



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU.**

**CIVIL CASE NO.12 OF 2004**

**IMELDA MUSUNDI OJWANG .....PLAINTIFF**

**VERSUS**

**FREDRICK O. OKWALO.....3RD DEFENDANT**

**KENNETH MUSUMBA .....2ND DEFENDANT**

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

1. By the amended plaint dated 14.2.15 the plaintiff prays for the following reliefs:

- a. **A declaration that the plaintiff is the proper owner of land parcel No. MARACHI/ELUKHARI/1657 and that the purported transfer to the 1st defendant is null and void as it was fraudulent;**
- b. **An order of permanent injunction restraining both the 1st and 2nd defendant from interfering and building on the land parcel No. MARACHI/ELUKHARI/1657 and a declaration that the plaintiff has obtained possession by adverse possession.**

2. The defendant did file their defence denying all the averments by the plaintiff and prayed that the plaintiff's suit be dismissed.

**PLAINTIFF'S CASE**

The plaintiff called 3 witnesses to support her case.

3.**PW1 JOHNAH WEUNDA NAMATSI** was a relative to the plaintiff's deceased husband. He testified that sometimes in the year 1978 he saw the 1st defendant with one CLEMENT coming to the plaintiff's home with a view of purchasing a piece of the plaintiff's land. The 1st defendant gave the late OJWANG Kshs.3000 for the purchase of 8 acres. Each acre was to cost Kshs.3000/= . Later in the year 1990 the deceased wanted to sub-divide the land into 5 portions for his sons but he discovered that the 1st defendant had taken a portion of the land. He fell sick and never recovered. He denied that the deceased went to the Land Control Board with the 1st defendant.

4. **PW2 EMELDA MUSUNDI OJWANG**, the plaintiff's wife told this court that the deceased was her husband having married her sometimes in 1959. She said that the 1st defendant came with one CLEMENT, her brother to buy land from the deceased. The 1st defendant wanted 8 acres at a cost of 3000 per acre. He only paid Kshs.3000 and nothing more. He did not come back. She said that later the 1st defendant brought the 2nd defendant to the suit property. She denied that the deceased attended Land Control Board for purposes of transferring the land to the 1st defendant.

5. On cross-examination by Mr. Bogonko, the witness insisted that the Kshs.3000 was actually a deposit. She confirmed that the 2nd defendant has built semi-permanent houses on the land.

6. **PW3 HUMPHREY ODONGO** is step-son to the plaintiff. He testified that in November 1990 he went with the deceased to Nambale Land Control Board where they discovered that the acreage of the deceased's land had been reduced. He wanted to sub-divide it into 5 portions for his sons.

At Busia Land Registry they discovered that the land had been excised and given to the 1st defendant. Subsequently Mr. Ojwang informed him and they now had to trace the 1st defendant. He went ahead to produce various exhibits including application to the Land Control forms board, and other transfer instruments.

7. He further said that, the deceased was illiterate and could only thumb print but the transfer form exhibit P5 was signed. He went on to testify that originally the suit land was number 985 and title issued in 1966. A sub-division was done which created numbers 1495 and 1496, Plot No.1495 was subdivided and resulted in parcel No, 1656 and 1657.

### **DEFENCE CASE**

8. The 1st defendant confirmed that he purchased land from the deceased in the year 1975. He was to buy 8 acres at a cost of Kshs.8000/=. He paid the same in installments on various occasions whereby in total he paid Kshs.6900/=. According to him the deceased promised to sale him 2 acres though he had paid more. He subsequently obtained consent from the Land Control Board to the suit land namely Marachi/Elukhari/1057. He further testified that they went to the Land Control Board once. The defendant confirmed that he later sold the land and transferred to the 2nd defendant who apparently was not received well by the plaintiff. He denied having committed any fraud as suggested by the plaintiff.

9. On cross-examination the defendant confirmed that he did not have the consent to transfer the parcel of land to himself from the deceased as those days the parties would attend the board once.

10. **DW2 MARY KISAKA** the District Officer Nambale testified in favour of the 1st defendant. She produced the extract of the records in respect to land parcel No. Marachi/Elukhari/1495 and the application for subdivision of the same dated 6.6.80. It also indicates transfer of 8 acres to the 1st defendant. She produced the certified copy of the black book. She also produced the consent for subdivision. On cross-examination she maintained that the board in those days would meet once to consider both sub-division and transfer. She however said that she did not have the consent to transfer the 2 acres.

### **ANALYSIS AND DETERMINATION**

11. It is not in dispute that the plaintiff is the administrator of the estate of the late OJWANG MAHERO. It is not also in dispute that there was a sale transaction between the deceased and the 1st defendant in 1978 as evidenced by a set of handwritten agreements. The purchase consideration is however disputed by the parties. The plaintiff believe that the 1st defendant only paid a sum of Kshs.3000 whereas the latter states that he paid a total sum of Kshs.6900/= although the agreed purchase price was Kshs.3000. Equally there was disagreement on whether the Kshs.3000 was for one acre or for the 8 acres. The plaintiff testified that the Kshs.3000 paid by the 1st defendant was meant for 1 acre and not 8 acres.

12. Be it as it may the gist of the plaintiff's suit is that the entire transfer to the 1st defendant of the suit property was tainted with fraud. The plaintiff and her witness testified that the deceased never attended any Land Control Board and that whatever instruments signed were a forgery and did not comply with the provisions of the Registered Land Act ( now repealed) Cap 300 and the Land control Act Cap 302.

It is therefore relevant to consider whether the 1st defendant's title is legitimately derived from the compliance of the above set of laws. The land in question was measuring 35 acres, and it is an agricultural land and by dint of the Land Control Act, the same applies in all fours.

13.\ From the exhibits produced in court it appears that on 6.5.80 (Pexh.2) the applicant applied to Nambale Division Land Control Board to

**“subdivide my plot of 35 acres into portions and**

**transfer 8 acres to MR. E.F. OSORE for Kshs,8000.-**

The parcel of land was Marachi/Elukhari/1695.

14. On 29/1/80 the board granted the consent to sub-divide but under paragraph 2 thereof it indicated:

**“2 (c).....S. Division.**

**d. Names of parties**

**(I) From Ojwang Mahero**

**(ii) To Erick Fredrick Osore Okwalo**

**(e) Length of term Absolute**

**(f) consideration Kshs.8000/=.**

15. Clearly the consent granted involved land parcel No.1495. My understanding was that the consent granted was for subdivision and not transfer.

16. Apparently and as clearly captured by the plaintiff in her submission the consent to sub-divide was granted on 29/1/80 yet the application to sub-divide was on 6/5/80 . How was the consent to sub -divide granted before the application?

17. In any case the transfer of land Exhibit D.4 was signed by the vendor on 1.7.82. Interestingly all the sale agreements produced by the defendant showed that the deceased thumb printed. What was so unique that during the signing of transfer, he signed using a pen?

18. More interesting is the fact that the transfer form relates to land parcel No. Marachi/Elukhari/1657 whose tile was issued on 7.7.83. Though DW2, the District Officer produced the extract of the black book, the same only relates to sub-division of land parcel No.1495.

19. There are no minutes to support the assertion by the 1st defendant that the deceased attended the land control board. Of great significance too is the absence of the consent to transfer the land to the 1st defendant.

20. Even more interesting is the absence of the mutation forms duly signed by the deceased authorising the Survey Department to sub-divide his parcel of land.

20. I find the testimony by the 1st defendant as well as the District officer (DW2) that in the 1970's and year 1980's the board used to sit once and approved both sub-division and transfers not believable. What, even hypothetically would the board be transferring? How would one sub-divide and transfer the same land with similar titles before being sub-divided and the resultant title being given their respective numbers? I find this argument superfluous and completely out of tune with the Land Control Act and other related land laws.

21. My above findings are well buttressed in the cross-examination of the 1st defendant when he said that:

**“The plaintiff never signed the agreement. There were other men. He thumb-printed. He**

**did not know how to write. Witness referred to exhibit D3. Before the Lands Officer he signed by pen.”**

**I don't have application for consent to transfer. At that time they were going to the board once. I only have the consent for sub- division.”**

22. \ I find further that the sale transaction in any case was void pursuant to the Provision of Section 8 of the Land Control Act which presupposes that a consent to transfer agricultural land ought to be obtained within 6 months of making the agreement.

23.\ In **KEBIRIGO PARISH CONSUMER COOPERATIVE SOCIETY VS DIOCESE OF KISII KENYA EAST AFRICA [2013] eKLR** the court held that:

**“ By Section 8 of Land Control Board was required to be made within 6 months of the making of the agreement subject to the jurisdiction of the High court to extend the period. Upon the failure by the deceased and the respondent to make an application for the Consent of the Land Control Board within 6 months the agreement for sale of the land became void for all purposes by virtue of Section 6(a) of the Land Control Act.”**

24.\ Consequently it then appears from the facts herein that the application to transfer the suit property was 6 months after 24.1.80. Apparently the alleged transfer was done on 1.7.82 way beyond the stipulated period. Needless to say none of the parties sought any extension through the High Court. Nonetheless as it has been established above, there was no consent to transfer the suit property namely MARACHI/ELUKHARI/1657. Whatever consent obtained referred to a sub-division of land parcel No. 1495.

25. \From the above observation I do find that fraud has been established against the 1st defendant. The alleged transfer was not signed by the deceased. It as in fact the 1st defendant who admitted that the deceased was illiterate and did not know how to write. He failed to explain how he “miraculously” signed the transfer before the Land Registrar. No proper laid down procedure was followed in having the parcel of land sub-divided and subsequently transferred.

26. \Although there is a semblance of consent to sub-divide no mutation form was even presented by the 1st defendant. I find that although the purchase price was agreed at kshs.8000 the 1st defendant only paid Kshs.6900, a sum which he has admitted. Clearly he did not complete the purchase consideration.

27. \ I find that the deceased's estate ought to receive back its land. It is unfortunate that the 2nd defendant has entered into the fray but the law ought to be observed. Consequently I shall allow the plaintiff's suit entirely and do order that:

- 1. The land title No. MARACHI/ELUKHARI/1657 do revert to the name of OJWANG MAYERO forthwith.**
- 2. The transfer documents to be signed by the 2nd defendant to effect the said changes and in default the Deputy Registrar of the court to sign the same.**
- 3. The 1st and 2nd defendants do vacate the suit parcel of land within the next 90 days from the date herein and in default the plaintiff to use all the necessary lawful means.**
- 4. The plaintiff shall have the costs of this suit to be borne by the 1st defendant.**

It is so ordered.

**Dated, signed and delivered this 2nd day of December 2015**

**H. K. CHEMITEI**

**J U D G E**

