



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 346 OF 2016

RICHARD OTIENO OORO 1ST PLAINTIFF

JOHN AWALLA OORO 2ND PLAINTIFF

VERSUS

WASHINGTON ODHIAMBO OGOLLA DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of a plaint dated 27th October 2016 seeking a declaration that the Plaintiffs are the rightful owners of the land parcel known as BONDO/NYANGOMA/4601 Nyangoma adjudication section. An order to evict the Defendant from land parcel known as BONDO/NYANGOMA/4601 Nyangoma adjudication section. A permanent injunction restraining the Defendant, their agents, servants, assigns, relatives or whomsoever claiming title or acting on their behalf from remaining in, occupying, continuing to occupy, constructing a structure on the same, selling, trespassing, and or encroaching and in any other manner interfering with land parcel No. BONDO/NYANGOMA/4601 Nyangoma adjudication section. Costs of the suit and any other relief.

The Plaintiffs stated that they are the legal owners of the land parcel known as known as BONDO/NYANGOMA/4601 Nyangoma adjudication section (the suit parcel) being administrators of the late estate of their late father Zadok Ooro Okiri the current registered owner of the suit parcel. The Plaintiffs stated that that the Defendant is their neighbour and resides on his father's parcel No. BONDO/NYANGOMA/3534 Nyangoma adjudication section and the parcels have a common boundary. They claim that the Defendant entered into the Plaintiffs' land parcel and put up a permanent structure claiming it was part of his late father's parcel.

The Plaintiffs averred that they lodged a complaint at the Land Adjudication Office and a site visit was scheduled to determine the boundary dispute. They averred that a surveyor visited the site, surveyed the two parcels and consequently wrote a report, which was read in the presence of both parties, to the effect that the Defendant was found to have encroached on the suit parcel and ordered to vacate the same. That they gave the Defendant a month to move out of the parcel but he refused to do so and began clearing the parcel, cutting down citrus fruits and was developing the house he had constructed on the parcel illegally. The Plaintiffs averred that the Defendant's acts were illegal and amounted to trespass and was causing them loss and damage.

On the other hand, the Defendant avers that the Plaintiffs' father settled at the suit parcel at the pleasure of the Defendant's grandfather Nyalwal Ogolla. That the Plaintiffs' father was only left with their homestead during adjudication process and the same did not extend to the suit premises. That if indeed the Plaintiffs have been owners of the suit parcels then the same was through fraud by the Plaintiffs particularly through not following due process in alienating the suit parcel without involvement, consent and participation of the Defendant's grandfather or the Defendant, fraudulently and illegally changing the boundary and parcel number, failing to disclose to the Defendant the transactions affecting their parcel No. 3534, and fraudulently and illegally having the Defendant's land registered in their names.

The 2nd Plaintiff testified as PW1, adopting the Plaintiffs' statements. In support of the Plaintiff's case the following document copies were produced as exhibits: Certificate of Death of their father, grant of letters of administration intestate, certificate of confirmation, title deed to the suit parcel in their father's name, title deed to the suit parcel in their names, letter form the Bondo sub-county land adjudication and settlement officer confirming the suit parcel as registered under the name of their father, report from the same officer to the effect that based on a ground visit it was confirmed that the Defendant had erected a house within the suit parcel, and a field report over the boundary dispute stating that after a ground visit it was observed that according to the Preliminary Index Diagram that the Defendant had surely encroached. *The Defendant did not call witnesses or adduce evidence to support his case at the hearing.*

Issues for Determination

1. Whether the Plaintiffs have proved their case

Section 26 of the Land Registration Act provides that:

“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.”

And where fraud is alleged as a ground of challenging the certificate of title, the same must be distinctly alleged and distinctly proved as elaborated by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR:

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

Analysis

The Plaintiffs have sufficiently proved that they are the registered proprietors of the suit parcel by way of succession of the estate of their father who was the first registered proprietor of the suit parcel after an adjudication process. They have sufficiently demonstrated that a ground visit under the auspices of the Bondo Sub-County Land Adjudication Officer was undertaken and a report made to the effect that the Defendant had indeed encroached on the suit parcel and erected a house thereon, and that both parties were advised to agree on how to demolish the house.

The Defendant’s challenge to the Plaintiffs’ claim is that the Plaintiffs’ father’s due portion was restricted to the homestead and that the Plaintiffs’ and/or his father had acquired title to the suit parcel fraudulently was not sufficiently backed up by evidence. The Defendant was required to go beyond the facts alleged and demonstrate fraudulent conduct by the Plaintiffs or the Plaintiffs’ father. The Defendant has failed to do so.

The plaintiff has proved his case on a balance of probabilities and it is hereby declared that the Plaintiffs are the rightful owners of the land parcel known as BONDO/NYANGOMA/4601 Nyangoma adjudication section. An order to evict the Defendant from land parcel known as BONDO/NYANGOMA/4601 Nyangoma adjudication section. HOWEVER THE PLAINTIFF TO ISSUE NOTICE OF 90 DAYS.

A permanent injunction is hereby issued restraining the Defendant, their agents, servants, assigns, relatives or whomsoever claiming title or acting on their behalf from remaining in, occupying, continuing to occupy, constructing a structure on the same, selling, trespassing, and or encroaching and in any other manner interfering with land parcel No. BONDO/NYANGOMA/4601 Nyangoma adjudication section. Costs of the suit to the plaintiff.

DATED ,SIGNED AND DELIVERED THIS 6TH OF MARCH 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Otieno Angira for plaintiff

N/A for defendants

Court Assistant Jonne.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE