



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**E.L.C CASE NO 1 OF 2018**

**MATHIAS OBANDE KALANDE.....PLAINTIFF**

**VERSUS**

**SCHOLASTICA KALANDE.....1ST DEFENDANT**

**CHRIS WAMALWA KALANDE.....2ND DEFENDANT**

**JUDGEMENT**

1. This suit was instituted here by the Plaintiff – **MATHIAS OBANDE KALANDE** – vide a plaint dated 22<sup>nd</sup> December, 2017 and filed on 9<sup>th</sup> January, 2018. Mathias sued the two defendants – **SCHOLASTICA KALANDE** and **CHRIS WAMALWA KALANDE** – who are wife and son of his late brother – **JAMES KALANDE**. They are also the administrators of the estate of the late **JAMES KALANDE**. The legal tussle between the parties relate to Land parcel NO. L.R SAMIA/BUDONGO/223 (“suit land” hereafter) originally owned by the plaintiff's late father and meant to devolve to the plaintiff, but said to have become the property of 2<sup>nd</sup> defendant in a wrongful and unlawful manner.

2. According to the plaintiff, his late father had nine (9) parcels of land. Of these, the plaintiff was supposed to get four (4), the late James Kalande four (4), while a sister was to get one (1). But things didn't work out that way. The late James Kalande got five (5), the plaintiff three (3) and the sister one (1). Of the five (5) properties that the late James Kalande got, one – the suit land itself – was meant for the plaintiff. The plaintiff seems to have insisted that the property was his and the late James seems to have accepted this at some point. But as fate would have it, James died before transferring the property to the plaintiff. In the succession proceedings initiated by the defendants in respect of the late James Kalande's estate, the plaintiff featured nowhere in the ownership equation and the 2<sup>nd</sup> defendant ended up becoming the registered owner of the suit property. This is what the plaintiff is contesting via this suit.

3. The plaintiff is seeking the following prayers:

*(i) A declaration that the late James Kalande held L.R SAMIA/BUDONGO/223 in trust for the plaintiff.*

*(ii) The registration of the 2<sup>nd</sup> defendant, Chris Wamalwa Kalande, as owner of L.R SAMIA/BUDONGO/223 be set aside and the said parcel of land be registered in the name of the plaintiff.*

*(iii) Costs*

4. The defendants responded vide a defence filed on 9<sup>th</sup> March, 2018. They denied the plaintiff's claim and pleaded, inter alia, that they followed due process to acquire the suit land.

5. The court started hearing the matter on 24<sup>th</sup> September, 2018. The plaintiff testified as PW1 and generally reiterated the substance of his pleadings. But there was also greater elaboration and substantiation. It was, for instance, made clear that the nine (9) parcels of land mentioned in the pleadings as having been owned by the plaintiff's late father comprised of parcels Nos. SAMIA/BUDONGO/1697, 223, 219, 235, 228, 1513, 1731, 191 and 194, with the plaintiff owning parcels Nos. 191 and 194 while his late brother, and by extension the defendants, owned 1697, 235, 223, 219 and 1513. It emerged also that the plaintiff's late brother had used land parcels Nos. 1697, 235, 223 and 219 as security for a loan he had obtained from a bank. He is said to have defaulted in payment and the plaintiff had to step in and pay in order to obviate or forestall an inevitable auction or sale.

6. According to the plaintiff, the arrangement in place between him and his late brother was that parcel No. 223 would be registered in his name as it was meant to be his right from the beginning. The plaintiff's late brother even gave the plaintiff the title deed for the land and thereafter signed an application to obtain consent for transfer from the area Land Control Board. But the brother died before the process of transfer was completed and the defendants surreptitiously or stealthily applied for letter of administration and falsely represented to the Probate and Administration Court that parcel No. 223 was their entitlement. The plaintiff said that he has used that land all along and he is

the one using it even now.

7. The plaintiff's testimony came with the following exhibits:

- *A letter showing he cleared the bank loan (PEX NO 1)*
- *Copy of Greencard for parcel no. 223 showing that it was charged to the bank (PEX NO 2)*
- *Title deed for parcel no. 223 (PEX NO 3)*
- *Letter dated 1/7/1996 by the plaintiff's late brother to Land Control Board, which was also given to the plaintiff (PEX NO 4)*
- *Application to Land Control Board (PEX NO 5)*
- *Copy of search showing that the 2<sup>nd</sup> defendant had become the owner of parcel no. 223 after succession proceedings (PEX NO 6)*

8. The plaintiff's side called two more witnesses. One of them was **PW2 – PAUL WAMALWA OUNA** – who testified on 21<sup>st</sup> January, 2019. He adopted his written statement dated 10<sup>th</sup> May, 2018 as his evidence. PW2 is a close relation of the parties and his evidence was clear that the late James Kalande, who was husband and father to 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively, used to work at the Lands office and used his influence wrongly to register the suit land in his name. He then proceeded to charge it to the National Bank of Kenya for a loan.

9. **PW3 – JULIUS ORINA MANWARI** – was the last witness on the plaintiff's side. His evidence confirms that the late James Kalande had taken a loan from National Bank of Kenya and offered the suit parcel of land as security. Kalande defaulted in payment and the plaintiff came to his rescue. It would appear that the plaintiff not only redeemed the suit land but also other properties similarly offered as securities. It is also clear in PW3's evidence that the late James Kalande had agreed to surrender the suit land to the plaintiff. He however died before doing so and it appears clear that when the defendants instituted succession proceedings they ignored or disregarded this arrangement and treated the suit land as their entitlement. That is infact why this suit was filed. The succession seems to have gone on behind the plaintiff's back but when the plaintiff later got to know of it, he mounted a challenge. But as the issue to be decided revolved around ownership, he first withdrew the challenge he had mounted and filed this case as the Probate and Administration Court lacked jurisdiction to decide on ownership.

10. The defence case started on 26<sup>th</sup> June 2019, with the 1<sup>st</sup> defendant testifying as DW1. She adopted her written statement as evidence. The statement is dated 9<sup>th</sup> March, 2018 and it shows her saying, interalia, that her late husband had charged the suit land to the bank for a loan as alleged but he repaid the loan himself without the plaintiff's help. She said too that her late husband never told her that he held the suit land in trust for the plaintiff.

11. Further, the 1<sup>st</sup> defendant said there was no fraud in her husband's acquisition of the suit land. She averred that they undertook the succession process openly and the plaintiff was faulted for alleging that it was done without his knowledge. In her evidence in court, the 1<sup>st</sup> defendant availed the following exhibits:

- *Land Certificate for the suit land (DEX NO 1)*
- *Gazette Notice for the Succession proceedings undertaken (DEX NO 2)*
- *Certificate for confirmation of grant arising from succession proceedings DEX NO 3.*
- *Copy of greencard for the suit land (DEX NO 4)*
- *Certificate of official search for the suit land (DEX NO 5)*

12. The 2<sup>nd</sup> defendant testified as DW2. Like DW1, this witness also adopted his written statement as his evidence. The statement is dated 9<sup>th</sup> March, 2018. He said that his late father had a loan with the National Bank which he repaid and had the title discharged to him. He further said that his late father never told him that he held the suit land in trust for the plaintiff. In general terms, the evidence of this witness is similar to that of DW1.

13. Both sides filed written submissions after hearing. The plaintiff's submissions were filed on 10<sup>th</sup> July, 2019. The submissions as filed were in essence a re-statement and/or overview of the plaintiff's case. The court was asked to grant the prayers sought in the plaint.

14. The defendants submissions were filed on 4<sup>th</sup> July, 2019. It was submitted, interalia, that there is the application to Land Control Board for consent which was availed in court and shown to be signed by the late James Kalande in 1996. The late James Kalande died in year 2008, some 12 years later. Doubts were expressed as to why the suit land was not transferred to the plaintiff during the period. According to the defendants, the plaintiff was indolent and the court should not assist him. It was also submitted that the suit land was acquired by the late

James Kalande on first registration. According to the defendants, title acquired in first registration is infeasible.

15. Further, the defendants submitted that the plaintiff has not yet challenged the succession process that led to registration of the 2<sup>nd</sup> defendant as owner of the suit land. The defendants also faulted the plaintiff for not stating particulars of trust. The court was told that the plaintiff has not proved his case, which is why the court should therefore dismiss it.

16. I have considered the pleadings, evidence, and rival submissions. It is common ground that the late James Kalande had charged the suit land to the National Bank of Kenya for a loan. The defendants evidence is that the late James Kalande repaid the loan without assistance from the plaintiff. But credible evidence given by the plaintiff's side shows that the late James Kalande defaulted in payment and the plaintiff came in to save the property from imminent auction or sale. I treat the plaintiff's evidence as credible because it was availed together with the necessary documentary backup. There is, for instance, a letter dated 16<sup>th</sup> March, 1989 availed here as PEX NO. 7 from Regent Auctioneers addressed to the late James Kalande intimating intention to sell the charged properties, which included the suit land, unless money owed to the bank was paid. There is also notification of sale (PEX NO. 8) dated 29<sup>th</sup> March, 1989 informing also of imminent sale of the same properties by the same firm of Auctioneers. Then there is a letter from National Bank dated 24<sup>th</sup> February, 1992 informing the Bank's counsel, who is PW3 in this case, of clearance of the loan. That letter is copied to the plaintiff. One would wonder why the letter had to be copied to the plaintiff if he was not involved in repayment. All this is a pointer to the fact of participation of the plaintiff in redeeming the charged properties from imminent sale or auction.

17. The late James Kalande is also clearly shown to have applied to the Land Control Board – see PEX NO 5- to have the suit land transferred to the plaintiff. When the plaintiff says therefore that there were arrangements to have the suit land transferred to him, he sounds credible. The evidence tendered by the defendants does not displace this position.

18. The defendants would have the court believe that they are entitled to the suit land because the late James Kalande never told them of the plaintiff's entitlement to it. The plaintiff's position is that the late James Kalande was cunning and he dilly-dallied on the issue of transfer until he finally died without transferring the suit land to him. In fact a consideration of the evidence as a whole shows that neither the late James Kalande nor the defendants are forthright on this issue. All are less than honest and show no appreciation of the fact that the plaintiff not only redeemed the suit land from sale but also redeemed other properties owned by them which he is not claiming.

19. In the courts view, it is not enough to fault the plaintiff for not giving particulars of trust. The imperative of justice would require that the court invokes the principles of overriding objectives and downplay the requirement to give such particulars. And this is because it is clearly shown that the defendants decided to shortchange the plaintiff during succession process in order to own the suit land. It is also because the person the defendants are shown to have succeeded is shown to have intended to transfer the suit land to the plaintiff.

20. It is wrong too for the defendants to say that the succession process still stands. The fact of the matter is that the plaintiff was clearly minded to challenge the proceedings but realized the futility of doing so without first ventilating the issue of ownership in this court. This suit itself is addressing the issue of ownership. The Probate and Administration Court would have ran into jurisdictional headwinds had it tried to handle the issue of ownership. In my view, the plaintiff has abundantly shown that he is the one entitled to own the suit land. The late James Kalande understood that well and grudgingly accepted it but was unwilling or reluctant to effect the transfer to the plaintiff.

21. The defendants themselves would wish the court to believe that the suit land was not meant for the plaintiff. Their evidence to that effect is however wishy-washy and unhelpful. It is clearly shown that the suit land is not their entitlement; it should belong to the plaintiff. I therefore make a finding that the plaintiff's case is well proved on a balance of probability. I therefore grant them prayers (a) and (b) in the plaint which I have also spelt out as prayers (1) and (2) at paragraph three of this Judgment. As regards prayer (c) which is about costs, I hold the view that this a delicate family matter and each side should bear its own costs.

**Dated and signed at Kericho this 10<sup>th</sup> day of March, 2020.**

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**A. K. KANIARU**

**JUDGE**

**Dated, signed and delivered at Busia this 10<sup>th</sup> day of March, 2020.**

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**A. OMOLLO**

**JUDGE**