



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 38 OF 2017

ANDREA WANJALA alias ANDREA WANJALA SIKAUTI PLAINTIFF

VERSUS

CHRISTOPHER OTINGA SIKAUTI1ST DEFENDANT

SIKAUTI WAFULA ONDWA2ND DEFENDANT

J U D G E M E N T

1. The plaintiff brought this suit against the two defendants over sharing of land parcel No. South Teso/Amukura/182 which he pleaded was given to him as a gift in 1952. He pleaded that his younger uncles Matayo Sheunda and Akwata Odinga visited him on this suit land and he also decided to gift them a portion of the suit land. That he gave Matayo 4 acres and Akwata 3 acres and boundaries demarcated in 1970.

2. It is the plaintiff's case that he presented his name and that of Matayo and Akwata during registration but without his knowledge the Registrar erred in his entry for registering them as owners in equal shares. That he never discovered this error as they lived peacefully with Matayo and Akwata. That his share of the land has been subdivided to many people including his sons and purchasers who need to be given their title deeds but the defendants who are sons of Matayo and Akwata want the land subdivided into 3 equal parts.

3. The plaintiff wants an order to issue against the defendants as follows;

(a) An injunction order restraining the Defendants from interfering with other parts of the land parcel SOUTH TESO/AMUKURA/182 a part from their own portions measuring 4 acres for MATAYO SHEUNDA and 3 acres for AKWATA ODINGA as demarcated by the existing boundaries as from 1972.

(b) The land Registrar Busia be directed by the way of court order to re-visit the land and determine the old boundaries and actual acres as demarcated in 1972 and do rectify their register to read what is on the ground.

(c) Cost of this suit.

(d) Any other relief this honourable court may deem fit to grant to the plaintiff.

4. The defendants filed a joint statement of defence on 24th May 2017 denying the plaintiff's claim. The defendants pleaded that this suit is sub-judice Busia HC P&A No. 308 of 2014 thus this court lacks jurisdiction to hear and determine the dispute. The defendants pleaded for the dismissal of the plaintiff's case with costs.

5. The plaintiff gave his testimony on 11th June 2018 and 20th May 2019. He adopted his witness statement dated 15th February 2017 as his evidence in chief. He produced the green card of the suit land as **Pex 1**; Ruling in Succession Cause No. 277 of 2014 as **Pex 3**. In cross examination, **PW1** admitted that the suit land was first registered in 3 names i.e. Andrea Wanjala, Matayo Sheunda and Akwata Odinga. Matayo is the father to the 1st defendant while Akwata is the father of the 2nd defendant. That it was wrong for the green card to indicate they owned the land in equal shares as he is the one who gave the two deceased persons land.

6. John Sikauti Otvasi gave evidence as **PW2** adopting his witness statement filed in court. He is a younger brother of the plaintiff. **PW2** said he and his brothers Simiyu, Wandera and Patrick received land from the plaintiff in the year 1977 before he gave Matayo and Akwata a portion of the suit land in 1988. That the defendants want more land from the plaintiff than what was given to their fathers. That there has been a boundary for more than 20 years and they have children. In re-examination, **PW2** said he lives on 3 acres of the suit land. This marked the close of the plaintiff's case.

7. Christopher Otinga gave evidence on behalf of the defence on 14th October 2019. He adopted his statement dated 22nd July 2017 as his

evidence chief. **DW1** said the parties herein are cousins. He produced a copy of the green card for the suit land as **Dex 1**. That the green card showed each of the 3 registered owners were entitled to $\frac{1}{3}$ share each. That he has no objection sharing the land as per the card. In cross-examination, **DW1** said he had not measured the land used by his father or his uncle Akwata Odinga. That it is the plaintiff who planted boundaries after the deaths of Matayo and Akwata. This also marked the close of the defence case.

8. Parties filed written submissions which I have read and considered. It is my considered opinion that the only question arising for determination is whether or not there was an error in the register which recorded the three proprietors as owners in equal shares. From the green card produced by both sides; the land was at first registered on 7th December 1972 in the names of Andrea Wanjala; Matayo Sheunda and Akwata Odinga. Their shares is indicated as $\frac{1}{3}$ share each.

9. According to the plaintiff this entry was made in error and it ought to be rectified to reflect the 4 acres he gave Matayo and 3 acres to Akwata Odinga and not the equal shares indicated in the register. The burden was thus on the plaintiff to demonstrate the error that would entitle him to an order of rectification of the Register. To prove this, the plaintiff said he is the one who was given the land before he later shared it with his uncles. The plaintiff did not however call any evidence to support his averment that he was given this land long before adjudication. Further he did not bring to this court any evidence that indeed the defendants have only been using 4 acres and 3 acres respectively of the disputed land.

10. The evidence of PW2 does not add much value to the plaintiff's case as PW2 only said the fathers' of the defendants were given land in 1988 but by which time the property was already registered in the names of the 3. PW2 was not present when the plaintiff was being given the land or when the plaintiff gifted his uncles. The witness made no mention of what transpired during the adjudication process.

11. Further the plaintiff accused the Land Registrar of making the error but he did not join him as a party to these proceedings. Under Section 143 (1) of the Registered Land Act Cap 300 (repealed) provides thus;

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.

The same provision is contained in Section 80(1) of the Land Registration Act No. 3 of 2012 thus;

(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.

Section 28 of Registered Land Act provides that;

“28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

12. The law provides for amendment of the register where it is proved that the registration was obtained, made or omitted by fraud or mistake. In the evidence of the plaintiff it is not ascertainable whether the registration was made or omitted by mistake or fraud and who is guilty of the omission. The plaintiff said he is the “one” who gave the three names to be entered in the register. He did not provide a document given to the Registrar if at all detailing the terms of registration of Matayo and Akwata as co-owners of the suit land. The plaintiff did not apportion any mistake/fraud on the part of his co-owners in regard to their registration as owners in equal share. He has thus failed to lay basis for the rectification of the register.

13. Section 26(1) of the Land Registration provides that;

“(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.”

There is no evidence that the two defendants and or their fathers acquired their titles unprocedurally as the plaintiff's evidence is that he gave them land. So this Section also does not impeach the rights conferred on the defendants through registration.

14. The plaintiff's evidence did not persuade this court that he is in actually possession of the remainder of the land after he removes the 7 acres he alleges to have gifted. I say so because the plaintiff said part of the land is occupied by his brothers' (PW2 included) and undisclosed purchasers. This suit was not brought in a representative capacity. The plaintiff has not satisfied the court that the areas occupied by these people are comprised in the 2/3 share of the defendants land. All in all, I find that the plaintiff has failed to prove his case on the standard required in law. Accordingly, I am left with no option but to dismiss his case with costs to the defendants.

Dated, signed & Delivered at BUSIA this 12th day of March 2020.

A.OMOLLO

JUDGE