



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 300 OF 2013**

**MODE OF PROCEEDINGS.....MULTI TRACK**

**MOSES WAKASIKA WOLAYO..... PLAINTIFF**

**VERSUS**

**MOHAMMED MAKONGOLO MUSAMBA.....1<sup>ST</sup> DEFENDANT**

**ABDULLA BURIA MUSAMBA.....2<sup>ND</sup> DEFENDANT**

**WAZAR OVATAR MUSAMBA.....3<sup>RD</sup> DEFENDANT**

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

By a plaint dated 13<sup>th</sup> October 2013 and filed herein on 15<sup>th</sup> October 2013, **MOSES WAKASIKA WOLAYO** (the plaintiff herein) prayed for Judgment against **MOHAMMED MAKONGOLO MUSAMBA**, **ABDULLA BURIA MUSAMBA** and **WAZAR OVATAR MUSAMBA** (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) in the following terms: -

- (a) Eviction from land parcels NO KIMILILI/KIMILILI/4902 and 4903.**
- (b) Costs of this suit.**
- (c) Interest on (b) above.**

The basis of the plaintiff's claim is that at all material times, he is the registered proprietor of the land parcels **NO KIMILILI/KIMILILI/4902** and **4903** yet in 2009, the defendants without any colour of right encroached onto the said parcels of land with a view of disposing him of the same hence this suit.

The defendants filed a joint defence and Counter – Claim in which they pleaded that the plaintiff fraudulently obtained registration of the land parcels **KIMILILI/KIMILILI/4902** and **4903** in his names particulars of which are pleaded in paragraph 4 (i) – (iv) as follows: -

- (i) Fraudulently and falsely presenting himself as a heir of one ASMAN MUSUMBA WABUTI ALI.**
- (ii) Fraudulently converting KIMILILI/KIMILILI/61 into KIMILILI/KIMILILI/4902 and 4903.**
- (iii) Fraudulently obtaining title on 23/9/2009 while the grant in his favour was revoked on 18/8/2009.**
- (iv) Obtaining title from land that he is not a beneficiary or dependent.**

The defendants further denied that they had encroached onto the land parcels **NO KIMILILI/KIMILILI/61** in 2009 and added that they have lived on the said parcel of land for over 40 years as the same belonged to their late father **ASMAN MUSUMBA WABUTI ALI** and therefore the plaintiff's registration is questionable and an order for their eviction cannot be issued as it is time barred. The defendants also pleaded that there have existed other suits in respect to this matter being: -

- 1. KIMILILI SRMCC NO 9 OF 2010.**
- 2. BUNGOMA CMCC NO MSC A 156 OF 2009.**

### **3. BUNGOMA CMCC NO 91 OF 2010.**

In their Counter – Claim, the defendants sought Judgment in the following terms: -

- 1. An order cancelling the titles NO KIMILILI/KIMILILI/4902 and 4903 as the same were obtained fraudulently.**
- 2. A permanent injunction restraining the plaintiff from claiming any part of the property known as KIMILILI/KIMILILI/61.**
- 3. Costs.**

The basis of the defendants’ Counter – Claim is that they are the heirs of one **ASMAN MUSUMBA WABUTI ALI** now deceased and who was the proprietor of the land parcel **NO KIMILILI/KIMILILI/61**. That the plaintiff is not a heir to the deceased and therefore the conversion of the title **NO KIMILILI/KIMILILI /61** into **KIMILILI/KIMILILI/4902** and **4903** was fraudulent as the plaintiff is not entitled to the Estate of the deceased.

The trial commenced before **MUKUNYA J** on 22<sup>nd</sup> October 2015 when the plaintiff told the Court that since 2009, the defendants have been cultivating his land parcels **NO KIMILILI/KIMILILI 4902** and **4903** which he obtained in 1996 after filing **KIMILILI SUCCESSION CAUSE NO 19 OF 1995** in respect of the Estate of his late brother **ALI CHAPURUKHA** who died in 1962 and who owned parcels **NO KIMILILI/KIMILILI/61** and **63**.

Thereafter, he sub – divided the parcel **NO KIMILILI/KIMILILI/61** to give rise to parcels **NO KIMILILI/KIMILILI/4902** and **4903** (the suit land) which the defendants are illegally occupying yet the grant issued to him in **KIMILILI SUCCESSION CAUSE NO 19 OF 1995** has never been cancelled. He therefore sought orders for the eviction of the defendants from the suit land.

**ABDULA BURIA MUSUMBA** who is the 2<sup>nd</sup> defendant herein testified on 22<sup>nd</sup> May 2017. He told the Court that the land parcel **NO KIMILILI/KIMILILI /61** belonged to his late father **ATHUMANI WABUTI MUSUMBA** who died in June 1995. He produced the Death Certificate and also a photo – copy of original title deed in respect of the title **NO KIMILILI/KIMILILI/61**. The proceedings show that the Judge asked for the original title deeds which were availed because the record of the list of exhibits dated 22<sup>nd</sup> May 2017 as prepared by **JOY** and **GLADYS** – Court Assistants reads: -

- 1. “Original title deed NO KIMILILI/KIMILILI/4902**
- 2. Original title deed NO KIMILILI/KIMILILI/4903**
- 3. Original title deed NO KIMILILI/KIMILILI/61**
- 4. Certified true copy of Green Card. Received by NYONGESA and placed in the Cabinet.”**

The 1<sup>st</sup> defendant added that he and the other defendants who are his siblings live in the land parcel **NO KIMILILI/KIMILILI/61** and did succession cause **NO 7 OF 2009** although he did not indicate in which Court. He added further that there have been previous litigation with the plaintiff over the same land. These are: -

- 1. Case at the LAND DISPUTES TRIBUNAL in 1999.**
- 2. KIMILILI SRMCC CASE NO 125 OF 2010.**
- 3. BUNGOMA CMCC CASE NO 91 OF 2010.**

He therefore asked the Court to cancel the titles **NOS KIMILILI/KIMILILI/4902** and **4903** adding that they have never sub – divided the original land parcel **NO KIMILILI/KIMILILI/61** on which they still live. He prayed that the plaintiff’s suit be dismissed.

The 1<sup>st</sup> defendant was not immediately cross – examined by **MR KITUYI** counsel for the plaintiff because counsel applied that the following case files be availed i.e.

- 1. KAKAMEGA H.C.C.C NO 283 OF 1993.**
- 2. NAIROBI H.C SUCCESSION CAUSE NO 19 OF 1995.**

Orders were therefore made that the said files be availed. Those files were subsequently availed and when the matter came up before me on 19<sup>th</sup> November 2018, it was agreed that the case do proceed from where it has reached. The 1<sup>st</sup> defendant was subsequently cross – examined on 30<sup>th</sup> January 2020.

**MOHAMED MAKONGOLO MUSUMBA** the 2<sup>nd</sup> defendant did not testify. He was stepped down after he stated that he could not recall having recorded any statement in respect to this case.

The 3<sup>rd</sup> defendant **WAZAR OVATAR MUSUMBA** adopted as his evidence his statement dated 18<sup>th</sup> December 2013 in which he states that the plaintiff is not a heir to their deceased father and obtained the titles to the suit land by fraud adding that he and his brothers have lived on the land parcel **NO KIMILILI/KIMILILI /61** which belonged to their late brother for the last 40 years and the plaintiff's title should be cancelled.

Submissions have been filed both by **MR KITUYI** counsel for the plaintiff and **MR WAFULA** counsel for the defendants.

I have considered the evidence by all the parties including the documents filed and the submissions by counsel.

I wish to state that at the request by counsel for the plaintiff, the Court called for and received the following files: -

- 1. NAIROBI H. C. SUCCESSION CAUSE NO 19 OF 1995.**
- 2. KAKAMEGA HIGH COURT CIVIL CASE NO 283 OF 1993.**

I have perused them. **NAIROBI HIGH COURT SUCCESSION CAUSE NO 19 OF 1995** has no relevance to this suit. It involves the Estate of one **BENEDICT NGAYO TITO** and neither the suit land nor parcel **NO KIMILILI/KIMILILI/61** form part of the Estate therein. Infact the assets of the deceased therein are listed as follows: -

- 1. Death gratuity in Jubilee Insurance Company.**
- 2. 3 sofa sets.**
- 3. 1 Television set.**
- 4. Clothes.**

**KAKAMEGA HIGH COURT CIVIL CASE NO 283 OF 1993** involves one **JOHN WOLAYO CHAPURUKHA** as plaintiff and one **MUSUMBA WABUTI ASMAN** as defendant. The dispute involved land parcel **NO KIMILILI/KIMILILI/61** and was dismissed by **B. K. TANUI J** on 20<sup>th</sup> January 1997 for want of prosecution.

Those two files do not add any value to this case and I hereby order that they be returned to their respective Courts.

There are two main issues for determination by this Court. These are: -

- 1. Whether the plaintiff is the lawful proprietor of the suit land and is therefore entitled to orders for the eviction of the defendants therefrom and;**
- 2. Whether, infact, the plaintiff fraudulently acquired the registration of the titles to the suit land in his names thereby necessitating the cancellation of the same.**

However, before I do that, there is an important issue of whether infact the plaintiff's suit is res judicata and therefore liable for striking out.

Res – judicata was not pleaded by the defendants in their defence or Counter – Claim although they mentioned in paragraph 10 thereof that there have existed the following cases: -

- 1. KIMILILI SRMCC NO 91 OF 2010.**
- 2. BUNGOMA CMCC MSC A NO 156 OF 2009.**
- 3. BUNGOMA CMCC NO 91 OF 2010.**

In the defendants' list of documents however, there is the mention of **KIMILILI SRMCC NO 125 OF 2010**. The only time that res – judicata was mentioned is in the submissions by the defendants' counsel filed on 10<sup>th</sup> March 2020.

The doctrine of res – judicata is an important principle which, when taken as a Preliminary Objection, can bring proceedings to an end. It should therefore be raised at the earliest opportunity because it is a complete bar to a claim. I have however looked at the pleadings that were availed in this case. I have already found that **KAKAMEGA HIGH COURT CIVIL CASE NO 283 OF 1993** was dismissed for want of prosecution and **NAIROBI HIGH COURT SUCCESSION CAUSE NO 19 OF 1995** involved different parties. **KIMILILI SRMCC NO 91 OF 2010** and **BUNGOMA CMCC NO 91 OF 2010** involve the same parties and the subject matter herein but there is no evidence that those two suits were heard and determined. Indeed, the pleadings are the same as in this case and my view is that those suits may have been withdrawn and this suit filed.

**BUNGOMA CMCC MISC APPLICATION NO 156 OF 1999** also involved the same parties and related to the adoption of an award from the Provincial Appeals Committee. That award was not annexed and so it is not clear if it involved the same land the subject of this suit. Even if it did, any subsequent award would not render this suit re – judicata because the Land Disputes Tribunals, as they existed then, had

no jurisdiction to determine a dispute involving the ownership of registered land. It is trite law that a decision rendered by a Court or Tribunal without jurisdiction cannot sustain a plea of res – judicata.

In **KIMILILI SRMCC CASE NO 125 OF 2010** which involved the same parties herein, the plaint had been amended to indicate the subject matter as parcel **NO KIMILILI/KIMILILI/4904** but in the Judgment delivered by **HON OIGARA – SRM** on 7<sup>th</sup> February 2011, the orders related to parcel **NO KIMILILI/ KIMILILI/4909**. That suit had been filed by the plaintiff herein against the defendants also seeking eviction orders.

It is clear that the plea of res – judicata cannot be sustained in this case. Perhaps that explains why it was not pursued with much conviction but nonetheless the Court was obliged to consider it because it amounts to a complete bar to these proceedings if up – held.

I will now consider the parties’ respective claims on their merits.

There is no doubt that the plaintiff is the registered proprietor of the suit land. That is clear from the Certificates of Search filed herein which show that the plaintiff has also been issued with titles to the said parcels of land. That means that the plaintiff, as the absolute owner of the suit land, is entitled to all the rights and privileges appurtenant thereto and that includes the right to eject trespassers from the said parcels. That is the main remedy he seeks. **Section 24 (a) of the Land Registration Act** provides that: -

**“Subject to this Act – (a) the registration of a person as he proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto .....**”

However, such title can be challenged if, as provided by **Section 26(1)** of the same Act, it is proved that the proprietor obtained the said title through fraud or misrepresentation to which he is a party or illegally unprocedurally or through a corrupt scheme. Similar provisions are found in **Sections 27, 28 and 143 of the repealed Registered Land Act** under which the said titles were issued. While **Article 40 of the Constitution** protects one’s right to property, it is also provided under **sub – article (6)** that: -

**“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”** Emphasis added.

Therefore, while the plaintiff is, prima facie, the registered proprietor of the suit land, it is that registration that the defendants have faulted in their Counter – Claim. I must therefore interrogate the manner in which the plaintiff acquired the registration of the suit land in his names.

It is not in dispute that the suit land is a resultant sub – division of the land parcel **NO KIMILILI/KIMILILI/61**. That is clear from the Green Card and was confirmed by the plaintiff in his oral testimony when he said that he acquired ownership of the suit land after the succession process in which he obtained the grant in respect of the Estate of his late brother **ALI CHAPURUKHA** the original owner of the land parcel **NO KIMILILI/KIMILILI/61**. However, that cannot possibly be correct because the 1<sup>st</sup> defendant produced a copy and also the original title deed to the said parcel of land (which is currently in custody of this Court) which clearly shows that the land parcel **NO KIMILILI/KIMILILI/61** was first registered in the names of **MUSUMBA ALI a.k.a MUSUMBA WABUTI ASMAN** on 10<sup>th</sup> August 1965 before the title was issued on 16<sup>th</sup> July 1979 following a change of names. It was never the property of one **ALI CHAPURUKHA**.

The said **MUSUMBA WABUTI ASMAN** is the late father of the defendants who made it clear that the plaintiff is not part of their family. This is what the 1<sup>st</sup> defendant said in cross – examination by **MR KITUYI**: -

**“The plaintiff could not do succession because he is not our family.”**

On his part, the 3<sup>rd</sup> defendant said: -

**“The plaintiff is not from the MUSUMBA family.”**

Given the un – disputed fact that the land parcel **NO KIMILILI/KIMILI/61** from which the suit land was curved was the property of **MUSUMBA WABUTI ASMAN** (the late father of the defendants) and not the property of **ALI CHAPURUKHA** (the plaintiff’s brother) and also in view of the fact that the plaintiff is not part of the defendant’s family, the succession process through which he acquired the suit land could only have been fraudulent. There is also no doubt that he was the prime mover of that fraudulent process aided by equally fraudulent officers in the Lands Registry because how else could they have sub – divided the land parcel **NO KIMILILI/KIMILILI/61** to give rise to the suit land when the original title has always been in the possession of the defendants? A nullity always begets a nullity – **MACFOY .V. UNITED AFRICA CO LTD 1972 AC 152**.

The plaintiff cannot, in the circumstances, enjoy the protection conferred by both the Land Registration Act and the Constitution in so far as his proprietorship of the said land is concerned. That registration having been acquired illegally, there can be no basis upon which this Court can evict the defendants as prayed. The plaintiff’s suit must be dismissed.

On the other hand, the defendants have proved that the plaintiff’s title to the suit land was obtained fraudulently. The only remedy available is to cancel those titles as prayed in the defendant’s Counter – Claim.

Ultimately therefore, there shall be Judgment for the defendants against the plaintiff in the following terms: -

**1. The plaintiffs suit is dismissed.**

**2. The defendants' Counter – Claim is allowed as follows: -**

**(a) The plaintiff's registration as proprietor of the land parcels NO KIMILILI/KIMILILI/4902 and 4903 is hereby cancelled.**

**(b) An order of permanent injunction is issued restraining the plaintiff by himself his agents, servants or those acting under him from claiming any portion of the land parcel NO KIMILILI/KIMILILI/ 61.**

**3. The plaintiff shall meet the costs of the dismissed suit and the defendants' Counter – Claim.**

**4. The original title of the land parcels NO KIMILILI/KIMILILI/61 be released forthwith to the defendants if that has not already been done.**

**5. The original title deeds for the land parcels NO KIMILILI/KIMILILI /4902 and 4903 be returned to the Land Registrar Bungoma with clear instructions that they be cancelled forthwith and the register reflected accordingly as ordered in 2(a) above.**

**6. The Deputy Registrar to ensure there is compliance with the orders in (5) above.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

**Judgment dated, delivered and signed at Bungoma this 27<sup>th</sup> day of May 2020.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

This Judgment was due on 4<sup>th</sup> June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23<sup>rd</sup> April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**