



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 546 OF 2017**

**(Formerly Kisii ELC case no. 462 of 2014)**

**HELLENA AROKA OSURI alias ELENA AROKA OSURI.....PLAINTIFF**

**-VERSUS-**

**GEORGE ATITO ATITO.....1<sup>ST</sup> DEFENDANT**

**NEWTON JUMA ATITO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. At the heart of the present dispute is land parcel number Kanyidoto/Kabura/1264 measuring approximately three decimal eight (3.8) hectares in area (Hereinafter referred to as the suit land). The sole registered proprietor of the suit land on first registration, was Alexander Osuri Atito alias Alex Atito Atito (deceased 1) who was the husband of the plaintiff namely Hellela Aroka Osuri, alias Elena Aroko Osuri. The suit land is currently registered in the names of George Atito Atito and Newton Juma Atito, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant respectively in this suit.

2. The plaintiff is represented by learned counsel, Mr. G.S. Okoth of G.S. Okoth and Company Advocates.

3. The 1<sup>st</sup> defendant is represented by learned counsel, Mr. S.O. Odingo of M/s. Odingo and Company Advocates.

4. The 2<sup>nd</sup> defendant is not represented in the present suit.

**B. The gist of the plaintiff's case**

5. By her plaint dated 8<sup>th</sup> October, 2014 and filed in court on 2<sup>nd</sup> December 2014, the plaintiff who was granted permission by court to file this suit in *forma pauperis* is seeking the following reliefs:-

*i. Special damages of Kshs. 3,300/=*

*ii. An order of declaration that the defendants hold land parcel No. Kanyidoto/Kabura/1264 in trust for the plaintiff and therefore a rectification of the register be done by deleting the names of both defendants and substituting in the place thereof the names of the plaintiff ELANA AROKA OSURI.*

*iii. General damages for fraud and fraudulent misrepresentation.*

*iv. Alternative or further an order that the plaintiff is entitled to be registered as the proprietor thereof having acquired title thereto by way of adverse possession.*

*v. Cost of this suit together with interest @14% p.a from the date of filing suit until payment in full.*

*vi. Interest on (a) and (b) at the rate of 12% p.a from the date of judgment until payment in full.*

**vii. Such further or other alternative relief as this Honourable court deem fit to grant.**

6. The plaintiff claimed that she is the widow and the sole administratrix of the estate of deceased 1 who died on 15<sup>th</sup> August 1982. That she was lawfully married to the deceased at the Catholic Church at Mwanza in Tanzania on 5<sup>th</sup> August 1982 and they were not blessed with any child. That deceased 1 and John Atito Atito (deceased 2) who was the father of 1<sup>st</sup> and 2<sup>nd</sup> defendants, were step brothers and sons of Atito son of Anyanga (deceased 3).

7. The plaintiff further claimed that on 3<sup>rd</sup> November 2010, she discovered that the suit land had been fraudulently transferred from the name of deceased 1 to deceased 2 as a purchaser of the same. Therefore she reported the incident of fraud to the then District Commissioner, Ndhiwa District for investigations. In the meantime, between 3<sup>rd</sup> November 2010 and 8<sup>th</sup> June 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants further fraudulently transferred the suit land to their joint names as proprietors in common of equal undivided share thus precipitating the present suit.

8. The plaintiff (PW1) testified and relied on his statement dated 8<sup>th</sup> October 2014 and list of documents of even date save for No. 7 thereof (PEXhibit 1 to 6 and 8<sup>th</sup> to 11<sup>th</sup>). She called her neighbour, Francis Ochola Orata (PW2) in support of her evidence. PW2 also testified and relied on PEXhibit 11, among others, in favour of the plaintiff's case.

9. On 5<sup>th</sup> February, 2020, learned counsel for the plaintiff filed submissions dated 4<sup>th</sup> February 2020 wherein he urged this court to grant the orders sought in the plaint. Counsel relied on **Suleiman Bin Abdulla –vs- Azzam (1958) EA 553, Kamplala District Land Board and another –vs- National Housing and Construction Corporation (2005) 2 EA 69 and Bishop Zacharia Mangondu Kimani and 2 others –vs- Rose Millicent Atieno (2017) eKLR**, to fortify his submissions.

**C. The gist of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's case**

10. On 20<sup>th</sup> September 2017, this court endorsed the following consent order; “ **By consent of the counsel for the plaintiff and the counsel for the defendant it is hereby agreed as follows:-**

***i. “The 1<sup>st</sup> applicant/defendant be and is hereby given leave to file and serve his statement of defence out time.***

***ii. A statement of defence be filed in court and served within the next 15 days from the date of filing this consent order.***

***iii. The death of the 2<sup>nd</sup> defendant be duly noted on the record of this case and hearing of the case do proceed against the 1<sup>st</sup> defendant against whom the cause of action survives.” (Emphasis added)***

11. The foregone order therefore determined the 1<sup>st</sup> defendant's application dated 3<sup>rd</sup> September 2015 and filed in court on 4<sup>th</sup> September 2015 whereby the 1<sup>st</sup> defendant sought:-

***a) Leave to file his defence out of time.***

***b) That his annexed draft statement of defence be deemed to have been properly filed upon payment of the requisite filing fees.***

12. Thus, in his statement of defence dated 3<sup>rd</sup> September 2015, the 1<sup>st</sup> defendant stated inter alia, that in the year 1982, the plaintiff being the Administratrix of the estate of deceased 1, sold the suit land to deceased 2 at the purchase price of kshs. 50,000/= and transferred the land accordingly. That upon the death of deceased 2, they carried out succession in respect of the estate of deceased 2, and obtained registration of the suit land in their names as proprietors.

13. The 1<sup>st</sup> defendant further stated that he has been staying together with the plaintiff peacefully on the suit land hence the issue of adverse possession does not arise. That the instant dispute has been heard and determined in Kisii High Court Misc. Civil Application No. 29 of the 2012. He denied the plaintiff's claim and sought dismissal of this suit with costs.

**F. Issues for determination**

14. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

15. From the summary of the pleadings, evidence of PW1 and PW2 as well as the plaintiff's submissions inclusive of authorities cited therein, I am of the considered view that the following issues fall for determination:-

***a) Has the plaintiff proved the elements of trust, and fraud and misrepresentation and or adverse possession as alleged herein against the 1<sup>st</sup> defendant to the requisite standard?***

***b) Are the reliefs sought available to the plaintiff in this suit?***

**E. Analysis and determination**

16. It was the contention of PW1 that she has equitable interest as a beneficiary of the estate of deceased 1 over the suit land. That the defendants hold the suit land in trust for her.

17. To affirm her contention, PExhibits 1,2,3, 4, 5 and 8 speak to the relationship between PW1 and deceased 1. PExhibit 8 reveals in part that PW1 is the widow of deceased 1 who died on 15<sup>th</sup> August 1982.

18. PW1 stated that he obtained PExhibit 4 at Ndhiwa Law courts. According to PExhibit 4 and PExhibit 5, all the estate of deceased 1 devolves on PW1.

19. PW2 reinforced the testimony of PW1 and testified in part that :

***“ I know the plaintiff (PW1). She is the wife of the late Alexander Osuri. She is my neighbour at home”***

20. This court is conscious of the definition of the term “Legal Representative” under **sections 2 of the Civil Procedure Act Chapter 21 Laws of Kenya**. The powers of personal representatives are also stipulated at **section 82(a) of the Law of Succession Act Chapter 160 of the Laws of Kenya**.

21. It is well settled that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

22. **Article 10 (2) (b) of the Constitution of Kenya, 2010** provides for the application of the national values and principles of governance including equity. In the case of **Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR**, the Court of Appeal sitting at **Eldoret** held that the court is not precluded from giving effect to equitable principles, in particular, the doctrine of constructive trust.

23. **Section 28 (b) of the Land Registration Act, 2016 (2012)** stipulates that trusts including customary trusts are overriding interests over registered land. By the evidence of PW1 and PW2 including PExhibits 1 to 5 and 8 and bearing in mind the clear contents of paragraphs 5 and 6 of the 1<sup>st</sup> defendant’s statement of defence, PW1 has proved that the 1<sup>st</sup> defendant holds the suit land in trust for her and the entire estate of deceased 1.

24. In respect of fraud, it is common baseline that the suit land is registered in the name of the defendants. In the case of **Tayebali Adamji Alibhai –vs- Abduhussein Adamji Alibhai (1938) 5 EACA 1**, it was held that rights and registration of land can be challenged on grounds, inter alia, fraud and misrepresentation. Furthermore, the same position is stated in **section 26 (1) (a) of the Land Registration Act (supra)** and the decision in **Kuria Kiarie and 2 others –vs- Sammy Mugeru (2018) eKLR**.

25. PW 1 specifically pleaded and stated the particulars of fraud at paragraph 12 of her plaint. So, has she proved the allegations of fraud as pleaded therein?

26. In the case of **Koinange and 3 others –vs- Koinange (1986) KLR 23**, it was held that where a party alleges fraud, such a party need to prove it. That though the standard of proof is not beyond any reasonable doubt, it is proof higher than a balance of probabilities.

27. At paragraph 7 of his defence statement, the 1<sup>st</sup> defendant merely denied the allegations of fraud against him. However, by PExhibits 6,9 and 11, PW1 has established that the 1<sup>st</sup> defendant’s registration of the suit land arose on account of a transfer of the same from the name of deceased 1 to deceased 2 and subsequently to the 1<sup>st</sup> defendant arising from an alleged fraudulent purchase; see the Court of Appeal decision in **Samwel Kamere –vs- Land Registrar Kajiado (2015) eKLR** and **Abdulla case (supra)**.

28. Concerning special damages, PW1 pleaded the same at paragraph 15 of her plaint. However, she proved special damages at khs. 1,500/= as pleaded at paragraph 15 (a) and discerned by PExhibit 9.

29. The award of general damages sought in the plaint is within the discretion of the court. In my view and considering the nature of the entire case, I think a sum of Kshs. 100,000/= general damages would be appropriate in the obtaining circumstances of this case.

30. By the way, I note the alternative remedy sought in the plaint. The plaintiff’s claim amounts to adverse possession as held by the Court of Appeal in **Wanje–vs- Saikwa No. 2 (1984) KLR 284**. Nonetheless, the remedy is not available to him owing to the other reliefs sought and proved in this suit.

31. In the end, it is the finding of this court that the testimonies of PW1 and PW2 stand uncontroverted. The plaintiff’s case is cogent and steadfast. The 1<sup>st</sup> defendant’s statement of defence is unsubstantiated hence must fail. The plaintiff is therefore entitled to the reliefs (a), (b) (c) (e) and (f) sought in her plaint. Quite clearly, she has proved her claim against the defendants on a balance of probabilities.

32. Accordingly, Judgment is hereby entered for the plaintiff against the defendants in the following terms:-

**a) Special damages of Kshs. 1,500/= only.**

**b) An order of declaration that the defendants hold land parcel No. Kanyidoto/Kabura/1264 in trust for the plaintiff and therefore a rectification of the register be done by deleting the names of both defendants and substituting in the place thereof the names of the plaintiff ELANA AROKA OSURI. The Land Registrar, Homa –Bay shall rectify the register accordingly.**

*c) General damages for fraud and fraudulent misrepresentation assessed at Kshs. 100,000/=.*

*d) Interest on (b) and (c) hereinabove at the rate provided for under section 26 (1) of the Civil Procedure Act (supra).*

**e) By dint of the proviso to section 27 (1) of the Civil Procedure Act (supra), costs of this suit shall be borne by the 1<sup>st</sup> defendant.**

**DELIVERED, SIGNED and DATED in open court at MIGORI this 3<sup>rd</sup> Day of MARCH 2020.**

**G.M.A ONG'ONDO**

**JUDGE**

**In presence of :-**

Mr. G.S. Okoth learned counsel for the plaintiff

Tom Maurice – Court Assistant