

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 124 OF 2013

HORACE AWORI.....PLAINTIFF

= VERSUS =

- 1. DICKSON MINYA AMUKOWA**
- 2. SEFERIO OKELLO NANDWA**
- 3. JAMES M. KARIUKI**
- 4. PIUS PAMBA OKUMU**
- 5. MAC ARTHUR ZACHARIA**
- 6. NICHOLAS ODUORI ODEKO**
- 7. MARTIN APOLO OTIENGO.....DEFENDANTS**
- 8. ELIZABETH ANYANGO OKUMU**
- 9. PASCAL N. WESONGA**
- 10. JACKSON C. VICTOR ONG'ALO**
- 11. EVERLYNE OBELETE OMWARO**
- 12. FRANCIS BALONGO**
- 13. FRANCIS LUNANI**

J U D G E M E N T

1. The plaintiff who is the registered owner of land parcel No. Bukhayo/Kisoko/1322 has sued the 13th defendants who derive their title from L.R No. Bukhayo/Kisoko/1680 claiming that the said defendants had invaded his land. He pleaded that the transfer and occupation of his land was illegal and fraudulent. He proceeded to set the particulars of fraud against the 1st defendant as hereunder;

- a) Purporting to be registered as proprietor of land parcel L.R Bukhayo/Kisoko/1322.**
- b) Failing to disclose to the second to thirteenth defendants that he had no registerable interest in the land.**
- c) Lying to the local administration that he had purchased land from the plaintiff.**
- d) Purchasing parcels of land at a low price in full knowledge the market value to be much higher.**
- e) Purchasing portions of land parcel L.R Bukhayo/Kisoko/1322 with full knowledge that the first defendant was not the registered owner.**

2. That he notified the defendants of intention to sue but they ignored the said notices. The plaintiff prays for judgment against the defendants for;

- a) Declaration that HORACE AWORI is the sole registered proprietor of all that parcel of land comprising L.R Bukhayo/Kisoko/1322.**
- b) An eviction order to issue jointly and severally against the defendants.**

c) Costs of this suit.

3. The defendants filed a joint statement of defence on 27th July 2012 denying the plaintiff's claim in toto. The 2nd – 13th defendants stated that they duly purchased portions of various sizes hived off L.R. No. Bukhayo/Kisoko/1680 and that they have no claim against the plaintiff. They denied encroaching on the plaintiff's land and urged the court to dismiss the plaintiff's suit with costs.

4. At the close of pleadings and determination of interlocutory applications, the suit was set down for oral hearing. The plaintiff was his sole witness while the defence called 7 witnesses.

5. The plaintiff produced as exhibits the following documents in support of his case:

(i) *Copy of title for Bukhayo/Kisoko/1322 – Pex 1.*

(ii) *Copy of proceedings of Land Dispute Tribunal No. 18/1990 – Pex 2.*

(iii) *Map Sheet – Pex 3.*

(iv) *Copy of official search for L.R No. 1322 – Pex 4.*

6. In his testimony given on 22/1/2015, the plaintiff stated that he acquired his land from Said Ali in 1984 and took possession by fencing it. That the 1st defendant was not his neighbour then. The plaintiff avers that the 1st defendant later sub-divided his land without his consent. He denies selling his land to anyone. That the survey map shows his land is still intact.

7. In cross-examination, the plaintiff agreed that the Land Dispute Tribunal proposed that a survey be done to confirm the boundary between the two parcels numbers 1322 and 1680. That all the defendants have encroached on his land. That he tried to inquire from the 1st defendant why he subdivided his land but the 1st defendant chased him away with a panga. That he got to know people encroached on his land in 1986. The witness confirmed the defendants have put up residential houses on the portions of land they occupy. In re-examination, the plaintiff said the defendants are not claiming ownership of his title. This marked the close of the plaintiff's case.

8. The surveyor Julius Mutuba gave evidence as **DW1**. He acted on the Court order dated 16/1/2013 served on him and visited the two parcels of land. **DW1** stated that parcel No. 1680 is already sub-divided into several parcels and marked on the ground. That parcel No. 1322 is fragmented into 14 portions but the official record does not reflect the same. He confirmed that parcel No. 3992 and 3993 came from 1680. He stated further that he saw the boundaries of the parcels derived from parcel No. 1680. That not all parcels resulting from fragmentation of 1680 are on the ground position of parcel No. 1322. The witness prepared a report dated 9/6/2016 which he produced as exhibit.

9. Cross-examined by Jumba for plaintiff, **DW1** stated that he did not enquire on the history of parcels Nos 1322 and 1680. **DW1** said it was not possible that the acreage of the portions within parcel No. 1680 exceeded the size of the land. That parcel No. 1322 was intact on record but is fragmented on the ground. That on the ground they found 4 portions in parcel No. 1680.

10. Dickson Minya Amokowa testified as **DW2**. He adopted his witness statement dated 19/6/2018 as his evidence in chief. **DW2** said he knew all the defendants (2nd – 13th) as he sold to them pieces of land from L.R No. Bukhayo/Kisoko/1680. He produced a copy of the title deed as **Dex 1**. That he sold to:

- **7th defendant: 50 x 100 ft**
- **2nd defendant: 4739**
- **Nambale Urban School - 4 acres (5441)**

11. That plot no 5540 measuring 0.91 ha was then subdivided into 3 portions Nos 6257, 6258 and 6259 (**Dex 4**). He sold parcels Nos. 6258 and 6259 to other people and retained No. 6257. That 6257 is size 0.80 ha which he later sub-divided into 6572, 6573, 6574, and 6575 (**Dex 5**). Of the resultant portions he retained parcel No. 6575 where he now lives. **DW1** denied sub-dividing the plaintiff's land. That there are other people he sold to this land who are not sued as defendants in this case. He urged the court to dismiss the plaintiff's suit.

12. In cross-examination **DW2** said he lives on 6574 while the 5th defendant lives on 6575. That he sold two plots to the 4th defendant. That the 8th defendant is on parcel No. 6574 and she also lives on No. 6575 like the 5th defendant. **DW2** could not tell the plot number sold to the 9th and 10th defendants. That the 11th defendant bought a plot measuring 25ft by 100ft. He also could not tell the number of the plot sold to the 12th defendant which he stated is measuring 50ft by 100ft. That both Francis and Lunani (12th and 14th defendants) are on plot 6574. **DW2** averred that he does not recognise plot No. 1322 since according to him the neighbouring plot is no 322. That he had sold land to 14 people but none of them had crossed the road to go and settle on parcel No. 1322.

13. In re-examination, **DW2** said he was not present when the land officials visited the disputed site on 22/11/2016. That the defendants live on the portions he sold to them. That not all the people he sold to have numbers of their portions. That he does not recognise L.R No. 1322 but does recognise No. 322 which the mutation form showed is neighbouring his plot.

14. **DW3** Nicholas Oduori Ondeko is one of the buyers. He stated that he purchased L.R No. Bukhayo/Kisoko/4738 in 2002 from DW2.

That the number highlighted in Pink in Pex 3 is the plot he bought. That he built a church on it and has clearly marked boundaries. That he neighbours Pius Pamba, Kariuki and a road. He is yet to get a title for his portion on account of what he says due to lack of money.

15. Pius Pamba Okumu testified as **DW4**. He stated that he bought parcel No. 4738 measuring 100 x 100 from the 1st defendant and put a church on it. That his neighbours are Dr. Malenge (4th defendant), Zephenia Ogola (2nd defendant) and a road that goes to a river while to the north he neighbours DW3. **DW4** in cross examination said the plaintiff is claiming the land his land which he bought in 2004. He has also not acquired title due to lack of money.

16. Jackson Victor Ongalo gave his evidence as **DW5** stating that the 1st defendant sold him a portion of land curved out of L.R No. 1680 and measuring 50 x 100ft. **DW5** has not received a title for his plot but he took possession and is farming food crops on it. In cross-examination, **DW5** said he has not processed his title because he was retrenched in 1999. He was aware of the plaintiff's case before the tribunal. That some of the people who bought their plots after him already have titles.

17. Martin Apollo Oyiengo testified as **DW6**. He adopted his witness statement filed on 18/9/2019 as his evidence in chief. **DW6** stated that he is the owner of Bukhayo/Kisoko/3993 which he purchased from the 1st defendant. That his plot is on the map produced by the plaintiff. In cross-examination, **DW6** stated that he already got a title to his land and produced a search certificate. He denied being sold a portion of the plaintiff's land.

18. Humphrey Etsi gave evidence on behalf of the 5th defendant as **DW7**. He produced the Power of Attorney donating to him the authority dated 29/10/2018. **DW7** said his father owns plot No. 6574 and 6575. He also gave the names of his neighbours as 1st defendant (South), Road (to the North, Ongaro 10th defendant (to the right) and Pius 4th and Zepherio 2nd defendants to the left. The witness concluded that he did not know the plaintiff.

19. In cross-examination, **DW7** said the 5th defendant has two titles in his name. That he saw the survey report. He could not tell whether Horace has land in the area. This marked the close of the defence case.

20. The plaintiff filed his submissions on 6/5/2020 and the defendant on 27/5/2020. The plaintiff rehashed the facts stated in evidence and proceeded to draw a chart showing the sub-divisions undertaken by the defendant in respect of L.R Bukhayo/Kisoko/1680. That from the Chart, the subdivisions amount to 12.40982 Ha which is more than the size reflected on the title.

21. The defendants equally rehashed the evidence and presented a similar diagram which represented the sub-divisions of L.R No. 1680. The diagram is as summarised below;

	Land Parcel	Acreage in hectares
1st sub-division	Bukhayo/Kisoko/1680	3.16ha
	Bukhayo/Kisoko/3992	3.11ha
	Bukhayo/Kisoko/3993	0.05ha
2nd sub-division	Bukhayo/Kisoko/3992	
	Bukhayo/Kisoko/4738	2.63ha
	Bukhayo/Kisoko/4739	0.48ha
3rd sub-division	Bukhayo/Kisoko/4738	
	Bukhayo/Kisoko/5540	0.91ha
	Bukhayo/Kisoko/5541	1.7ha
	Road	0.02ha
4th sub-division	Bukhayo/Kisoko/5540	0.91ha
	Bukhayo/Kisoko/6257	0.80ha
	Bukhayo/Kisoko/6258	0.054ha

	Bukhayo/Kisoko/6259	0.052ha
5th sub-division	Bukhayo/Kisoko/6257	0.80ha
	Bukhayo/Kisoko/6572	0.21ha
	Bukhayo/Kisoko/6573	0.47ha
	Bukhayo/Kisoko/6574	0.0546ha
	Bukhayo/Kisoko/6257	0.0725ha

22. The defendants added that parties are bound by their pleadings submitting that the plaintiffs having withdrawn the claim against the 2nd defendant without giving any reason is now estopped from laying claim against the rest of the defendants who all trace their title to L.R No. 1680. They urged the Court to dismiss the plaintiffs claim.

23. From the evidence adduced, the dispute revolves on the question of whether or not the defendants trespassed on the plaintiff's parcel No. Bukhayo/Kisoko/1322. The plaintiff has demonstrated that he is the registered owner of L.R No. 1322 by producing a copy of his title and certificate of official search. None of the defendants are laying claim to title to this parcel.

24. The 1st defendant stated that he purchased L.R No. 1680. After purchasing it he subdivided it at different times and sold to the 2nd – 13th defendants together with other persons who have not been sued. He has denied interfering with the plaintiff's parcel. The question is whether or not the plaintiff proved his case? From the evidence of DW1 who is the County Surveyor that visited the two parcels (1322 and 1680) to ascertain their status on the ground; he stated that parcel No. 1322 is fragmented on the ground into 14 portions but the fragmentation is not registered in their records. The plaintiffs evidence is that he has not subdivided his land.

25. The surveyor proceeded to annex a sketch plan to his report showing the fragmentation of L.R No. 1322. From the sketch plan, the plot referred to as **"previously 1680"** did not have boundaries of plots on it picked during the field visit. The evidence of DW1 does confirm that the plaintiff's parcel on the ground is indeed subdivided and occupied. There is no dispute that the 1st defendant subdivided his land into several portions (from the diagram in their submissions they are about 14 plots) and sold to different people. He produced green cards to give the history of the subdivisions as Dex 2 to 5. There were also mutation forms filed in the 1st defendant's affidavit sworn on 7/8/2012.

26. The 1st defendant stated that he did not know L.R No. 1322 but was only aware of L.R No. 322 which neighbours his plot. The mutation form dated 5/2/1985 creating title No. 1680 and 1681 does show that L.R No. 1322 was neighbouring the original title number 1349. It is the mutation creating new numbers from 1680 that referred to the plot above it as 322. The parcel number indeed does exist as shown in the Registry Index Map Sheet No. 7. Even the mutation creating titles numbers 4738 and 4739 does show the existence of plot No. 1322.

27. Besides the defendants presenting the green cards for the subdivisions undertaken on L.R No. 1680, there was no evidence on the Registry Index Map to demonstrate that the amendments were effected save for plots numbers 4378 and 4379. Some of the defendants were claiming ownership of the same plot numbers yet they had not jointly purchased and even gave names of different persons as their neighbours. For instance, during examination in chief, the 1st defendant said that he lives on L.R No. 6574 but in cross-examination he said he lives on L.R No. 6575. Similarly, it was said that the 5th defendant owns L.R No. 6574 which was also claimed by 2nd, 8th, 12th & 14th defendants.

28. The 2nd, 3rd, 8th, 9th, 11th to 13th defendants did not give evidence in support of their case. The defendants who testified did not state that they were giving evidence on their behalf and on behalf of the remainder of the defendants. The 1st defendant added that he could not remember the plot numbers sold to the 10th and 12th defendants. The defendants' evidence was thus full of contradictions. Some of the defendants the plaintiff has accused of living on land parcel No. 1322 had nothing to show that their plots were identified on the ground and confirmed to have originated from L.R No. 1680. The evidence of DW1 corroborated the plaintiff's case that L.R No. 1322 was fragmented into 14 portions on the ground. Having confirmed interference of his land on the ground, the burden shifted on the defendants as buyers show proof to the Court that they did due diligence before purchasing their suit plots by confirming their locations on the ground and sizes.

29. Section 18 of Land Registration Act provides thus;

(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).

30. Going by the evidence adduced, I am satisfied that the plaintiff has proved his case by demonstrating that his land is fragmented on the ground which could only have been done by the 1st defendant. He thereafter sold to the 2nd – 13th defendants the subdivided plots from parcel no 1322 without the consent or authority of the plaintiff. The 1st defendant's actions were illegal as the same amounted to denying the plaintiff his right of user as guaranteed under sections 24 and 25 of Land Registration Act and article 40 of the Constitution.

31. Consequently, I enter judgment for the plaintiff as prayed in the plaint. The 1st – 13th defendants are given 90 days to surrender vacant possession of the portions of L.R Bukhayo/Kisoko/1322 they are in occupation of. In default, the plaintiff is at liberty to carry out the eviction through the assistance of the Court Bailiff at the defendants' costs.

32. The costs of the suit awarded to the plaintiff.

Judgement dated, signed and delivered at BUSIA this 17th day of September, 2020.

A. OMOLLO

JUDGE