



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 744 OF 2017**

**(formely Kisii Elc Case No. 156 of 2010)**

**JAMES OWUOR AMOLO suing as legal representative the estate of**

**JACKTONE AMOLO OYARE.....PLAINTIFF**

**VERSUS**

**PETER ADONGO OKONGO.....1<sup>ST</sup> DEFENDANT**

**JOHN ANGIRO ADUKE.....2<sup>ND</sup> DEFENDANT**

**MARY AWACH.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The suit property is title number Kanyamkango/Kajulu/488 measuring approximately thirteen point four (13.4 hectares in area. It is located in Kajulu II in Kanyamkago within Migori County. The said property was registered in the name of the 1<sup>st</sup> defendant son of the late Pius Okongo (deceased) and subdivided in the name of 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Previously, the said property was registered in the name of **JACKTONE AMOLO OYARE** (Deceased original plaintiff) who was the father of the plaintiff and filed this suit on 9<sup>th</sup> June 2010 by way of a plaint dated 3<sup>rd</sup> June 2010.

2. Simultaneously filed with the plaint was an application by way of chamber summons of even date wherein the deceased original plaintiff sought a temporary injunction to restrain the 1<sup>st</sup> defendant from in any way interfering with, wasting, damaging, alienating, constructing and or doing anything on the suit property pending the hearing and determination of the suit. On 30<sup>th</sup> June 2010, Makhandia J ( as he then was) allowed the application in the terms sought therein.

3. As the suit was pending on 27<sup>th</sup> September 2011, an order was issued in Migori Senior Principal Magistrate's court Misc. Application No. 37 of 2010 (hereinafter referred to as the Migori Magistrate's Miscellaneous case) for eviction of the deceased original plaintiff from the suit property. Thereafter the deceased original plaintiff filed an application by way of notice of motion dated 3<sup>rd</sup> October, 2011 in this suit for a stay of execution of eviction orders issued in the Migori Magistrate's Misc case and on 5<sup>th</sup> October 2012, the motion was conditionally allowed by R. Lagat Korir J. On 6<sup>th</sup> May 2014 the court (Mutungi J) ordered a stay of the eviction orders on condition that the deceased original plaintiff would execute a bond sum of Kshs. 100,000/= as a security for costs within sixty (60) days from the date of the order. Thus the court allowed the deceased original plaintiff's notice of motion dated 24<sup>th</sup> February 2015 in terms of amendment of the plaint to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the suit.

**B. REPRESENTATION:**

4. The plaintiff is represented by Mr. Moracha learned counsel of Moracha and Company Advocates. Initially, the firm of Erick Ntabo and Company Advocates appeared for the plaintiff.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are represented by learned counsel Mr. S. Ndege of S. Ndege and Company Advocates. Previously, J.O Magolo and Company Advocates and Mudeyi Okumu and Company Advocates at different times appeared for 1<sup>st</sup> defendant who had

originated this suit in person.

**C. SUMMARY OF THE PLAINTIFF'S CASE:**

6. By an amended plaint dated 24<sup>th</sup> February 2015 and filed on even date pursuant to the ruling of the court (Okongo J rendered on 27<sup>th</sup> August, 2015, the plaintiff is seeking the following reliefs:-

**a) Cancellation of title issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' known as Kanyamkago /Kajulu/488 and rectification of register thereof to have the name of the plaintiff James Owuor Amolo entered in the register in his place and on his failure to surrender title, the executive officer of the Honourable Court to sign necessary transfer documents.**

**b) Costs**

**c) Interest on (b) above**

**d) Any other alternative relief this honourable court may deem fit to grant.**

7. The gist of the plaintiff's claims is that in 1970s the deceased original plaintiff bought the suit property from deceased father of the 1<sup>st</sup> defendant. It was then transferred and registered accordingly. On 11<sup>th</sup> December 2014, upon search at Migori Land Registry, the plaintiff discovered that the property was registered in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in lieu of the deceased original plaintiff who had passed away on 5<sup>th</sup> March 2012. That the plaintiff and his family have occupied the suit property for over thirty nine (39) years. That the registration of the property in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, is fraudulent thus provoking the instant suit.

**D. SUMMARY OF THE DEFENDANTS' CASE:**

8. The 1<sup>st</sup> defendant in this statement of defence and counterclaim dated 2<sup>nd</sup> July,2011 and filed on 4<sup>th</sup> July 2011, denied the plaintiff's claim and sought the following orders:-

**a) An order that the plaintiff do hand over vacant possession of the suit property to the defendants.**

**b) Costs of and incidental to this suit and interest at court rates.**

**c) Any other or further relief this honorable court may deem fit and just to grant.**

9. Briefly, the 1<sup>st</sup> defendant states that he is the bonafide registered owner of the suit land. That the deceased original plaintiff wrongfully, illegally and or fraudulently uttered transfer documents to the District Land Registry at Migori purporting that the deceased father of the 1<sup>st</sup> defendant that transferred the suit property to him in the year 2000. That the deceased original plaintiff was subsequently charged and convicted of forgery and uttering false documents in respect of the title to the suit property at Migori Senior Principal Magistrate court in Criminal case No. 519 of 2002; **Republic Vs- Caleb Owuor Agik and another** (herein after referred to as the Migori Criminal case). That the deceased original plaintiff's title to the suit property was cancelled accordingly.

10. In their statement of defence and counterclaim dated 3<sup>rd</sup> August 2016 and filed on 4<sup>th</sup> August 2016, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants state that they are the duly registered proprietors of the suit property having lawfully purchased the same from the 1<sup>st</sup> defendant free from any encumbrances whatsoever. They affirmed that the deceased original plaintiff was found guilty of forgery of title documents of the suit property in the Migori Criminal case.

11. Wherefore in the counterclaim, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have sought orders that :-

**i. An order directing the defendant do give vacant possession of the suit land to wit; Kanyamkago/Kajulu/488.**

**ii. In the alternative, the defendant to vacate the suit land known as Kanyamkago/Kajulu/488 with the assistance of court bailiffs and the District officer Uriri Division to provide security.**

**iii. Costs of the suit.**

**iv. Any other relief that this honourable court may deem opt to grant.**

12. The plaintiff reiterated his entire amended plaint and denied the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's statement of defence and counterclaim by his reply thereto dated 24/8/2016. He states that the suit property cannot have two registered proprietors at the same time. That the deceased original plaintiff was acquitted of charges in the Migori Criminal case. He pleaded particulars of illegalities on the part of the defendants and urged the court to dismiss the defence and the counterclaim of the defendants with costs and interest.

**E. SUMMARY OF THE EVIDENCE OF THE PARTIES:**

13. On 18<sup>th</sup> April 2018, the plaintiff (PW1) adduced evidence that the deceased original plaintiff filed the present suit before he passed on

prompting the plaintiff to obtain a grant of letters of Administration intestate in respect of the state. He relied on a copy of title deed to the suit property and other documents as per his list of documents dated 21<sup>st</sup> March, 2011 (PEXhibits 1 to 3) which include a copy of title of the suit land.

14. The 1<sup>st</sup> defendant (DW1) testified by relying on his statement dated 16<sup>th</sup> January 2018 and filed on 17<sup>th</sup> November 2018. He also relied on his list of documents dated 3<sup>rd</sup> August 2016 (DEXhibits 1 to 14) which include a copy of the title of the suit land (PEXhibit 1) agreement of sale dated 14<sup>th</sup> May 2012 (PEXhibit 4) and letter of consent of the Land Control Board dated 16<sup>th</sup> May 2012 (PEXhibit 14).

15. The 2<sup>nd</sup> defendant (DW2) testified that he bought the suit property from DW1 as shown on DEXhibit4. He relied on his statement dated 3<sup>rd</sup> August 2016 and filed on 4<sup>th</sup> August 2016.

#### **F. THE PLAINTIFF'S SUBMISSIONS:**

16. The plaintiff's counsel filed submissions dated 30<sup>th</sup> November 2018 wherein he stated, inter alia, that he is the legal representative of the estate of the deceased original plaintiff who bought the suit property from the 1<sup>st</sup> defendant's deceased father at Kshs. 40,000/=. That the application dated 3<sup>rd</sup> June 2010 for an order of temporary injunction was granted by the court and that DW 1 never obeyed the injunction as he sold the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That the 2<sup>nd</sup> registered proprietor of the suit property was the deceased original plaintiff whose title was never cancelled and or recalled.

17. Learned counsel for the plaintiff cited **section 30 (2) (a) of the Land Registration Act, 2012** and also relied on the case of **John Kiine Musharu –v- Ole Tasur Koonti Kisii ELCC number 11 of 2009 consolidated with Kisii ELCC Number 28 of 2009, Koonti Ole Tasur –v- John Kiine Musharu** in support of this submissions.

#### **G. THE DEFENDANTS' SUBMISSIONS**

18. Learned counsel for the defendants filed submissions dated 21<sup>st</sup> November 2018 wherein he provided the background of the suit, brief facts of the case and it's status. He framed ten (10) issues for determination which include:-

**i. What is the effect of the Judgments in Criminal case No. 519 of 2002 and SPMCC Misc. Application no. 37 of 2010?**

**ii. Is there cause of action disclosed in the current case ie ELC NO. 156 OF 2010 against the defendant?**

**iii. Did the defendants jointly or severally participate in any of the alleged fraud as particularized in paragraph 7 of the amended plaint or at all?**

**iv. Is there a claim of adverse possession of the suit land made out in the plaint?**

**v. Are the 2<sup>nd</sup> and 3<sup>rd</sup> defendants (ie the new owners of the suit property) entitled to the order of eviction against the plaintiff/occupants?**

19. Counsel also submitted that the plaintiffs failed to specifically plead and prove his claim on a standard below beyond any reasonable doubt.

20. Counsel further submitted that the plaintiff has not proved his case on a balance of probability. He urged the court to dismiss the plaintiff's suit with costs and allow the defendants' counterclaim which has been proved to the required standard namely above the usual standard in Civil cases namely on a balance of probability.

21. To buttress his submissions, counsel relied on the following authorities:-

a) Esther Ndegi Njiru and another –v- Leonard Gata (2014) **eKLR**

b) Alice Chemutai Too –v- Nickson Kipkirui Korit and 2 others (2015) **eKLR**.

c) Lawrence P. Muriuki Mungai Attorney of Francis Muruki Mwaura –v- A.G. and 4 others (2017) **eKLR**

#### **H. ISSUES FOR DETERMINATION**

22. I have carefully examined the entire pleadings, evidence of the parties and submissions including authorities cited in this suit. I am guided by the decision of the Court of Appeal in **Great Lakes Transport Co. (U) Ltd –v- Kenya Revenue Authority ( 2009) KLR 720** regarding issues for determination in a suit. I take into account issues framed in the defendants' submissions and embrace them accordingly.

#### **I. ANALYSIS OF EVIDENCE:**

23. It was the evidence of the plaintiff (PW1) that he was issued with letters of administration and obtained title to the suit property (PEXhibit 1). He also stated that the name of the 1<sup>st</sup> defendant (DW1) appears on the certificate of official search (PEXhibit 2). That his father

bought the property from father of DW1 and that he has lived on the property since 1970.

24. During cross-examination, PW1 stated that he is the registered owner of the suit property and that the deceased original plaintiff was convicted and fined by court. That the (PW1) had no agreement and transfer in relation to the property. He testified in examination in chief, inter alia;

**“ I stay on the land. My five brothers and sisters also live on the land”**

25. According to DW1, the suit property is registered in his name prior to 6<sup>th</sup> July, 2012. That he acquired the property on 21<sup>st</sup> October 2008. He produced letters of administration dated 7/4/2008 (DEXhibit 8) and others (DEXhibit 1,2 and 3) in support of his claim.

26. DW1 further stated that DEXhibit 1 is in his name. That DEXhibit 2 is the name of DW2. On cross-examination, DW 1, stated in part that :-

**“I transferred the suit land in a year. I cannot recall. I do not stay on the suit land.”**

27. It is noted from the evidence of DW 2 that he relied on DEXhibit 4 and 5. Quite plainly, DW 1 and DW2 obtained the suit property by the prescribed procedure as revealed by DEXhibits 4,5,8,12, 13 and 14.

28. There are allegations of fraud against the defendants at paragraph 7 of the amended plaint, **Black's Law Dictionary 10<sup>th</sup> Edition** defines the term **“FRAUD”** as follows:-

**“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”**

29. It is trite law that any allegation of fraud must be pleaded and strictly proved to the standard of proof required of him which is obviously higher than that required in ordinary Civil cases, namely proof upon a balance of probabilities but certainly not one beyond a reasonable doubt as in criminal cases ; see **Ndolo –v- Ndolo (2008) 1KLR (G and F) 742.**

30. The purported transfer of the suit property on 20<sup>th</sup> April, 2000 as per DEXhibit 9 and on 22<sup>nd</sup> September 2009 as shown on PEXhibit 1 was fraudulent and irregular. This is notable from DEXhibit 10 that the deceased father of DW1 died on 30<sup>th</sup> June 1988 yet the court held that the said deceased died in 1998 see (DEXhibit 5 at page 3). It is quite clear from the DEXhibits 5 that the deceased original plaintiff did not appeal for the judgment. Wherein he was guilty and convicted; see **Esther Wanjiru case (supra)**.

31. The defendants contend that the plaintiff did not state that he is legal representative of the estate of the original plaintiff. I am aware that the estate of the deceased is vested in the legal representative as defined under **section 2 of the Civil Procedure Act (Cap 21)**.

32. In the case of **Omari Kaburu –v- ICDC (2007) eKLR** , Wanjiru Karanja J (as she then was ) rendered herself thus:-

**“ the law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.”**

33. It follows that there was lawful transfer of the suit property by way of DEXhibits 12,13 and 14 to DW2 and 3<sup>rd</sup> defendants. So, DEXhibit 2 which is in favour of the 1<sup>st</sup> defendant (DW1) was not fraudulent in the obtaining circumstances.

34. To that extent, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were lawful purchasers of the suit property; see **Kuria Greens Ltd –v- Registrar of Titles and another (2011) eKLR** by Musinga J (as he then was) and **Lawrence Mungai case (supra)**

35. It must be borne in mind **that section 143 repealed Registered Land Act (Cap 300)** under which the suit property was registered provided for title cancellation through order of the court; see **Musharu case (supra)**. Interestingly, the plaintiff did not lay a claim for adverse possession in respect of the property and has not proved the same or all as per the dictates espoused by the Court of Appeal in **Wilson K. Katana and 101 other –v- Salim Abdallah Bakshwein and another (2015) eKLR. Article 40 (1) of the constitution of Kenya 2010** anchors secure protection of right to property as read with **Section 152 of the land Act** prohibits unlawful occupation of public, community and private land apply in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the present suit.

#### **CONCLUSION AND DETERMINATION:**

36. In the final analysis, I find that the plaintiff's claim has not been proved against the defendants (counter claimers) on a balance of probability. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's counter claim has proved accordingly.

37. A fortiori, the plaintiff's suit be and is hereby dismissed with costs to the defendants. I enter judgment for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, jointly and severally against the plaintiff in terms of orders (a) and (b) of their counterclaim dated 3<sup>rd</sup> August 2016 with costs.

38. For avoidance of doubt, the eviction of the plaintiff (defendant in the counterclaim) from the suit property shall be in accordance with **Section 152 B of Land Act,2016 (2012)**.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 20<sup>th</sup> day of March 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

No appearance for Plaintiff -

No appearance for the Defendants-

Tom Maurice – Court Assistant.