



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 89 OF 2014**

**MATHEW WACHA NYONGESA.....PLAINTIFF**

**- VERSUS -**

**SAMWEL MWANGI KANYARI ..... 1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> DEFENDANT**

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

1. The plaintiff brought this suit against the two defendants vide his plaint dated 16<sup>th</sup> April 2014 claiming an interest over land parcel No. Bukhayo/Bugengi/4550 measuring 0.41ha being a sub-division of Bukhayo/Bugengi/1539. The plaintiff pleaded that he acquired the land through purchase from Samson Oduori Ogono who was the proprietor of Bukhayo/Bugengi/1539 on 15<sup>th</sup> December 1994. The plaintiff prays for judgement to be entered for him as follows;

**a. A declaration that the sub-division of L.R BUKHAYO/BUGENGI/1539 to create L.R. No. BUKHAYO/BUGENGI/4549 and 4550 and the subsequent registration thereof in 1995 is the sole legitimate sub-division of the said L.R No. BUKHAYO/BUGENGI/1539 and the same be restored.**

**b. A declaration that the purported sub-division of L.R. No. BUKHAYO/BUGENGI/1539 in 1999 to create L.R No. BUKHAYO/BUGENGI/6726 and 6727 was null and void and of no effect.**

**c. An order cancelling the titles purportedly issued in respect of L.R Nos BUKHAYO/BUGENGI/6726 and 6727 and any subsequent sub-divisions therefrom.**

**d. A permanent injunction against the 1<sup>st</sup> defendant, his servants, employees, agents and all those claiming through him restraining him from trespassing into, and/or any claim and/or interfering with the plaintiff peaceful use and occupation of all that parcel of land known as BUKHAYO/BUGENGI/4550.**

**e. Costs of the suit.**

2. The 2<sup>nd</sup> defendant filed a statement of defence on 6<sup>th</sup> May 2014 to deny the plaintiff's claim. He pleaded that the District Surveyor did not act negligently or recklessly or fraudulently. The 2<sup>nd</sup> defendant pleads that there is no cause of action set out against it. The 2<sup>nd</sup> defendant asked the Court to dismiss the suit.

3. The 1<sup>st</sup> defendant filed his defence on 23<sup>rd</sup> June 2014. He pleaded that the subdivision of Bukhayo/Bugengi/1539 into plot 6726 and 6727 was lawfully and procedurally done. The 1<sup>st</sup> defendant pleads that he followed all the lawful procedures in acquiring title for Bukhayo/Bugengi/6727 and puts the plaintiff to strict proof. The 1<sup>st</sup> defendant thus denies the allegations contained in the plaint.

4. The plaintiff called two witnesses in support of his case while the defence called 3 witnesses. The plaintiff gave evidence as **PW1** on 20<sup>th</sup> February 2017. He stated that he works as a security officer at Bugono but comes from Mundika. **PW1** said he owned land parcel No. Bukhayo/Bugengi/4550 measuring 0.41ha which land he bought from Samson Oduori Ongono in 1994 he produced the sale agreement as exhibit **Pex 1**. He also produced a certificate of search showing ownership by Samson Oduori Ongono as **Pex 2**. **PW1** continued that Samson applied to the Land Control Board – Nambale to sub-divide the land – consent produced as **Pex 3(a)** and **(b)**. **PW1** said he paid for the survey at Kshs.2,500 (**receipt Pex 4**) and the signed mutation forms as **Pex 5**. That the mutation forms gave new numbers as **Pex 6**.

5. **PW1** continued that he bought the map of the area which he produced as **Pex 7**. That he got to know the 1<sup>st</sup> defendant in 1999 when the 1<sup>st</sup> defendant visited the suit land with a surveyor to survey the land. **PW1** denied that this land belonged to the 1<sup>st</sup> defendant. That in 1999 when the 1<sup>st</sup> defendant came to survey the land, parcel No. 1539 had ceased to exist. **PW1** said he raised a complaint with the lands office on 13<sup>th</sup> June 2011 and the Land registrar wrote to the Chief Land Registrar, Nairobi seeking advice on how to handle the issue which letter he produced as **Pex 8**. That the Chief Registrar wrote back suggesting that one party should go to court to have the issue resolved.

6. The plaintiff produced the proceedings in Busia SRM'CC 122/200 and Land Disputes Tribunal case as **Pex 10** and **11**. It is his evidence that even the Regional Surveyor, Kakamega confirmed that parcel No. 1539 had been sub-divided into numbers 4549 and 4550 which letter is produced as **Pex 12**. He urged the Court that his number be re-instated back in the register.

7. In cross-examination, **PW1** said the consent was given on 13/4/1995 while the agreement says he finished making payment on 5/12/1995. **PW1** agreed he did not have consent transferring the land to him. That the portion of land he bought belonged to Samson's brother called Mande. In re-examination **PW1** said he was not given the document mentioned in paragraph 3 of **Pex 12**. That he got his title deed on 7/6/1995 before finishing paying for the purchase price. The seller is now dead so he could not come to give evidence. The records in the lands office went missing so he could not be given a green card for his title.

8. Philip Kirui testified as **PW2**. He is a surveyor with the Ministry of Lands working in Kakamega and attached to County Survey Office. **PW2** said they deal with amendment of maps from County survey areas. He identified **Pex 12** addressed to the District Surveyor and District Land Registrar Busia. The letter said the land No. 1539 had been sub-divided in 1995 to create parcel Nos 4549 and 4550. That the District Surveyor had forwarded to them mutation forms relating to the sub-division for them to amend the map. The new numbers 4549 and 4550 are in the map thus No. 1539 was no longer available for another sub-division.

9. In cross-examination, **PW2** said the Land Control Board consent is necessary before mutation forms are made. He was referred to the mutation approved by the surveyor on 13/2/1995 before the consent was given on 13/4/1995 for parcel No. 1539. He agreed this was irregular on the face of it. **PW2** admitted that Pex 12 was not responded to. That the letter dated 7/9/2015 gave okay for accepting of parcel Nos 6726 and 6727 and cancellation of 4549 and 4550. In re-examination, **PW2** said they have not effected the amendment to create parcel No. 6726 and 6727. **PW2** said he did not find the letter dated 7/9/2015 in their records. This marked the close of the plaintiff's case.

10. The 1<sup>st</sup> defendant testified as **DW1**. He comes from Marachi and is a tailor. **DW1** stated that he bought land from the late Samson Oduori Ongono. That the seller died and when the succession was done he got his parcel of land. He produced a copy of the confirmation of grant as **Dex 1**. That later a survey was done and he got his title No. 6727 curved out of parcel No. 1539. He produced the mutation dated 5/5/1999 as **Dex 2**. He also produced his title as **Dex 3**. The ruling given in BUSIA PMCC No. 122 of 2000 was also produced as **Dex 5** and the letter dated 7<sup>th</sup> September 2015 as **Dex 6**. **DW1** said the plaintiff is falsely claiming his land.

11. In cross-examination, **DW1** stated that he got his land through succession and the plaintiff never objected. That he has never been charged with fraud. That the succession was in respect of the estate of Barasa Ong'ono. That it is the son of Barasa Ong'ono who had sold him the land. He did not bring the sale agreement between him and Samson-deceased. **DW1** said he appealed the decision of the Land Dispute Tribunal although he could not remember the appeal case number. It is **DW1** evidence that the plaintiff is unlawfully living on his land. **DW1** also said he was not aware the plaintiff had a title for the land he was living on. He did not have a receipt he paid for the search. In re-examination, **DW1** said the plaintiff is living on a portion of his land not the whole of it.

12. Tom Chepkwesi who was the Land Registrar, Busia testified as **DW2**. He had with him parcel file for land No. Bukhayo/Bugengi/1539. That this parcel was later sub-divided into parcel Nos 6726 and 6727 and he produced the green card as **Dex No. 7** and the mutation form as **Dex No. 8**. That the owners of parcel No. 6726 are Samson odour Ong'ono and Mande Ong'ono and 6727 is the 1<sup>st</sup> defendant. **DW2** denied the existence of parcel Nos 4549 and 4550.

13. In cross-examination, **DW2** said they do not have records of parcel Nos 4549 and 4550 in their system. He did not know who the Land Registrar in Busia was in 1995. That surveyors generates parcel files and mutation survey can be done by any licensed surveyor who sends it to District Surveyor for verification and allocation of numbers. **DW2** agreed that the numbers 4549 and 4550 are existing on the map produced as **Pex 7**. **DW2** confirmed the mutation was registered on 13/3/1995 at Busia Land's Registry. He was also shown the title deed issued on 7<sup>th</sup> June 1995 to the plaintiff. That from the documents shown to him, the plaintiff acquired his land through a genuine process. **DW2** could not ascertain who was to blame for the double titling of the suit land.

14. Titus Ojwang testified as **DW3**. He is a Land Surveyor employed by the government and working in Busia. **DW3** said that according to documents in their office the parcel No. 1539 was sub-divided to create No. 4549 and 4550 in the year 1994 but he did not carry the number book. **DW3** stated that another sub-division was done on plot 1539 to create Nos 6726 and 6727 in 1999. **DW3** continued that it is not normal to have one land subdivided twice. That there is a place for the Registrar to sign on the mutation form. **DW3** produced the two mutations dated 28/3/2011 and 5/5/1994 as 2<sup>nd</sup> defendant's exhibits **Dex 1** and **2**.

15. In cross-examination, **DW3** said both mutations were in favour of the 1<sup>st</sup> defendant. That the mutation which created parcel Nos 4549 and 4550 was filed at the regional office in Kakamega. In their number book, **DW3** confirmed parcel No. 1539 was sub-divided and created 4549 and 4550. That whatever happens after numbering is the role of the Land Registrar who is the one to determine the issue of ownership. **DW3** said he had not seen any amendment on the map creating parcel numbers 6726 and 6727. That after the 1<sup>st</sup> subdivision, parcel No. 1539 was not available for subdivision. That the Regional Office gets information from the District Land Registrar/Survey and the Regional Office cannot effect changes without information from the District Land Registrar and Surveyor. That **Pex 12** quoted the District Land Surveyor's reference at **paragraph 2**. **DW3** does not know who lives on the two plots. This marked the close of the defendant's Case.

16. The plaintiff filed his written submissions on 12<sup>th</sup> November 2019. The plaintiff submits that upon survey and sub-division of the original number 1539, it ceased to exist and was thus unavailable for further transactions including sub-division to create the 1<sup>st</sup> defendant's title. He

blamed the Land Registrar and Surveyor for allowing the 1<sup>st</sup> defendant to transact on a title that had ceased to exist. According to the plaintiff, **DW2** was negligent and not truthful for alleging that parcel Nos 4549 and 4550 did not exist. He cited the provisions of Section 15 of the Registered Land Act cap 300 (repealed) in support of his Case. The plaintiff submits the 1<sup>st</sup> defendant has no basis to impeach his title on account of the evidence on record. It is his case that he has proved his case thus entitled to the orders prayed for.

17. The 1<sup>st</sup> defendant filed his submissions on 3<sup>rd</sup> December 2019. He submitted that the plaintiff's claim is premised on allegations of fraud, negligence and recklessness directed at the Busia Land Registrar and Surveyor. He also accused the 1<sup>st</sup> defendant of conspiracy. The 1<sup>st</sup> defendant submitted that the plaintiff did not produce documents to support the evidence that he is the registered owner of L.R No. 4550. The 1<sup>st</sup> defendant took issue with the registration of the mutation on 13/3/1995 when the letter of consent dated 13/4/1995. That there was no consent to transfer and an executed transfer in favour of the plaintiff produced. The 1<sup>st</sup> defendant also stated that the plaintiff did not challenge the certification of confirmation of grant and prayed the court finds the plaintiff's case is not proved and ought to be dismissed with costs.

18. The 2<sup>nd</sup> defendant in his submissions gave a summary of the pleadings filed and evidence adduced by the parties. The 2<sup>nd</sup> defendant denied the particulars of fraud attributed to them as the records at the lands office did not show that parcel No. 1539 was ever subdivided. The 2<sup>nd</sup> defendant stated that L.R No. 1539 was in the name of Barasa Odera and the person who sold to the plaintiff was registered as his personal representative on 9/6/1988 through Succession Cause No. 80 of 1987. That the 1<sup>st</sup> defendant was also registered as an owner pursuant to a grant in Cause No. 80 of 1987 which Cause did not have the plaintiff's name. That because the Land Registrar disowned the plaintiff's title, the suit cannot succeed pursuant to the provisions of Section 26 of the Land Registration Act which provides thus;

**“The certificate of title issued by Registrar upon registration, or to a purchaser of land upon a transfer shall be taken as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner and 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;**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”**

19. I have analysed the evidence adduced and the submissions rendered. The questions for my determination are;

a. Which of the two titles is valid?

b. What orders ought this Court to grant?

c. Who bears the costs of this suit?

20. Both the plaintiff and the 1<sup>st</sup> defendant are claiming the disputed one (1) acre portion through purchase. The plaintiff produced a title deed for Bukhayo/Bugengi/4550 issued to him on 7<sup>th</sup> June 1995. On the 2<sup>nd</sup> page of the title, the part of the Registrar is signed. The Land Registrar who testified as **DW2** said he did not know who the Land Registrar was in Busia as at 1995. The only reason he questioned the plaintiff's title was because he did not have its details in the parcel file.

21. Besides the title, the plaintiff produced as **Pex 3(a)** and **3(b)** the application for consent and letter of consent respectively to sub-divide land parcel No. 1539. There was no question raised in respect to the signature of Samson Oduori appearing in **Pex 3(a)** and the mutation form (**Pex 5(a)**). In **Pex 5(a)**, it is indicated as prepared by Arch Surveys on 8/1/1995 and registered in Busia Lands Registry on 13/3/1995. On page 1 of **Pex 5(a)** the presentation book is given as 106/3/95, registration fee charged is Kshs.250 and receipt No. given as D220204 plus a copy of this receipt was also produced. The parcel numbers given are 4549 and 4550 signed as approved by the District Surveyor Busia(K) on 13/2/1995.

22. The evidence of **DW2** was that he did not have records of this number in his parcel file. The plaintiff accused the Land Registrar and District Surveyor of negligence, recklessness and fraud in allowing the 1<sup>st</sup> defendant to transact on L.R No. 1539 which had ceased to exist. The burden was therefore imposed upon the plaintiff to discharge that indeed L.R No. 1539 had ceased to exist and I am persuaded that he discharged this burden by his production of a duly registered mutation form and letter of consent to subdivide. The issue of the consent letter being issued after the mutation was registered should be explained either by the District Land Registrar and or Surveyor why they gave out new the numbers and subsequently registered them without the letter of Land Control Board consent. The Land Registrar is charged with the responsibility of registering documents only if he is satisfied that they are in order. He cannot shift the burden back to a member of the public who goes for his services.

23. Further the evidence of **PW2** and **DW3** confirmed that the map was amended to reflect the new numbers 4549 and 4550. **DW3** said the regional office amends the map only after receiving information from the District Land Registrar/Surveyor's office. In the letter dated 4<sup>th</sup> June 2015 (**Pex 12**) addressed to the District Surveyor Busia said in paragraph 3 thus;

“Records held in this office indicate that parcel No. Bukhayo/Bugengi/1539 had been sub-divided into parcels Bukhayo/Bugengi/4549 and 4550. The mutation form for this sub-division was forwarded to this office vide your letter BSA/IS/1/Vol. IX/201 of 1<sup>st</sup> July 1998 and the parcels Bukhayo/Bugengi/4549 and 4550 amended on the map. The parcels Bukhayo/Bugengi/6726 and 6727 can therefore not be amended unless the amendment of the parcels Bukhayo/Bugengi/4549 and 4550 is cancelled.”

24. In the letter dated 13<sup>th</sup> June 2011 (**Pex 8**) addressed to the Chief Land Registrar Nairobi and drawn by the District Land Registrar, Busia, the Registrar stated thus;

“It has been noted that the above parcels of land (Bukhayo/Bugengi/1539) has been sub-divided into two different sets of numbers namely; Bukhayo/Bugengi/4549 and 4550 and Bukhayo/Bugengi/6726 and 6727 but the first set of registers are missing.”

26. The Land Registrar in the above letter acknowledged that parcel number 1539 had been subdivided twice. Mr. Chepkwesi (DW2) was thus untruthful to say that the plaintiff's title was fake because he had no records of the same yet his predecessor in office acknowledged the existence of the subdivisions into 4549 and 4550. This is further corroborated by records and correspondence from the Regional Survey Office. Consequently, I safely come to the conclusion that land parcel No. Bukhayo/Bugengi/1539 ceased to exist when it mutated to Bukhayo/Bugengi/4549 and 4550. The plaintiff has demonstrated that the 2<sup>nd</sup> defendant was indeed reckless and negligent in registering the later sub-division into Bukhayo/Bugengi/6726 and 6727.

26. The 2<sup>nd</sup> defendant submitted that Samson Oduori had no capacity to sell land to the plaintiff yet he was only a beneficiary of the estate of Barasa Odera – deceased. The Attorney General proceeded to contradict his submission by adding that the said Samson Oduori had been registered as the legal representative of the estate of the said Barasa pursuant to a grant issued in Cause No. 80 of 1987. Definitely, as an administrator the said Samson Oduori had capacity to deal with the land registered in Barasa Odera's name. This is further confirmed by the Certificate of Confirmation of grant produced as **Dex 1** issued on 3/9/1993.

27. In **Dex 1**; the property is given as Bukhayo/Bugengi/1539. The share of heirs is stated;

1. Samson Oduori. To be the sole heir and hold in trust for his brother Wabwire Ong'ono and Michael Ong'ono.
2. Mande Ong'ono and Anna Ongendo to have life interest on the estate.
3. Samwel Mwangi Kayen as purchaser to get 2 acres.
4. Ashindi Obona purchaser to get 3½ acres.

28. The 1<sup>st</sup> defendant is claiming the land based on the distribution contained in the certificate of confirmation of grant. Infact he added that the plaintiff was not entitled to the land because his name was not included in the list of beneficiaries. To show his entitlement, the plaintiff produced a sale agreement dated 15<sup>th</sup> December 1994 (**Pex 1**) executed between him and Samson Oduori Ong'ono. The reason given by Samson Oduori for selling the land was, **“To go and buy land near my mother and I will not come back for the land.”** The agreement was witnessed by Mande Ong'ono, Justo Nyongesa and Mandet.

29. As stated above, as at December 1993, Samson Oduori was the legal representative of Barasa Odera therefore he had capacity to sell. From the contents of this agreement, it appears he was selling his share in the land to go buy land near his mother. Since the 1<sup>st</sup> defendant's share was identified alongside Samson Oduori's share in the certificate of grant, the 1<sup>st</sup> defendant needed to demonstrate that the part sold to the plaintiff is what constituted his share physically on the ground.

30. The 1<sup>st</sup> defendant left the evidence presented by the plaintiff unchallenged on this account. As at the time he was carrying out the survey, the plaintiff was already in occupation of the land. It was not made clear to this court by the defendant that he bought his title before the plaintiff. However, since he began processing his title while the plaintiff was already in occupation, he ought to have put the administrator to task to show him his 2 acres of land instead of converting what was already taken by the plaintiff as part of his share. After all, the remaining size of land after the first sub-division by the plaintiff comprised in Bukhayo/Bugengi/4549 was 2.70ha (equivalent to 6¾ acres) which was sufficient to provide for the 1<sup>st</sup> defendant's 2 acres.

31. Although the 1<sup>st</sup> defendant accused the plaintiff of not presenting Land Control Board consent to transfer and executed transfer by the vendor neither did he present the same. According to him his title was genuine because there was a green card and parcel file. The letter of 13<sup>th</sup> June 2011 drawn by the register already confirmed that the records in respect of 4549 and 4550 were missing hence the plaintiff could not present documents misplaced by the lands registry. The plaintiff cannot be punished for a mistake to which he was not a party to. The non-inclusion of the plaintiff's name did not void the transaction between him and Samson Oduori - the legal administrator.

32. In light of the evidence presented I am satisfied that the plaintiff has proved his Case on a balance of probabilities as parcel number 1539 was not available for subdivision in 1999 to create the 1<sup>st</sup> Defendant's title. Accordingly, I enter judgement in his favour as prayed in the plaint

**a. A declaration be and is hereby given that the sub-division of L.R BUKHAYO/BUGENGI/1539 to create L.R. No. BUKHAYO/BUGENGI/4549 and 4550 and the subsequent registration thereof in 1995 is the sole legitimate sub-division of the said L.R No. BUKHAYO/BUGENGI/1539 and the same be restored.**

**b. A declaration be and is hereby issued that the purported sub-division of L.R. No. BUKHAYO/BUGENGI/1539 in 1999 to create L.R No. BUKHAYO/BUGENGI/6726 and 6727 was null and void and of no effect.**

**c. An order is issued by this court cancelling the titles purportedly issued in respect of L.R Nos BUKHAYO/BUGENGI/6726 and 6727 and any subsequent sub-divisions therefrom.**

**d. A permanent injunction is issued against the 1<sup>st</sup> defendant, his servants, employees, agents and all those claiming through him restraining him from trespassing into, and/or any claim and/or interfering with the plaintiff peaceful use and occupation of all that parcel of land known as BUKHAYO/BUGENGI/4550.**

**e. Costs of the suit is awarded to the plaintiff.**

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**