



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**CASE NO. 323 OF 2017**

**(Formerly Kisii ELC CASE NO. 366 OF 2012)**

**CONNIE FRANCIS C.O. OWALA.....PLAINTIFF**

**VERSUS**

**JAPHETH ANGILA ATINGA.....1<sup>ST</sup> DEFENDANT**

**KEM BOSIRE, DISTRICT LAND REGISTRAR**

**MIGORI DISTRICT.....2<sup>ND</sup> DEFENDANT**

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

**JUDGMENT**

**A) INTRODUCTION**

1. This judgment concerns K.E.M Bosire, Land Registrar Migori and the Honourable Attorney General who are the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein respectively. It is noted that the determination in respect of the 1<sup>st</sup> defendant Japheth Angita Ating'a was rendered by this court on 4<sup>th</sup> April, 2017.
2. The property in the present suit is Title Number Kamagambo/Kanyamamba/451 measuring approximately three decimal six hectares (3.6Ha) in area. It is located in Rongo Sub County within Migori County.
3. Initially, this suit was lodged at Kisii Environment and Land Court and upon the establishment of this court, on 20<sup>th</sup> March 2017, the suit was transferred to this court for hearing and determination. On 17<sup>th</sup> October 2018, I ordered that the suit be heard in regard to damages only.
4. The plaintiff, Connie Francis C.O Owala is represented by learned counsel, Mr. G.S Okoth of G.S Okoth and Company Advocates.
5. Miss E. Opiyo learned counsel appears for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein.

**B) THE GIST OF THE PLAINTIFF'S CASE**

6. In a plaint dated 1<sup>st</sup> October 2012 and lodged in court on 15<sup>th</sup> October 2012, the plaintiff sued the defendants jointly and severally for:-
  - a) Special damages Ksh. 16, 100/=.
  - b) General damages for fraud, mesne profits and loss of earnings and profits.
  - c) An order of rectification of the register for Land Parcel No. Kamagambo/Kanyamamba/451 (the suit land herein) by deleting the name of Japheth Angila Atinga in entry Nos. 7,8 and 9 revoking the title deed issued to him and reinstating the name of Isaya Owala Orwa as the proprietor thereof awaiting administration of his estate.
  - d) Aggravated, punitive and or exemplary damages to be paid by the defendants.
  - e) An order of permanent prohibitory injunction to restrain the 1<sup>st</sup> defendant, his kin, servants, agents or any person depriving

authority or title through him from entering into the suit land or any part thereof.

f) Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full.

g) Interest on (a) (b) and (d) at the rate of 12% p.a from the date of filing suit on (a) and from the date of judgment on (b) and (d) until payment in full.

h) Such further or other alternative relief as this Honourable court deems fit to grant.

7. The plaintiff (PW1) claims, inter alia, that he is the legal administrator of the estate of Isaya Arnold Owala Orwa (deceased) who is the registered proprietor of the suit land as well as LR NO Kamagambo/Kanyawanga/563, among other parcels of land. That the deceased is survived by 13 beneficiaries and before his death, he had various suits pending in various courts between the 1<sup>st</sup> defendant and himself. That on diverse dates between 4<sup>th</sup> November 2011 and 28<sup>th</sup> December 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants wrongfully and maliciously conspired and combined among themselves to fraud and injure the deceased's estate and the plaintiff of his equitable rights, title and interest in the suit land by way of overt acts set out at paragraph 6 of the plaint. As a result, the said estate has been greatly injured and deprived of their legal and equitable title and interest in the suit land, thus, provoking the instant suit.

8. This suit was heard on 23<sup>rd</sup> September 2019 whereby PW1 stated that he relied on his undated statement filed on 15<sup>th</sup> October 2012 as part of his evidence. He also relied on his list of documents dated 1<sup>st</sup> October 2012 and filed in court on 15<sup>th</sup> October 2012 (PEXhibits 1 to 11).

9. By 6-paged submissions dated 28<sup>th</sup> October 2019 and filed in court on 5<sup>th</sup> November 2019, learned counsel for PW1 argued that PW1 has proved his case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the grant of reliefs sought in the plaint. Counsel provided a brief background, facts of the case, cited the relevant law including, the Black's Law Dictionary on the definition of the term "fraud", Section 71 of the Law of Succession Act Chapter 16 of the Laws of Kenya, **Elijah Makeri Nyangwara v Stephen Mungai Njuguna and another (2013)eKLR, Kenya National Highway Authority v Shahen Masoud Mughal and 5 others (2017)eKLR, Alice Chemutai Too -Vs- Nickson Kipkurui Kurui and 2 others (2013)eKLR, Damaris Wanjiku Mwai v Patrick Tumuri Kimutwe ELCC No. 346 of 2017** and Section 27 of the Civil Procedure Act Chapter 21 Laws of Kenya.

#### **C) THE GIST OF THE 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS' CASE**

10. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiff's claim in their statement of defence dated 7<sup>th</sup> June 2013 duly filed in court on 19<sup>th</sup> June 2013 and sought dismissal of the same with costs. They stated inter alia, that the law and procedure were followed herein. That registration done in their offices depends on documents presented hence upon registration in this case, there must have been valid documents presented accordingly.

11. On 23<sup>rd</sup> September 2019, Philip Makini Onyiego (DW1), the Land Registrar in charge of Migori County, testified and relied on the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' list of documents dated 16<sup>th</sup> February 2018 and filed in court on 17<sup>th</sup> April, 2018 (DEXhibits 1 to 5). He stated that cancellation shown in DEXhibit4 corrected errors therein under Section 79 of the Land Registration Act, 2016 (2012). That there was no wrong committed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as it is the 1<sup>st</sup> defendant to blame for the corrected entries.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants failed to file and serve submissions or at all yet they were directed to do so by this court's orders of 23<sup>rd</sup> September 2019 and 10<sup>th</sup> December 2019. As such, they were accorded the right to access to justice and a fair hearing as provided for under Articles 48, 50 (1) as read with Article 25(c) of the Constitution of Kenya, 2010 respectively.

#### **D) ISSUES FOR DETERMINATION**

13. I have thoroughly considered the pleadings and submissions of the plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the evidence of PW1 and DW2 in this suit. Being guided by the Court of Appeal decision in **Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2000)2EA 385**, I am of the considered view that the issues for determination are condensed thus:

a) Whether the plaintiff has proved his claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this suit to the requisite standard.

b) Depending on the outcome in issue number 1 hereinabove, what are the appropriate final orders to issue herein?

#### **E) DISCUSSION AND DISPOSITION**

14. On the first issue, the plaintiff alleged fraud against the 1<sup>st</sup> and 2<sup>nd</sup> defendants at paragraph 5 of the plaint. The particulars of fraud are pleaded at paragraph 6 (a) to (h) thereof as noted in long line of authorities including **Vijay Morjaria v Nansingh Madhusingh Darbar and another (2000)eKLR**, and **Ndolo v Ndolo (2008)IKLR (G&F) 742**.

15. Moreover, at paragraph 9 of the plaint, it is alleged that the 2<sup>nd</sup> defendant unlawfully registered the 1<sup>st</sup> defendant as the proprietor of the suit land whereas the deceased was the registered sole proprietor thereof on 28<sup>th</sup> May 1974. In examination in chief, PW1 stated in part:

*“My late father was Isayah Owala Orwa....He owned the suit land...He died in October 2012...”*

16. PW1 further testified per his statement that the 1<sup>st</sup> defendant illegally altered entries made in the suit land register as set out in paragraphs 6 (a) to (h). During cross examination, PW1 stated, inter alia;

***“...I then obtained PExhibit 2. I did not have PExhibit 2 registered in the Land Registry...I stopped PExhibit 7 by way of a caution...I did not inform 2<sup>nd</sup> and 3<sup>rd</sup> defendants of PExhibit 8...PExhibit 7 bears cancellation done and presented to 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant. I can't tell who cancelled writings on PExhibit 7...”***

17. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiff's allegations at paragraph 4 of their statement of defence. Furthermore, DW1 stated in examination in chief that cancellation in DExhibit 4 corrected the errors thereon. That entry Number 11 in DExhibit 1 followed PExhibit 8. As noted at paragraph 16 hereinabove, PW1 failed to draw the attention of the 2<sup>nd</sup> defendant to PExhibit 2 and 8 herein for necessary action.

18. DW1 told the court that the 1<sup>st</sup> defendant is to blame for the entries in DExhibit 1. During cross examination, he stated;

***“...The entries signed thereafter as numbers 5, 6, 7, 8, 9, 10 and 11 are noted as correct entries in DExhibit 1. PExhibit 6 presented at the Land Registry caused entry numbers 7, 8 and 9 owing to the time of its presentation. PExhibit 7 was presented at the Land Registry by 1<sup>st</sup> defendant...”***

19. DW1 further stated that entries in land register may be corrected by other entries therein. I am not unaware of the Land Registrar's discretionary powers to rectify the register under **Section 79 (supra)**.

20. In view of the foregone, did the 2<sup>nd</sup> defendant commit fraud as alleged by the plaintiff herein? The **Black's Law Dictionary 10<sup>th</sup> Edition** at page 775 defines the term fraud as:

***“A reckless misrepresentation made without justified belief in it's truth to induce another person to act”***

21. Similarly, I endorse the reasoning in **Abiero –vs- Thabiti Finance Co. Ltd and another (2001)KLR 496** where it was held that “**fraud**” means:

***“It is a generic term embracing all multifarious means which human beings devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and include all surprise trick, winning, dissembling and any unfair way by which another is cleared.”***

22. It is distinctly pleaded at paragraph 6 (f) of the plaint that the 1<sup>st</sup> defendant did deceive the 2<sup>nd</sup> defendant to effect the changes in the suit land register. However, as noted at paragraphs 17, 18 and 19 hereinabove, the 1<sup>st</sup> defendant informed the correction of entries made therein. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are absolved from any blame thereby.

23. As regards the second issue, the plaintiff did specifically plead special damages at paragraph 8 (a) and (b) of the plaint. It is the duty of a claimant to not only plead special damages but to prove the same as held in **Great Lakes Transport Co (U) Ltd –vs- Kenya Revenue Authority (2009)KLR 720**.

24. The plaintiff is also seeking mesne profits under prayer (b) in the plaint. This court is aware of the term “**mesne profits**” under Section 2 of the Civil Procedure Act Chapter 22 Laws of Kenya and the decision in **Rioki Estate Company (1970) Ltd v Kinuthia Njoroge (1977)KLR 146**.

25. Mesne profits are also a form of special damages which must be specifically pleaded and proved. In that regard, I approve the stand point taken by M. Odero J in **Nakuru Industries Ltd –vs- S.S Mehta and sons (2016) eKLR** involving similar circumstances.

26. In the instant suit, whereas the plaintiff distinctly pleaded special damages, he has failed to prove it as well as specifically plead and prove mesne profits. Clearly, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not liable for the alleged acts of the 1<sup>st</sup> defendant herein. The plaintiff has failed to prove his case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the requisite standards.

27. A fortiori, the plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants mounted by way of a plaint dated 1<sup>st</sup> October 2012 and lodged in court on 15<sup>th</sup> October 2012 be and is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 22<sup>nd</sup> day of JULY, 2020.**

**G. M.A. ONGONDO**

**JUDGE**

**In Presence of:-**

Mr. Omonde Kisera holding brief for G.S. Okoth learned counsel for plaintiff

Court Assistant – Tom Maurice