



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 94 OF 2013**

**JOSEPH OCHOROKODI EMOIRE.....1<sup>ST</sup> PLAINTIFF**

**ABUBAKAR KARANI.....2<sup>ND</sup> PLAINTIFF**

**= VERSUS =**

**MARGARET MARY ANYANGO**

**ST. BERNARD KAKURUKIT SECONDARY SCHOOL**

**THE CHAIRMAN, BOARD OF GOVERNORS**

**ST. KAKURUKIT SECONDARY SCHOOL.....DEFENDANTS**

**J U D G M E N T**

1. The 1<sup>st</sup> Plaintiff, **JOSEPH OCHOROKODI EMOIRE** instituted this suit against the Defendants, **MARGARET MARY ANYANGO, ST. BERNARD KAKURUKIT SECONDARY SCHOOL** and **THE CHAIRMAN, BOARD OF GOVERNORS ST. KAKURUKIT SECONDARY SCHOOL** vide the undated Plaint filed on 15<sup>th</sup> November 2013. The Plaint was amended on 4<sup>th</sup> March 2015 and again further amended on 11<sup>th</sup> July 2016. Later on, a case in the lower court, **BUSIA CMCC NO. 388 OF 2014**, was consolidated with the current case thus introducing the 2<sup>nd</sup> Plaintiff, **ABUBAKAR KARANI** who had been sued by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the lower Court regarding the same land namely **NORTH TESO/ANGURAI/1145**. The Plaintiffs are suing the 1<sup>st</sup> Defendant for fraudulent subdivision of the mother title, **NORTH TESO/ANGURAI/318** into **NORTH TESO/ANGURAI/1144, 1145** and **1146** and the subsequent unlawful transfer of **NORTH TESO/ANGURAI/1145** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They seek a cancellation of titles of the aforementioned resultant subdivisions and restoration of the original title

**NORTH TESO/ANGURAI/318.**

2. The 1<sup>st</sup> Defendant filed her defence dated 2<sup>nd</sup> December 2013 on 10<sup>th</sup> December 2013. The Defendants then filed a joint amended Defence and Counterclaim on 10<sup>th</sup> March 2015 and again a further amended Defence and Counterclaim on 20<sup>th</sup> April 2017. They pleaded that Plaintiffs had no claim to the suit property as the same had been lawfully sold to the 1<sup>st</sup> Defendant, who in turn lawfully and procedurally transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They prayed for the dismissal of the Plaintiff's case and in their counterclaim sought eviction orders against the Plaintiffs and any other persons claiming through them from the suit property.

3. Parties were heard on various dates from 12<sup>th</sup> June 2018. PW 1, the 1<sup>st</sup> Plaintiff testified that he is the father of the 2<sup>nd</sup> Plaintiff and that the 1<sup>st</sup> Defendant is the 2<sup>nd</sup> Plaintiff's estranged wife. He stated that the original property **NORTH TESO/ANGURAI/318** was registered jointly in the names of 3 people namely himself and his brothers, **OKAFALI OCHOROKODI** and **CAROLI SIKAUTI**. PW1 averred that they did not sell the land or any portion thereof to anybody and neither did they authorize its subdivision. However, he alluded to an incident when he was unwell and the 1<sup>st</sup> Defendant who was nursing him at the time tricked him into signing documents that he was informed were for his transfer to a better hospital from the one he had been admitted in. Knowing that PW 1 had custody of the title documents of the original property, the 1<sup>st</sup> Defendant allegedly took advantage of PW1's indisposition and illiteracy.

4. When PW1 discovered the fraud he warned the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants not to buy land from the 1<sup>st</sup> Defendant through his advocates but they did not heed his warning. They bought the suit property and constructed a school thereon. PW1 contended that even if he wanted there was no way he could have participated in the sale and subdivision of the original property; **NORTH TESO/ANGURAI/318** as one of the registered proprietors, **OKAFALI OCHOROKODI** was last seen in 1976 and is presumed dead. Dealings in the property without first

carrying out succession proceedings rendered them irregular, unlawful and amounted to a nullity. Each registered proprietor also held 0.48 ha each of the shares allocated to them in trust for one of their brothers, BONIFACE OCHOROKODI who was a minor at the time. By subdividing the original property, appropriating to herself her presumed share and selling it to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the 1<sup>st</sup> Defendant had illegally disinherited some beneficiaries. PW1 was however at pains to explain when exactly he was tricked into signing the transfer documents and contradicted himself by testifying that his late father had given the 2<sup>nd</sup> Defendant the portion of land upon which the school was built sometime back. He also admitted that he never made any report to the Police regarding the alleged forgery.

5. PW 2, **ABUBAKAR KARANI OCHOROKODI** mostly rehashed PW 1's testimony. He stated that he married the 1<sup>st</sup> Defendant, a nurse at Modini Health Centre in 2001, but they separated in 2012. When shown the sale agreement with respect to the suit property, he denied that the signature on it was his. He testified further that he had reported the forgery matter at the Police Station in Modini but did not get any assistance from them. The Plaintiffs produced the following exhibits in support of their case:

- a. Green Card for **NORTH TESO/ANGURAI/318** - P.Exh 1
- b. Letter by Plaintiffs' Advocates dated 16<sup>th</sup> October 2013 – P.Exh 2

6. DW1, the 1<sup>st</sup> Defendant testified that she bought a 1.24 ha portion from the 1<sup>st</sup> Plaintiff on 14<sup>th</sup> June 2005. She paid the purchase price on two instalments and he voluntarily signed all the agreements. The transactions were then consolidated into the final one of 18<sup>th</sup> September 2012 (D.Ex 9) which was witnessed by the 2<sup>nd</sup> Plaintiff, SALIM EMOJONG, BONIFACE OCHOROKODI and CAROLI SKAUTI. DW1 insisted that BONIFACE OCHOROKODI was the biological father of the 2<sup>nd</sup> Plaintiff; not the 1<sup>st</sup> Plaintiff as alleged. Further, she denied being married to the 2<sup>nd</sup> Plaintiff and admitted that they only cohabited from 2007 to 2009; before she purchased the suit property. She also denied taking advantage of the 1<sup>st</sup> Plaintiff's illiteracy. DW 1 averred that she has been in occupation of the suit property with the 1<sup>st</sup> Plaintiff's full permission and knowledge since she bought it. She developed it by constructing a permanent home and planting various crops and trees thereon.

7. DW 1 testified further that she also bought land measuring 0.14ha from KAROLI SKAUTI on 3<sup>rd</sup> June 2007 for a consideration of Kshs. 30,000. Her total portion was surveyed and the boundary fixed. She asserted that **NORTH TESO/ANGURAI/1145** was rightfully hers and the two sellers had signed all forms necessary to facilitate its transfer to her name. She then sold the land to the 2<sup>nd</sup> Defendant but the school is currently not using it due to the Plaintiffs' hostility.

8. In an interesting turn of events DW 2, KAROLI SKAUTI, a brother to the 1<sup>st</sup> Plaintiff testified on behalf of the Defence. He confirmed that he was present during the sale of the suit property to the 1<sup>st</sup> Defendant together with the 2<sup>nd</sup> Plaintiff, a village elder named CELESTINE ORIAMA EMAKATAIT and BONIFACE EMOJONG appearing as witnesses. He testified further that both 1<sup>st</sup> Plaintiff and himself sold land to the 1<sup>st</sup> Defendant. They signed two agreements each to that effect and received the agreed consideration. He testified further that the 2<sup>nd</sup> Plaintiff has been residing on the property on which the school is constructed and that they have disagreed on occasion.

9. **CELESTINE ORIAMA EMAKATAIT** testified as DW 3. He stated that he was a neighbour to the parties as well as a village elder and was present during the sale of the suit property in 2005. DW 3 presided over the transaction, counted the money due to the 1<sup>st</sup> Plaintiff, Kshs. 62,000 and handed it to him. He confirmed that the land sold was a portion of **NORTH TESO/ANGURAI/318**. The co-owner, **OKAFALI OCHOROKODI** was unknown to him. Like his co-witnesses he also insisted that the 2<sup>nd</sup> Plaintiff was a son to **BONIFACE OCHOROKODI**.

10. DW 4, **GERALD AKISA EMASETE**, a teacher at ST BERNARD'S SECONDARY SCHOOL testified that the school bought the suit property measuring 1.38ha from the 1<sup>st</sup> Defendant for a consideration of Kshs. 1,700,000. He stated that there was a house erected thereon when they bought it. Consent to transfer was obtained to from the Land Control Board and the title in the school's name was processed and issued. However, the school has not taken possession of the property to date because the Plaintiffs are still residing on it. He denied having received the letter from the Plaintiffs' advocates warning them not to buy the property. There was no proof of receipt. The Defence produced the following exhibits in support of their case:

- a) Green Card NORTH TESO/ ANGURAI/1145 – D. Exh 1
- b) Title Deed NORTH TESO/ ANGURAI/1145 – D. Exh 2
- c) Land Sale Agreement dated 19/8/2013 – D. Exh 3
- d) Application for Land Control Board Consent – D. Exh 4
- e) Land Control Board Consent Letter – D. Exh 5
- f) Transfer Form – D. Exh 6
- g) Land Sale Agreement dated 21/7/2000 – D. Exh 7
- h) Acknowledgment dated 13/7/2005,14/6/2005 and 22/9/2005 – D. Exh 8
- i) Agreement dated 18/9/2012 – D. Exh 9

- j) Agreements dated 15/4/2007, 3/6/2007 and 4/4/2011 – D. Exh 10(a - c)
- k) Green card NORTH TESO/ ANGURAI/318 – D. Exh 11
- l) Transfer dated 22/1/13 – D. Exh 12
- m) Copy of ID, JOSEPH OCHOROKODI – D.Exh 13
- n) Consent Letter – D. Exh 14
- o) Title Deed NORTH TESO/ ANGURAI/1145 – D. Exh 15
- p) Official Search Certificate NORTH TESO/ ANGURAI/1145 – D. Exh 16
- q) Official Search Certificate Receipt – D. Exh 17

11. The Plaintiffs' submissions were filed on 9<sup>th</sup> April 2019. Counsel for the Plaintiffs merely briefly rehashed the facts of their case. He contends that the letter sent to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the Plaintiffs' Advocates at the time amounted to a caveat or sufficient notice that the property had a questionable title and any purported purchase would be at their own risk.

12. The Defendant's submissions were filed on 16<sup>th</sup> May 2019. Aside from recounting a summary of the Defence's version of events, Counsel for the Defendants submitted that the Plaintiffs had not proven their case based on fraud to the requisite evidentiary threshold. He relied on the case of **RG Patel vs Lalji Makanji (1957) EA 314** as well as Sections 107(1) and (2) of the Evidence Act. It was further submitted that the sale, transfer and registration of the suit property was above board hence the Plaintiffs did not have a claim to it. Counsel then concluded that the sale and transfers having been above board, the Defendants' counter claim was merited and they were entitled to eviction orders based Sections 24 and 25 of the Land Registration Act as well as the case of **Michael Githinji Kimotho Vs Nicholas Muratha Mugo (1997) eKLR**.

13. I have read the parties' pleadings, evidence, submissions and the applicable law. It is trite law that he who alleges must prove in accordance with section 107 of the Evidence Act. The Plaintiffs seek orders of cancellation of title of NORTH TESO/ANGURAI/1144, 1145 and 1146 and that it reverts back to the original NORTH TESO/ANGURAI/318 in effect divesting ownership of NORTH TESO/ANGURAI/1145 from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The only evidence they availed was a letter from their advocates informing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of the purported defect in title and a copy of the green card of the mother title. They did not call an expert witness to prove the forgery neither did they enjoin the Lands Registrar to show that the subdivision and transfer of the property was fraudulently done.

14. Moreover, the Plaintiffs seek a blanket cancellation of the aforementioned 3 titles but have only claimed **NORTH TESO/ANGURAI/1145**. There has been no mention of the status of **NORTH TESO/ANGURAI/1144** and **1146**. The ownership of these two parcels is unknown. The granting of the order would affect the parcels which would in turn affect owners who have not had a chance to ventilate their cases in Court. The Court will not act in vain by issuing orders that will be ineffective against the said parties. More information should have been availed concerning parcels Nos 1144 and 1146 because the orders sought are bound to affect them and their owners.

15. The chronology of events presented by the Defence and backed by public records paints a more credible picture. The register being the authority reveals that the title of the original NORTH TESO/ANGURAI/318 was closed on subdivision into NORTH TESO/ANGURAI/1144, 1145 and 1146 on 7<sup>th</sup> December 2012. In as much as Counsel for the Plaintiffs tried to poke holes at the 1<sup>st</sup> Defendant's testimony concerning the delay between the dates of sale spanning from 2005 and the subdivision in 2012 it is not uncommon for formalities to take place over such a time period. The property then changed hands in on 7<sup>th</sup> November 2013 and was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Prior to their registration, a caution was registered against the title by one Kassim Vincent Okware on 27<sup>th</sup> March 2013 claiming beneficiary interest. The same was however removed on 5<sup>th</sup> July 2013 by the Registrar.

16. Sections 24(a), 28 and Section 30(3) of the Land Registration Act provide that registered owners of a property have absolute ownership of the land and the Certificate of Title in their name is prima facie evidence of its validity as reflected in the Register. I agree with the Defence that the Plaintiffs have not proved their case on fraud to warrant cancellation of the title of the suit property. With the evidence on record, it can also be argued that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are purchasers for value and as such cannot be faulted. They conducted their due diligence and obtained a clean title. The evidence availed shows that the property was sold. The Plaintiffs own brother - DW2 - confirmed the sale. The area village elder at the time - DW3 - also vouched for it. In my view, the two Plaintiffs are not telling the truth. I reject their story.

17. The upshot of the foregoing is that the Plaintiff's suit is dismissed. The Counter-claim is allowed as the Defendants have demonstrated they legally own the land. No fraud or illegality has been proved against them. The Plaintiffs should also pay the costs of the suit.

**Dated, signed and delivered at Busia this 11<sup>th</sup>, day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiffs: Present

Defendants: Present

Counsel of the Plaintiffs: Present

Counsel of the Defendants: Present

CA: Nelson Odame