



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 4 OF 2016

CHRISTINE OYENDE

KELEMENTINA AKOTH.....PLAINTIFFS

= VERSUS =

HENRY MAKHUMBIRI MUKOLWE.....DEFENDANT

J U D G E M E N T

1. By a plaint dated 12/1/2016 and amended on 8/3/2018 the plaintiffs prayed for judgement against the defendant jointly and severally for;

(a) Revert/rectify all the records on land parcel No. Marachi/Elukhari/2136 to AKULINA AUMA (deceased).

(b) Costs of this suit.

(c) Any other relief this Honourable Court may deem fit to grant.

2. The plaintiffs brought this suit as the representatives of the estate of the late Akulina Auma – deceased whom they state is their father. That the deceased was the registered owner of L. R. No. Marachi/Elukhari/721 measuring 5.39ha. That Mr. Akulina sold a portion of this land to the defendant’s father John Otsimi Makhumbiri – deceased.

3. The plaintiffs pleaded further that upon subdivision, the late Otsimi Makhumbiri got his title. However, the defendant herein fraudulently obtained Akulina’s ID and used the same to subdivide L.R No. Marachi/Elukhari/2018 into L.R No. Marachi/Elukhari 2135 and 2136. Thereafter the defendant registered himself as owner of the parcel number Marachi/Elukhari.2136 which constitutes the land in dispute. That when they learnt of the defendant’s action, the plaintiff instituted a case before the Land Disputes Tribunal and the award was made in their favour.

4. That the award was later adopted as an Order of the Court. That inspite of the adoption, the defendant has refused and or ignored to surrender the suit title number Marachi/Elukhari/2136 to be registered in the deceased name hence this suit.

5. The defendant was served but he did not enter appearance. The 1st plaintiff Christine Oyende gave evidence on 11/3/2020 in support of their Case. She stated that the defendant’s father bought 6 acres from their father but the defendant took additional 2 acres illegally. That they reported the matter to the village elder who summoned him. The village elder sent them to the Land Dispute Tribunal who found for the plaintiffs. The witness said there is no one living on this land. She urged the Court to return the land to them.

6. In support of their Case, the plaintiffs filed searches in respect of title numbers;

(i) Marachi/Eluchari/2135 bearing the name of Christine Oyende.

(ii) Marachi/Eluchari/2136 bearing the name of Henry Mukolwe Makumbiri.

7. The plaintiffs also filed a copy of green card for Marchi/Elukhari/2136. It indicates that this number was a sub-division of L.R No. Marachi/Elukhari/2018. The defendant was registered as owner thereof on 28/3/1994. Before his registration, Marachi/Elukhari/2136 was first registered in the name of Akulina Auma Wesonga as at 20/3/1994. The green card thus shows that the transfer to the defendant’s name was effected during the lifetime of Akulina - deceased. It is not indicated when Akulina died but given that the letters of administration were taken out by the plaintiffs in 2013 and the confirmed grant issued on 26/6/2014, Akulina may have died after 1994.

8. Before being issued with a grant, they had sued the defendant before the tribunal. Below is the content of the award given by the Tribunal;

“It is hereby ordered that;

1. The Applicant (AKULINA AUMA WESONGA) piece of land Marachi/Elukhari/2018 is 2.99ha.”

It is this award/order which the plaintiffs are relying on to claim the suit land. Unfortunately, the proceedings before the elders of the Land Dispute Tribunal was not annexed/produced. The Order on the face of it is rather incomplete as it does not say what was awarded.

9. It is not denied that Akulina – deceased was the owner of L.R No. Marachi/Elukhari/2018. What the plaintiffs pleaded and which they needed to prove is that the subdivision of L.R No. 2018 was undertaken by the defendant and that it was fraudulently done. No evidence was led of how the subdivision process was done. There were no mutations produced to indicate who signed it neither was any evidence called to corroborate the allegations that the defendant fraudulently obtained the ID of Akulina or that it is the defendant who was actually engaged in the subdivision of L.R No. Marachi/Elukhari/2018. Allegations of fraud must be specifically pleaded and proved. In this Case, neither the particulars of fraud were pleaded nor was there any proof made.

10. Further, claims for fraud must be made within 3 years of such discovery. By September 2005, the plaintiffs were aware of the fraud committed by the defendant when they filed the Land Dispute Tribunal Case. Yet from 2005, they did nothing to apply to cancel the defendant’s title until the year 2016 when this Case was filed. The claim based on fraud is thus time-barred by Section 4(2) of the Limitation of Actions Act which provide thus;

“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

11. The plaintiffs claim must fail on two accounts. First; there was no fraud pleaded nor was it proved by the evidence adduced. Secondly because the claim which hinged on fraud was filed out of time without leave of the court. Although the suit was undefended, it was not proved within the standards of probability. Consequently, I proceed to dismiss it with no orders on costs.

Dated, signed and delivered at BUSIA this 4th day of June, 2020.

A. OMOLLO

JUDGE