



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 261 OF 2010

TOBIAS OJODE ONDITI PLAINTIFF

VERSUS

JOHN NYANGAYA NDEGE 1ST DEFENDANT

YUNUS JACOBO SWALO 2ND DEFENDANT

ALIS DALISU 3RD DEFENDANT

FRANCISCA ATOGO OYAO 4TH DEFENDANT

JUDGMENT

1. The plaintiff as administrator of the estate of **Noti Onditi** (deceased) commenced the instant suit by a plaint filed in the Principal Magistrate's court at Migori as Civil Case No. 32 of 2008. This suit was vide an order issued in Kisii High Court Misc. Civil Application No. 45 of 2009 on 20th July 2010 transferred to the High Court for hearing and determination which resulted in the present suit.
2. By the plaint the plaintiff claims that his deceased father one **Noti Onditi** was the registered proprietor of land parcel title number **Suna East/Wasweta I/1244**. The plaintiff alleges that the defendants jointly and/or severally fraudulently procured the transfer and subdivision of the said parcel of land resulting in the land being subdivided into land parcels **Suna East/Wasweta I/11873, 11871, 11872 and 11874** which parcels are presently registered in the defendants names.
3. The plaintiff prays for judgment against the defendants jointly and severally for:-
 - a. **Declaration that the registration of the defendants as the proprietors of the suit parcel of land is null and void.**
 - b. **Cost of the suit.**
 - c. **Any other relief this honourable court may deem fit to the plaintiff in the circumstances of this suit.**

Upon the defendants being served with summons to enter appearance as per the affidavit of service sworn by one Opiyo Juma on 31st July 2008 only the 4th defendant entered appearance and filed a defence dated 11th August, 2008. The 4th defendant by her defence denied the averments contained in the plaintiff's plaint and stated that her late husband David Adundo Oyao purchased the parcel of land from Yunus Jacob Swalo, the 2nd defendant and that she denied any knowledge

that one **Noti Onditi**, was the proprietor of **Suna East/Wasweta I/1244**. The 4th defendant states that her late husband purchased land parcel **Suna East/Wasweta I/11874** from Yunus Jacob Swalo who was the registered proprietor. The 4th defendant denied all the particulars of fraud alleged by the plaintiff in the plaint and asserted he purchased the property from Yunus Jacob Swalo who was the registered owner and therefore in effect set up his bonafides in the purchase to rebut the allegations of fraud as against them. The 1st, 2nd and 3rd defendants did not file any defence.

4. The matter was fixed for hearing on 30th September 2015 when only the plaintiff was present in court. The court having satisfied itself the defendants had been served with a hearing notice as per the affidavit of service made by one **Vatalis Onyango** and filed in court on 25th September 2015 allowed the plaintiff to proceed with the hearing of the case ex parte. The plaintiff testified in support of his case and called no other witness.
5. The plaintiff testified that he was left land parcel Title Number **Suna East/Wasweta I/1244** by his late father. He stated that the defendants in 1998/1999 defrauded and/or cheated his father of his land. The witness denied that his father sold any land to the defendants and asserted that the documents used by the defendants to procure the transfer of land title **Suna East/Wasweta I/1244** to the 2nd defendant Yunus Jacob Swalo were fraudulent. The plaintiff referred to and produced as exhibits his bundle of documents namely:-
 - i. **Copy of transfer of land dated 29th June 1977 from Noti Onditi to Yunis Yakobo presented for registration on 9th August 1977.**
 - ii. **Letter dated 15th March 1988 from the land registrar to Yunis Yacobo also copied to Noti Hezekia Onditi.**
 - iii. **Copy of abstract of title of land title Suna East/Wasweta I/1244.**
 - iv. **Copy of mutation from of Title Suna East/Wasweta I/1244 depicting the subdivision of same in subtitles 11871, 11872, 11873 and 11874 presented for registration on 8th April 1999.**
6. The plaintiff testified that he was not at home when the defendants executed the transactions that gave them titles to the respective land parcels stating that he was at the time working at a road construction site in Homa Bay. The plaintiff stated that two of the defendants had constructed homes in the suit properties. The plaintiff stated he has no house in the disputed property and that he rents a house for his family elsewhere and that the defendants have denied him access to the land.
7. The plaintiff testified that he raised complaints about how the transactions were carried out with the land registrar Migori and that the land registrar summoned the defendants but the defendants refused to appear before the land registrar. The land registrar wrote to the defendants on 31st August 2006 as per the copy of letter in the plaintiff's bundle of documents. The plaintiff stated that he opted to come to court after he failed to get any assistance from the land registry and the administration. Before the court the plaintiff claims that the defendants acts in procuring the transfers of the land that belonged to the plaintiff's father was fraudulent and seeks the revocation of the said titles on the grounds that the same are null and void on account of fraud.
8. The issues for determination by the court in this case are whether the plaintiff has proved the defendants acquired the parcel of land **Suna East/Wasweta I/1244** and for the resultant sub titles from the plaintiff's deceased father fraudulently and further whether the registration of the defendants as the proprietors of the suit parcels of land was null and void and therefore liable to be cancelled or revoked.
9. The cardinal rule of evidence is that he who alleges must prove the allegations and/or averments. The burden of proof rests with the person who alleges and therefore in the present case the plaintiff bears the burden to prove that the registration of the 2nd defendant as proprietor of title number **Suna East/Wasweta I/1244** was fraudulent and further the subsequent subdivision thereof of the said property to create subtitles **Suna East/Wasweta I/11873, 11871, 11872 and 11874** which were subsequently registered in the defendants names was fraudulent.
10. Sections 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya makes provisions as to

who bears the burden of proof in the proof of any factor matter.

Section 107 provides:-

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. In the instant case the plaintiff has alleged fraud on the part of the defendants and therefore the burden of prove and establish fraud rested on the plaintiff. The burden of proving fraud in a civil case is on a standard higher than the usual standard on a balance of probability in civil cases though it is not so high as to be proof beyond a reasonable doubt as is required in criminal cases. An allegation of fraud is a serious matter as it could attract criminal liability and it is for that reason that the standard of proof is on a pedestal higher than on a balance of probability. A party cannot merely allege fraud and leave it at that. Actual evidence establishing fraud has to be tendered in proof.
12. Bearing in mind the standard the plaintiff is required to satisfy to prove fraud against the defendants, I have to ask myself whether the plaintiff has met that threshold and my honest answer is that he has not. **What is the evidence the plaintiff has tendered in proof of his allegations?** The plaintiff places reliance firstly, on the form of transfer of land from **Noti Onditi** (the plaintiff's father) and **Yunis Yakobo** (the 2nd defendant) dated 29th June 1977 registered on 23rd August 1977. Secondly, the plaintiff places reliance on the land registrar's letter of 15th March 1988 which had indicated the transferor's and transferee's signatures on the transfer had not been attested. It is noteworthy that the same letter summoned both the transferor and the transferee to report to the land registrar's office with their National Identity Cards on 6th April 1988 at 10.00am ostensibly for verification and certification of their signatures. No evidence was tendered that the parties did not attend before the land registrar as required. The land registrar had stated in the letter if they failed to attend as requested the transfer of land would be rejected.
13. The evidence suggests that the transfer was not rejected which may mean the parties actually did attend and the verification was done. The land registrar approved and registered the mutation form presented for the subdivision of **Title No. Suna East/Wasweta I/ 1244** on 8th April 1999 and the land was at that date registered in the 2nd defendant's name pursuant to the transfer registered on 23rd August 1977 suggesting the land registrar had found no reason to reject the same. None certification of the transfer form alone would not lead to the conclusion that the transfer was fraudulent. No evidence was led to suggest that the plaintiff's father was not the one who had signed the transfer or had not received the consideration in regard to which the transfer was executed. Indeed there is no evidence that the plaintiff's father ever contested the transfer to the 2nd defendant during his lifetime. The letter from the land registrar of 15th March 1988 was copied to the plaintiff's late father and the assistant chief and the plaintiff's father who, as the certificate of death shows, died on 16th February 2000 never contested the transfer to the 2nd defendant during his lifetime. From the time of the land registrar's letter and the time the plaintiff's father died there was a period of nearly 12 years and during this period there was no claim of fraud either by the plaintiff's father or the plaintiff.
14. The plaintiff filed a succession cause No. 103 of 2002 at Migori SRM's court and the certificate of confirmation of grant dated 30th March 2004 shows that he inherited land parcels **Suna East/**

Wasweta I/2223, 7516 and 10205 from his deceased father and this puts to question his assertion that his father left him the suit property and that he lives in a rented house because the defendants have denied him access to the suit property. The present suit has the hallmarks of the plaintiff making the claim as an afterthought as clearly the period between 1977 when the transaction took place and 2006 when the plaintiff initiated the pursuit of the matter through inquiries is not explained as to why there was no pursuit either by the plaintiff's late father or the plaintiff himself.

15. For the above reasons, I am not satisfied the plaintiff has proved any fraud as against the defendants to the required standard and I find and hold that no fraud has been proved or established against the defendants and I accordingly dismiss the plaintiff's suit against the defendants. The order of inhibition ordered to be registered against land parcels **Suna East/Wasweta I/11871, 11872 and 11874** is hereby ordered to be lifted forthwith.

16. I make no order for the costs of the suit and all the parties are to bear their own costs.

Judgment dated, signed and delivered at Kisii this 4th day of December, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

Plaintiff present in person

N/A for the defendant

J. M MUTUNGI

JUDGE