



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 96 OF 1989

WILLIAM OUKO OGOLLAPLAINTIFF

-VERSUS-

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA1ST DEFENDANT

DISTRICT LAND REGISTRAR, SOUTH NYANZA2ND DEFENDANT

PRISCAH BOSIBORI NYANGERI 3RD DEFENDANT

JUDGMENT

1. The plaintiff brought this suit sometimes in the year 1989. The suit as initially filed was brought against the Attorney General, the 1st defendant herein and one, A. M Mugenyi who was the District Land Registrar, South Nyanza at the material time as the only defendants. The plaint was amended in the year 1991 and the District Land Registrar, South Nyanza District was joined in the suit as 2nd defendant in place of A. M Mugenyi aforesaid who had been sued in his personal name. Through the same amendment, Mwanatumu Iddi Mwasina, Zena Khamis and Dismas Nyangeri Obiero were also joined in the suit as 3rd, 4th and 5th defendants respectively. On 8th August 1994, the plaintiff notified the court that he did not wish to pursue the suit as against the 3rd and 4th defendants who by then had neither entered appearance in the suit nor filed a statement of defence. This left the Attorney General, the District Land Registrar, South Nyanza District and Dismas Nyangeri Obiero as the only defendants in the suit. Dismas Nyangeri Obiero, the then 5th defendant died on 21st February, 1997. On 23rd August 2002, the plaintiff amended the plaint once again with leave of the court through which amendment, the names of Mwanatumu Iddi Mwasina and Zena Khamis formerly the 3rd and 4th defendants were removed from the suit. At the same time, the then 5th defendant, Dismas Nyangeri Obiero who had died as aforesaid was substituted with his legal representative, Priscah Bosibori Nyangeri, the 3rd defendant herein. The further amended plaint was filed in court on 23rd August 2002 with the Attorney General, the District Land Registrar, South Nyanza and Priscah Bosibori Nyangeri, the 1st, 2nd and 3rd defendants herein respectively as the only defendants.
2. In the said further amended plaint which was dated 8th August 2002, the plaintiff averred that on or about 26th February 1976, he entered into an agreement for sale of land with one, Harrison Makuge Maucha ("hereinafter referred to only as "Maucha"). The said agreement was with respect to a portion of all that parcel of land then known as LR No. Suna East/Wasweta I/3370 (hereinafter referred to as "Plot No. 3370"). The plaintiff averred that following the said agreement, Maucha applied to the Land Control Board and obtained the necessary consents to sub-divide Plot No. 3370 and transfer to him (the plaintiff) a portion thereof that he had sold to him.

Plot No. 3370 was subsequently sub-divided and a portion thereof known as LR No. Suna East/Wasweta I/4451 measuring 0.194 ha. (hereinafter referred to as "Plot No. 4451") transferred and registered in his name as the proprietor thereof. He was thereafter issued with a title deed with respect to the said parcel of land.

3. The plaintiff averred further that on or about 8th February 1989, the 2nd defendant acting without jurisdiction and notice to the plaintiff, proceeded to cancel the plaintiff's title over Plot No. 4451. The 2nd defendant thereafter again without any notice to the plaintiff caused Plot No. 4451 to be re-surveyed pursuant to which survey, two (2) parcels of land namely, LR No. Suna East/Wasweta I/6277 ("Plot No. 6277") and LR No. Suna East/Wasweta I/6279 ("Plot No. 6279") were created. The plaintiff sought the following reliefs in his further amended plaint;-
 - a. A declaration that the 2nd defendant had no power to cancel the register for LR No. Suna East/Wasweta I/4451 in the manner and under the circumstances in which it did it.
 - b. A declaration that the plaintiff was lawfully registered as the proprietor of LR No. Suna East/Wasweta I/4451 and should remain so registered.
 - c. An order that the registration of LR No. Suna East/Wasweta I/6279 be cancelled and the registration of LR No. Suna East/Wasweta I/4451 be reinstated.
 - d. An order that there be a re-survey for the purposes of correcting the unlawful registration that was effected as aforesaid.
 - e. Cost of the suit
 - f. Any other relief that the court may deem fit to grant in the circumstances.
4. The defendants did not file amended statements of defence in response to the further amended plaint. Pursuant to the provisions of order 8 rule 1 (6) of the Civil Procedure Rules, the defendants are taken to have chosen to rely on their statements of defence that they had filed prior to the filing of the further amended the plaint. The 1st and 2nd defendants had filed a statement of defence on 21st June 1989. In their statement of defence, the 1st and 2nd defendants admitted that the plaintiff was registered as the proprietor of Plot No. 4451 before the title of the said parcel of land was cancelled in February, 1989. The 1st and 2nd defendants denied however that the cancellation of the register for Plot No. 4451 was unlawful or that it was carried out in breach of the rules of natural justice and in excess of the powers of the 2nd defendant. The 1st and 2nd defendants contended that Plot No. 4451 was registered in the name of the plaintiff as the proprietor thereof fraudulently and as such the cancellation of its title was proper, lawful and justified. The 1st and 2nd defendants contended that the plaintiff claimed to have purchased Plot No. 4451 from Maucha and presented to the 2nd defendant a purported Letter of Consent of the Land Control Board which he claimed to have been issued by Migori Land Control Board approving the transfer of the said parcel of land to the plaintiff which consent turned out not to have been issued by the said Land Control Board. The 1st and 2nd defendants contended that the plaintiff caused the 2nd defendant to register him as the proprietor of Plot No. 4451 that was excised from Plot No. 3370 while he knew that he was not entitled to be so registered. The 1st and 2nd defendants averred that following the cancellation the plaintiff's title over Plot No. 4451, Plot No. 3370 was subsequently lawfully subdivided which sub-division gave rise to LR Nos. Suna East/Wasweta I/6277, 6278 and 6279 ("Plot Nos. 6277, 6278, 6279"). The 1st and 2nd defendants denied that Plot Nos. 6277, 6278 and 6279 were registered in place of Plot No. 4451.
5. Dismas Nyangeri Obiero, deceased, who was substituted with the 3rd defendant herein had filed a statement of defence on 25th April 1991, in which he denied the plaintiff's claim in its entirety and challenged the plaintiff to prove the same. He contended that he had been wrongly joined in the suit and intimated that he would raise the issue for determination *in limine* when the suit comes up for hearing. The 3rd defendant indeed raised the issue as a preliminary objection on 8th August 1994. The objection was dismissed by Mbaluto J. on 9th August 1994.
6. The suit was listed for hearing before Makhandia J. (as he then was) on 21st July 2011 when the plaintiff gave evidence and closed his case. After the close of the plaintiff's case, the matter was adjourned to 4th October 2011 for further hearing. By the time the matter came up for further

hearing on 4th October 2011 Makhandia J. had been transferred and the same was listed for directions before Sitati J. who directed that the hearing of the same do proceed from where it had reached before Makhandia J. The suit was thereafter set down for hearing on 30th April 2013 and 17th July 2013 on which occasions it failed to take off due to the unavailability of the 1st and 2nd defendants' witnesses. The 3rd defendant did not also appear in court on both occasions. When the matter came up for hearing again on 13th October 2014, all the defendants did not appear in court although they had been served with a hearing notice. At the request of the plaintiff's advocate, the court marked the defendants' cases as closed and directed that the parties do make closing submissions in writing. The matter came up for mention on 4th May 2015 to confirm if the parties had filed their written submissions. As at that date, only the plaintiff had filed written submissions as had been ordered by the court. The court had no alternative but to fix a date for judgment.

7. I have considered the pleadings on record and the evidence that was tendered by the plaintiff in proof of his case against the defendants. I have also considered the written submissions that were filed by the plaintiff's advocates. The parties did not agree on issues for determination by the court. From my analysis of the pleadings and the evidence on record, the following in my view are the issues that arise for determination in this suit;-
- i. Whether the cancellation of the register for the parcel of land known as LR No. Suna East/Wasweta I/4451 ("the suit property") that was registered in the name of the plaintiff as the proprietor was lawful?
 - ii. Whether the parcels of land known as LR Nos. Suna East/Wasweta I/6277 and 6279 were registered in place of LR No. Suna East/Wasweta I/4451 ("suit property") aforesaid?
 - iii. Whether the registration of the said parcels of land known as LR Nos. Suna East/Wasweta I/6277 and 6279 was valid?
 - iv. Whether the plaintiff is entitled to the reliefs sought in the further amended plaint?

8. **The first issue;**

The plaintiff gave evidence that he was at all material times registered as the proprietor of the suit property. The plaintiff testified that he purchased the suit property that was a portion of Plot No. 3370 from Maucha in 1976 at a consideration of kshs. 4,000/=. The plaintiff produced in evidence as exhibits, a copy of agreement for sale dated 26th February 1976 which he entered into with Maucha with respect a portion measuring 60 feet by 240 feet of Plot No. 3370 (P.Exh.1), a copy of an application for consent of the land control board to sub-divide Plot No. 3370 into two portions dated 19th October 1987 (P.Exh. 3), a copy of the mutation form dated 2nd October 1987 through which Plot No. 3370 was sub-divided into two portions namely, Plot No. 4450 and Plot No. 4451 (the suit property) (P.Exh. 4), a copy of an application for consent of the land control board to transfer Plot No. 4451 from Maucha to the plaintiff (P.Exh. 5), a copy of a letter of consent of the Land Control Board dated 15th December 1987 to transfer Plot No. 4451 from Maucha to the plaintiff (P.Exh. 6), a copy of the instrument of transfer of land dated 5th January 1988 that was executed by the plaintiff and Maucha in respect of the suit property (P.Exh. 7) and a copy of the title deed dated 13th January 1988 for the suit property. The 1st and 2nd defendants had admitted in their statement of defence that the plaintiff was the registered proprietor of the suit property prior to the cancellation of his title thereto. The 3rd defendant on the other hand had denied that the plaintiff was registered as the proprietor of the suit property. The 3rd defendant did not however give evidence at the trial of this suit. The evidence that was tendered by the plaintiff concerning the acquisition and registration of the suit property in his name was therefore not controverted. I am satisfied on the evidence before me that the plaintiff was the registered as the proprietor of the suit property before the register of the said property was cancelled by the 2nd defendant. The plaintiff was registered as such under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) (hereinafter referred to as "the Act"). Section 28 of the Act provided as follows:-

"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be defeated except

as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

- a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and
- b. Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting in the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which is subject as a trustee.”

9. Section 142 of the Act gave the land registrar power to rectify the register of land; in formal matters and in the case of errors or omissions not materially affecting the interest of a proprietor, in any case with the consent of all parties interested, where upon resurvey the dimension or area of land shown in the register is found to be incorrect and, in cases where it is necessary to change the name or address of the proprietor. These are the only instances that were provided for under the Act in which the land registrar could rectify the land register. The land registrar had no power to cancel any registration. The power to cancel a register or registration was reserved for the court under section 143 of the Act. The 1st and 2nd defendants herein have contended that the 2nd defendant was entitled to cancel the registration of the plaintiff as the proprietor of the suit property because the said registration was procured fraudulently. Under section 143 (1) of the Act, only the court had power to rectify the register through cancellation of registration on account of fraud or mistake. The land registrar did not have similar power. In a letter dated 8th February 1989 to the District Officer, Suna Migori, that was produced by the plaintiff in evidence as P.Exh. 9, the 2nd defendant stated that it had cancelled the registers for among others, the suit property because the sub-division of Plot No. 3370 that gave rise to the same was not consented to by the Land Control Board. I am in agreement with the submission by the plaintiff that the 2nd defendant acted outside its jurisdiction when it purported to cancel the plaintiff's title over the suit property. The 2nd defendant had no power to cancel the plaintiff's title on account of fraud or for want of Land Control Board consent. The 2nd defendant having acted without jurisdiction, its decision and action were illegal, null and void. It is my finding therefore that the cancellation of the plaintiff's title over the suit property through the cancellation of the register for the said property was unlawful.

10. The second issue;

The plaintiff has contended in the further amended plaint as follows at paragraph 9 thereof:

“On 22nd February, 1989 the 2nd defendant unlawfully and in excess of the jurisdiction and against all the rules of natural justice ordered re-survey of the plaintiff's parcel of land Suna East/Wasweta I/4451 and unlawfully registered land parcel No. Suna East/Wasweta I/6277, 6279 in its place.”

In his testimony, the plaintiff told the court that the 2nd defendant had caused the suit property to be re-surveyed which survey resulted in the creation of Plot No. 6279 and Plot No. 6278. The plaintiff told the court that Plot No. 6279 was transferred and registered in the name of Dismas Nyangeri Obiero, deceased who is represented by the 3rd defendant herein. He stated that the said parcel of land swallowed up the entire land that was previously comprised in the suit property. The plaintiff produced in evidence a copy of a certificate of official search on the register of Plot No. 6279 dated 12th October 1990 (P.Exh. 10) which shows that the said parcel of land was registered in the name of Dismas Nyangeri Obiero on 3rd March 1989 and that it measured 0.35ha. The said certificate of official search also shows that Plot No. 6279 is a sub-division of Plot No. 3370. The plaintiff did not produce a certificate of official search on the register of Plot No. 6277. On the material before me I am not satisfied that Plot No. 6277 and Plot No. 6279 or any of them originated from or were registered in place of the suit property as claimed by the

plaintiff.

11. As I have stated above, the certificate of official search on the register of Plot No. 6279 that was produced by the plaintiff in evidence shows that the said parcel of land originated from Plot No. 3370 and not from Plot No. 4451 (“the suit property”). I have noted further that whereas Plot No. 6279 measures 0.35ha., the suit property measured 0.194. Plot No. 6279 could not therefore have been registered in place of the suit property as it is nearly twice the size of the suit property. In the circumstances, I am inclined to accept the contention by the 1st and 2nd defendants that after the registration of the suit property was cancelled, the original parcel of land namely; Plot No. 3370 was subdivided afresh which sub-division gave rise to Plot Nos. 6277, 6278 and 6279. These sub-divisions of Plot No. 3370 cannot therefore be said to have been registered in place of the suit property. While I am in agreement that portions of these three parcels of land are comprised of what was formerly the suit property, it is not correct to say that any of them was registered in place of the suit property. This is because none of the said parcels of land has the same measurement as the suit property. It is my finding therefore that Plot Nos. 6277 and 6279 were not registered in the place of the suit property.

12. The third issue;

According to the evidence before the court, Plot No. 3370 was sub-divided into two (2) portions on 10th December 1987 when the mutation dated 8th December 1987 was registered by the 2nd defendant. That sub-division gave rise to Plot No. 4450 and Plot No. 4451 (“the suit property”). The two parcels of land were also registered on 10th December 1987. Plot No. 3370 having been sub-divided, its register closed and new registers opened for the two new sub-divisions aforesaid, the 2nd defendant had no power to cancel the two new registers and purport to combine Plot No. 4450 and Plot No. 4451 (“the suit property”) for afresh sub-division that gave rise to Plot Nos. 6277, 6278 and 6279 aforesaid. Section 25 (1) of the Registered Land Act, Cap.300, Laws of Kenya (“the Act”)(now repealed) provides that the Land Registrar could only combine or consolidate two or more parcels of land which are owned by the same proprietor. In this case, after the initial sub-division of Plot No. 3370, one of the portions thereof namely, the suit property was registered in the name of the plaintiff while the other portion namely, Plot No. 4450 was registered in the name of someone else. It was not open to the 2nd defendant to combine the two parcels of land and purport to restore the original Plot No. 3370. It is my finding therefore that the purported fresh sub-division of Plot No. 3370, the creation of Plot Nos. 6277, 6278 and 6279 and the registration thereof was unlawful.

13. The fourth issue;

I have set out earlier in this judgment the reliefs sought by the plaintiff in this suit. I am of the view that the plaintiff is entitled to all the reliefs sought in the further amended plaint dated 8th August 2002. As I have stated earlier in this judgment, the 2nd defendant had no power to cancel the register for the suit property. The plaintiff is therefore entitled to a declaration to that effect that he has sought in prayer (a) of the further amended plaint. In prayer (b), the plaintiff has sought a declaration that he was the lawfully registered proprietor of the suit property. The plaintiff has proved that he acquired and was registered as the proprietor of the suit property lawfully. The defendants’ contention that the plaintiff acquired the suit property through fraudulent means was not proved. The plaintiff is therefore entitled to the declaration sought with regard to his ownership of the suit property. In prayer (c) of the further amended plaint, the plaintiff has sought an order that the registration of Plot No. 6279 be cancelled and the registration of the suit property be reinstated. I have already held earlier in this judgment that the purported cancellation of the register for the suit property and the second sub-division of Plot No. 3370 that gave rise to Plot Nos. 6277, 6278 and 6279 were unlawful. It follows that Plot Nos. 6277, 6278 and 6279 were created unlawfully and are liable to cancellation on that account. The plaintiff has only prayed for the cancellation of the registration of Plot No. 6279. The plaintiff led evidence that this is the parcel of land from the second sub-division in which the suit property was incorporated. I have noted that Plot No. 6279 measures 0.35ha. while the suit property measured 0.194ha. The plaintiff’s contention that the suit property was subsumed in Plot No.6279 is not far-fetched. In any event, the 3rd defendant who is the owner of Plot No. 6279 did not tender any evidence to contest this fact. The plaintiff is therefore entitled

to an order for the cancellation of the registration of Plot No. 6279 and the reinstatement of the suit property even if the same may not retain the same parcel number. In this regard, a survey will have to be carried out as sought in prayer (d) of the further amended plaint on Plot No. 6279 so that a portion thereof measuring 0.194 can be curved out and reconstituted as the suit property while the remainder thereof which measures 0.156 ha. shall remain registered in the name of the 3rd defendant.

14. Conclusion;

In view of what I have stated above, it is my finding that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants for;

- i. A declaration that the 2nd defendant had no power to cancel the plaintiff's title over LR No. Suna East/Wasweta I/4451.
- ii. A declaration that the plaintiff was lawfully registered as the proprietor of LR No. Suna East/Wasweta I/4451.
- iii. An order that LR No. Suna East/Wasweta I/6279 shall be surveyed and sub-divided into two (2) portions measuring 0.194ha. and 0.156ha. respectively by the Migori County Land Surveyor at the cost of the plaintiff. The portion thereof measuring 0.194ha. shall be assigned a new parcel number and registered in the name of the plaintiff by the County Land Registrar, Migori. The other portion measuring 0.156ha. shall also be assigned a new parcel number and registered in the name of the 3rd defendant by the said County Land Registrar.
- iv. The register for LR No. Suna East/Wasweta I/6279 shall be closed on sub-division referred to in (iii) above and the 3rd defendant shall surrender the original title deed therefor to the County Land Registrar, Migori for cancellation after the said sub-division failure to which the said original title deed shall be deemed cancelled.
- v. The plaintiff shall also surrender to the County Land Registrar, Migori, the original title deed for LR. No. Suna East/Wasweta I/4451 for cancellation upon the registration of a portion measuring 0.194ha. of LR. No. Suna East/Wasweta I/6279 in his name pursuant to the order given in (iii) above.
- vi. Cost of the suit to be paid by the 1st and 2nd defendants only.

Delivered, Dated and Signed at Kisii this 10th day of July, 2015.

S.OKONG'O

JUDGE

In the presence of;

Ochwang'i h/b for Marwa for the plaintiffs

N/A for the defendants

Milcent Court Assistant

S.OKONG'O

JUDGE