



**REPUBLIC OF KENYA**

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

**ELC 735 OF 2015**

**FORMERLY CIVIL SUIT NO. 203 OF 2009**

**VINCENT OCHIENG OSIKA (Suing as the  
personal Representative and administrator to  
the estate of ALFAYO OSIKA WANJARA).....PLAINTIFF**

**VERSUS**

**PATRICK CORNEL AHENDA.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LANDS REGISTRAR RACHIONYO DISTRICT.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

Vincent Ochieng Osika suing as the personal representative and administrator of the estate of Alfayo Osika Wanjara (hereinafter referred to as the Plaintiff) has come to this court in this matter against Patrick Cornel Ahenda, District Lands Registrar Rachuonyo District, the Attorney General averring that his late father was first Registered owner of Land Parcel number Kabondo/Kakagutu East/1028 measuring approximately 2.62Ha and was so registered until he passed on 18/10/1997.

The Plaintiff further avers that in October 2009 the 1<sup>st</sup> defendant came and fenced off the suit parcel claiming that it was his property and asked the Plaintiff's family to move out and stop cultivating the same. The Plaintiff avers that upon inquiries from the lands registry he was shocked to find that the 1<sup>st</sup> Defendant had registered himself as the owner of this parcel in August 1999 and that they have never sold any parcel to the 1<sup>st</sup> defendant and no consideration has passed between the Plaintiff and his family with the 1<sup>st</sup> defendant for him to have acquired the title to the suit parcel.

The plaintiff states that, on or about the year 1996 his father sold to one Orito Omollo one acre of land by and agreement which was unwritten, but they both passed on without completing this transaction or transferring this portion of land, and on or about 1999 the said Orito Omollo's son one Elly Omollo told his mother Margaret Oguttu Osika of his intention to sell the portion sold to the 1<sup>st</sup> defendant.

The Plaintiff contends that at no time ever formally did the said Elly Omollo ask for their consent to transfer any portion of their land to the 1<sup>st</sup> Defendant and at no time did they seek any land board consent at their request or take up letters of administration to be able to us transfer any portion of the suit property to the 1<sup>st</sup> defendant name.

The Plaintiff claims that the 1<sup>st</sup> defendant in collaboration with unscrupulous officials at the 1<sup>st</sup> defendant's office at Kosele ,Rachuonyo District headquarters illegally and fraudulently transferred the suit property to the 1<sup>st</sup> defendant's name, when he had no capacity to do so and in law cannot transfer property of the deceased without getting letters of administration.

The Plaintiff has particularised the said fraud as the 1<sup>st</sup> defendant had no capacity to transact and there was no consent to transfer, failure to pay levy, forgery, lack of letters of administration. The 1<sup>st</sup> defendant has trespassed and destroyed property. The Plaintiff particularised los and damage.

The Plaintiff prays for a declaration that that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit Property and a permanent injunction do issue restraining the Defendant, whether by themselves or their servants or agents or otherwise howsoever, interfering with the Plaintiff peaceful occupation of the suit parcel and from trespassing remaining on or continuing in

occupation of the suit property.

Furthermore, a declaration that the defendant acquired the suit title fraudulently and the same be cancelled and the land registrar be directed to rectify the register to return the title to the name of the deceased (Alfayo Osiku Wanjara). General and punitive damages for unlawful trespass. Costs of this suit together with interest thereon.

The 1<sup>st</sup> Defendant filed amended defence and counter-claim stating that the plaintiff has no locus standi to file the suit. He denied having fenced off the property.

The 1<sup>st</sup> Defendant states that he is the registered proprietor of land parcel no. Kabondo/Kakangutu East/1359 which came from the subdivision of Kabondo/Kakangutu East/1028 that became extinguished after subdivision. He states that:

Sometime in the years 1998 and 1999, the defendant entered into a contract with the plaintiff and his mother Mrs. Margaret Osika wherein they agreed that the defendant would purchase the suit property being a portion of the parent title then registered in the name of the plaintiff's deceased father, Alfayo Wanjala Osika.

The agreed purchase price was Kshs. 300,000.00 of which Kshs. 100,000.00 was paid upon the request and at the direction of the vendors to one Mr. Oriato to whom the vendors had contracted to sell the suit property and who had received part-payment in respect thereof and had agreed to accept a refund of the said part-payment in order to treat the contract with them as abrogated. The remainder of the agreed purchase price together with further sums related thereto were paid to the vendors full particulars whereof are known to the plaintiff;

Upon completing payment of the agreed consideration sometime in late July 1999 the vendors undertook to complete all formalities for the transfer of the suit property to the defendant whereupon the defendant proceeded to travel out of the country on business returning to find that the vendors had completed all formalities and procured the transfer of the suit property into his name. They presented to him a title deed for the suit property in his name which he accepted;

The vendors failed to notify the defendant that the acquisition process had been completed without their obtaining the requisite letters of administration of the estate of Alfayo Wanjala Osika;

The vendors misrepresented to the defendant that all formalities for the completion of the acquisition process were undertaken in accordance with the requirements of the law;

The vendors as the lawful beneficiaries of the late Alfayo Wanjala Osika did enter into a lawful agreement for the sale of the suit property and accepted receipt of the agreed consideration for the sale of the suit property and purported to effect a transfer to the defendant of their legal and equitable interest in the suit property wherefore they are estopped from denying the plaintiff's equitable interest therein;

The Defendant counterclaims against the plaintiff ownership of the suit property the sale having been completed, the failure of proper registration of his interest notwithstanding, and contends that from the circumstances a constructive trust was created in his favour over the suit property and further that the constructive trust survived the irregular transfer by the vendors of the suit property to the defendant. And the defendant sees a declaration of the constructive trust aforesaid and for such orders as shall affect the lawful and proper transfer of the title for the suit property to him and the consequent issue of a title deed in his favour.

The defendant avers that the plaintiff herein received and acknowledged receipt of a substantial part of the purchase price.

In the premises the defendant denies that he acquired his parcel of land illegally or fraudulently as alleged by the plaintiff and will put the plaintiff to the strictest proof thereof. In the premises the defendant denies that the plaintiff has suffered any loss.

The defendant avers that the suit filed is incompetent and an abuse of the process of the court and will pray that the same be dismissed with costs.

The defendant in the counter claim states that the plaintiff misrepresented that he was the representative of the estate of one Alfayo Osika Wanjara with full authority to transact the sale of the suit land on behalf of the estate.

The Defendant prays for a declaration of a constructive trust of the legal and equitable interest in the suit property in favour of the defendant and an order that a transfer of the title thereof be duly executed and registered in his favour.

He further prays for a permanent injunction restraining the plaintiff, either himself or through his servants, employees or agents, restraining them from trespassing onto the suit property and from attempting or purporting to attach, distrain or otherwise alienate the defendant's interest therein or any of the property of the defendant thereon; The costs of this suit, both party and party and advocate and client together with interest thereon at court rates from the date of filing suit and until payment thereof in full.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied all allegation of fraud and claimed to have followed the procedure free from any irregularity.

The plaintiff filed a reply to amended statement of defence and defence to counter claim stating that Kabondo/Kakangutu East/1359 does not exist. He denies any contract with the 1<sup>st</sup> defendant and denies all allegations by the 1<sup>st</sup> defendant. The Plaintiff reiterates that the 1<sup>st</sup> Defendant obtained transfer fraudulently. The plaintiff reiterates that the 1<sup>st</sup> defendant transferred the land to himself fraudulently. In conclusion the plaintiff states that no counter-claim exists.

When the matter came up for hearing the plaintiff testified at length that his father died on the 18<sup>th</sup> of October 1997 in Wang Chieng location Rongo Pala sub-location in Rachuonyo South District. When his father died he was a young man but remembers that he had sold part of the suit land to one Mr Oriato who had helped him pay an AFC Loan. When the plaintiff completed school he was set to do succession of the father and checked for the copy of his father's title deed but found it missing and when he checked at the lands registry he found that his deceased father had transferred the land to the 1<sup>st</sup> defendant on 30<sup>th</sup> August 1999 albeit being deceased. In year 2009, the 1<sup>st</sup> defendant went and fenced the land and forced the plaintiff and family to stop using it. The plaintiff was categorical that they have never sold the land.

The 1<sup>st</sup> Defendant did not come to court to give evidence and therefore offered no evidence. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not call evidence.

I do find that the plaintiff has proved on a balance of probabilities that the suit parcel of land was transferred un-procedurally to the 1<sup>st</sup> Defendant.

The proprietor of the land was deceased when the suit parcel of land was subdivided and a portion transferred to the 1<sup>st</sup> Defendant. However, it is not proved that the 1<sup>st</sup> Defendant was involved in the impropriety. Definitely the whole transaction was fraudulent and tainted with illegality.

It is not proved on a balance of probabilities that the 1<sup>st</sup> Defendant forged the transfer document and the consent of the Land Control Board.

It is clear that the whole transaction in respect of parcel of land 1028 was tainted with illegality.

**Section 26 (1) of the Land Registration Act 2012 provides:**

**“26. (1) 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.”**

**Article 40 (6) of the Constitution of Kenya provides:**

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

This court finds that the Plaintiff has proved that the subdivision of 1028 and transfer of Kabondo/Kakangutu East/1359 was unprocedural and unlawful and therefore illegal. I do find that the 1<sup>st</sup> Defendant acquired title to parcel number Kabondo/Kakangutu East/1359 unprocedurally, illegally and unlawful and the same is hereby cancelled. The subdivision of 1028 is herein also nullified as the same was done illegally when the proprietor was dead. The register to be rectified to revert the 1028 and to be registered in the names of deceased Alfayo Osika Wanjara. The counter claim is dismissed. Costs to the plaintiff. Orders accordingly.

**DATED, DELIVERED AND SIGNED THIS 22ND DAY OF MAY, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19

pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

A.O. OMBWAYO

**ENVIRONMENT & LAND**

**JUDGE**