKU EGESA

CAROLINE NASIRUMBI OLOO.....PLAINTIFFS

= VERSUS =

BOAZ EGESA LUKOBA

RICHARD WABWIRE EGESA

PATRICK OUMA EGESA.....DEFENDANTS

J U D G M E N T

1. The suit herein is clearly a family property feud. The Plaintiffs **FRANCISCA NAROCHO EGESA, LEONARD WANDERA EGESA, GEORGE OKUKU EGESA** and **CAROLINE NASIRUMBI OLOO** instituted it vide the Plaintiff dated 26th September 2014 against the Defendants, **BOAZ EGESA LUKOBA, RICHARD WABWIRE EGESA** and **PATRICK OUMA EGESA** seeking the Court's intervention for unlawful and unfair subdivision and distribution of the parcel of land known as **L. R NO. BUKHAYO/MATAYOS/1755** which they deemed to be ancestral land held in trust for them.

2. This is a family matter. The 1st Plaintiff is the mother to the second, third and fourth Plaintiffs and the 2nd and 3rd Defendants. The 1st Defendant is her husband. The Plaintiffs pleaded that the 1st Defendant as the registered owner of land parcel No. **BUKHAYO/MATAYOS/1755** valued at Kshs.7million subdivided it into three parcels, **BUKHAYO/MATAYOS/4267, 4268** and **4269**. He registered parcel No. **BUKHAYO/MATAYOS/4267** measuring **4.16 Ha** in his own name and transferred **4268** and **4269** each measuring **2.8 Ha** to the 2nd and 3rd Defendants respectively.

3. The Plaintiffs pleaded further that the 1st Defendant now intends to subdivide **BUKHAYO/MATAYOS/4267** into five portions for distribution among themselves with the remainder being designated for sale to third parties. They fault the same as their portions will be unequal to those of the 2nd and 3rd Defendants which has given rise to this suit. They seek orders of cancellation of the subdivided titles namely **BUKHAYO/MATAYOS/4267, 4268** and **4269** consequently reverting back to the original title **BUKHAYO/MATAYOS/1755** for equal distribution among the 1st Defendants family members as well as costs.

4. The Defendants entered appearance on 6th November 2014 and filed their joint Defence on 15th December 2014. Their chronology of facts is in tandem with that of the Plaintiffs. It is pleaded that **BUKHAYO/MATAYOS/4267** is designated for the Plaintiffs and a purchaser and that the Plaintiffs' involvement was not required in the subdivision and distribution of the suit property.

5. The Court record shows that there was another suit involving the same parties and subject matter being **BUSIA CMCC NO. 133 OF 2014** instituted on 19th March 2014 in which the 1st Defendant is named as the Plaintiff and the 2nd, 3rd and 4th Plaintiffs named as Defendants. On the hearing date, 15th November 2017 parties consented to consolidate the two cases with **BUSIA ELC NO. 190 of 2014** as the lead case. The Plaintiff in **BUSIA CMCC NO. 133 OF 2014** became the Counter Claim and the Defence in response became the Defence to the Counter Claim. In the Counter Claim the 1st Defendant pray for an injunction order restraining the Plaintiffs from interfering with the 1st Defendant's use, division and disposal of land parcel no. **BUKHAYO/MATAYOS/4267**. The 1st, 3rd and 4th Plaintiffs authorized the 2nd Plaintiff, **LEONARD WANDERA EGESA (PW 1)** to testify on their behalf. Essentially then, this is a case where members of the same

family have risen against one another.

6. PW 1 testified that sometime in November 2013, the 1st Defendant subdivided **BUKHAYO/MATAYOS/1755** into three parcels, **BUKHAYO/MATAYOS/4267, 4268** and **4269** with the latter two parcels in the 2nd and 3rd Defendant's names and the former remained in the 1st Defendant's names. PW 1 and the other Plaintiffs waited to be given their shares of land but that was not done. On 8th April 2014, the 1st Defendant brought prospective buyers to the suit property. Being aggrieved they sought to resolve the issue as a family but were unsuccessful. They then filed this suit to obtain their fair share. He testified further that parcel no. 4267 measures 9 acres while 4268 and 4269 given to the 2nd and 3rd Defendants measures 7 acres each hence their portions from 4267 will definitely be much smaller.

7. On cross-examination PW 1 was shown the title deed and green card pertaining to the suit property. He confirmed that the 1st Defendant's was the registered owner of the property and that the original property **BUKHAYO/MATAYOS/1755** belonged to the 1st Defendant's paternal uncle and was transferred to the 1st Defendant who paid consideration of Kshs.80,000 for it. He further confirmed that no trust was indicated on the documents nor did the Plaintiffs contribute to the purchase of the suit property. PW 1 prayed for a fair share of the land as it belonged to their grandfather (in the traditional sense) hence they were entitled to inherit it equitably.

8. The 1st Defendant, **BOAZ EGESA LUKOBA** testified as DW 1. He reiterated that the suit property belonged solely to him having been purchased from his paternal uncle, **MULAMA OLUBA**. He intended to distribute the land among his five children, two accepted their portions and processed their titles but the rest who were not satisfied sued him. DW 1 insisted that the suit property was not ancestral land and he was therefore free to distribute it as he wished. His father, one **JAIRUS LUKOBA** had land at Buluma which is the ancestral property. He prayed for the suit to be dismissed with costs.

9. DW 2, **PATRICK OUMA EGESA** stated that he was given his parcel of land for free and had it registered in his name. He started living on it in 2016. He asserted that the Plaintiffs were also given their portions which are still intact. The 2nd Plaintiff lived on his own designated portion. The only problem was that they were not satisfied with the manner of distribution. He also prayed for the suit to be dismissed.

10. Both sides filed submissions. The Plaintiffs' were filed on 29th May 2018 and the Defendants' were filed on 4th May 2018. The Plaintiffs' focused primarily on equal rights of ownership of the suit property to which they contended to be entitled. The Defendants Counsel on the other hand submitted that the Plaintiffs had no cause of action against the Defendants as the 1st Defendant had absolute ownership of the suit property in accordance with sections 24 and 25 of the Land Registration Act.

11. The facts of this case are not in issue. The crux of the matter is the nature of the original Land Parcel No. **BUKHAYO/MATAYOS/1755**. Both sides are in agreement that the suit property belonged to the 1st Defendant's paternal uncle who sold it to him. Does the relationship of the original owner to the 1st Defendant solely translate into the property being ancestral land to be held in trust for future generations? In my view, the suit property does not conform to the legal characteristics of ancestral land. It was not previously unregistered land held under custom pre-consolidation and registration under the Registered Land Act. There is therefore no trust created under the concept of intergenerational equity.

12. Further, the evidence on record reveals that the nature of the title of the property under the Registered Land Act cap 300 is indicated as "Absolute." It is also shown that a transfer of was effected on 11th April 1995 from Mulama Oluba to the 1st Defendant for consideration of Kshs.80,000. It is not uncommon for relatives to transact in property. As an absolute proprietor the 1st Defendant has the right to deal with his property in the manner he so wishes.

13. In light of the foregoing, the Plaintiffs' case is hereby dismissed. The Defendant's counter claim is allowed as prayed. Since the parties are members of one family, both sides shall bear their own costs.

Dated, signed and delivered at Busia this 6th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs: Present

Defendants: Present

Counsel for Plaintiffs: Present

Counsel for Defendants: N/A

Court Assistant: Nelson Odame