



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 129 OF 2013

JOSEPH RAJULA LUNANI.....PLAINTIFF

VERSUS

DONALD OYATSI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 11/12/2007 and filed on 14/12/2007, the Plaintiff – JOSEPH RAJULA LUNANI – impleaded this court to find for him against the Defendant – DONALD OYATSI – whom he accused of fraudulently acquiring ownership of Land Parcel No. MARACHI/ELUKHARI/2611(Hereinafter the “suit land”), which belonged to the Plaintiff’s late father – LAMBERT OBUYU LUNANI. The fraud is said to consist in securing subdivision of the suit land without consent or knowledge of the owner; failing to notify the owner of the suit land of intention to subdivide and appropriate it; acquiring the suit land without any consideration; and failing to obtain consent of the Land Control Board.
2. The Plaintiff prayed for the following orders;
 - a) The Honourable court do order for cancellation of the defendant’s names as proprietor of Land Parcel No. MARACHI/ELUKHARI/2611 and that the same be replaced with the name of the Plaintiff by way of rectification.
 - b) Costs of the suit.
3. The matter proceeded without the Defendant’s input at first and the Plaintiff got a judgment which essentially awarded him what he was claiming. The Plaintiff later successfully contested the judgment and was allowed to defend the suit. He subsequently filed a defence and counter-claim and pleaded, *inter alia*, that he acquired the suit land through purchase and that the process of acquisition was above board and lawful. According to the Defendant, the suit land was sold to him by the Plaintiff’s late father.
4. The Defendant further faulted the Plaintiff for claiming land in his own name yet the suit as filed shows that the land should form part of the estate of his late father. The suit was said to be an abuse of the court process and/or null and void *ab initio* for that reason. It was also said to violate clear provisions of the Succession Act.
5. The Defendant gave details of how he got to own the suit land. It is the Plaintiff’s late father, he pleaded, who initiated the sale after facing problems in school fees payment for his children, the Plaintiff included. The year was 1988 and the Plaintiff had been admitted to a secondary school after finishing his primary education. The Plaintiff’s late father wanted to raise school fees and he therefore wanted to sell the property. At that time the land was still in the name of Plaintiff’s grandfather but the Plaintiff’s late father was sure of his inheritance. The sale took place over a long period, with the money paid going mainly to payment of school fees for the Plaintiff.
6. Eventually, succession relating to the estate of the Plaintiff’s grandfather was done, with the Plaintiff’s late father becoming the administrator. The larger parcel of land as then owned by the Plaintiff’s grandfather was subdivided and the Plaintiff’s late father got his own portion. It is that portion that the same father subdivided so that the Defendant could get the portion he had purchased. It appears clear that when the larger parcel of land owned by the Plaintiff’s grandfather was subdivided, the resultant portion that the Plaintiff’s late father got to own became Marachi/Elukhari/2610. The Defendant got to own MARACHI/ELUKHARI/2611. According to the Defendant, there was no fraud and all the legal and procedural requirements were adhered to in order for him to own his portion. In all stages and instances, the Plaintiff’s late father was said to have played his role.
7. As pointed out earlier, the Defendant’s defence came with a counter –claim. In the counterclaim the Defendant pleads, *inter alia*, that the Plaintiff is trying to unjustly enrich himself to the detriment of the Defendant by seeking to claim ownership of the suit land yet he was educated using the money raised when it was sold. The Plaintiff is accused of fraud, with particulars alleging, *inter alia*, that he commenced these invalid proceedings as administrator of his late father’s estate while the suit land is not part of that estate. In the alternative, the Plaintiff was said to have abused his position as the administrator of his late father’s estate by seeking personal ownership of the suit land instead of seeking to add it to the estate. The Defendant also faulted the Plaintiff for, among others, trespassing on the suit land under cover

of judgement of this court while he had not yet extracted a decree or obtained orders to execute the judgement. He was further accused of obtaining the judgement through false representation and/or abuse of the court process.

8. It was further pleaded that the Defendant has been suffering loss of about 50,000/= per month, starting from 1/3/2010. The Defendant prayed for the following orders in his counter-claim.

- a) Possession of Land Parcel L.R MARACHI/ELUKHARI/2611
- b) A declaration that the title deed or certificate of title issued to Plaintiff for ownership of the suit property is null and void,
- c) A mandatory injunction compelling the Land Registrar to cancel the Plaintiff's title to the suit land
- d) Mesne profits at the rate of 50,000/= from 1/3/2010 until possession is delivered.
- e) A mandatory injunction to compel the Plaintiff to hand over vacant possession of the suit land.
- f) An injunction restraining the Plaintiff, his servants or agents from remaining on or continuing in occupation or entering the suit land.
- g) Costs.
- h) Any other fit or just relief.

The Plaintiff filed a reply to defence and defence to counter-claim on 7/8/2018. There was rebuttal of the defence and denial of the counter-claim.

9. The court started hearing the matter on 27/2/2017, with the Plaintiff testifying as PW2 on that day and later on calling two other witnesses – PAUL NDUBI LUNANI(PW2) and MERCELINE LUNANI(PW3) – on subsequent and different dates.

10. The Plaintiff testified, *inter alia*, that his late grandfather owned Land Parcel No. MARACHI/ELUKHARI/1259 and had (3) sons, Lambert Obuyu Lunani, Peter Lunani and Paul Lunani. Parcel No. 1259 was supposed to be shared among the three sons. No portion of it had been sold to anybody by the time the Plaintiff's late grandfather died. The size of the land was 36 acres and each son was therefore entitled to 12 acres. But the subdivision done later created four(4) parcels – Numbers 2608, 2609, 2610 and 2611 – and the Defendant became the owner of one – Parcel No. 2611. It is the ownership of this parcel that the Plaintiff is contesting.

11. Being aware that the Defendant said he bought the land and that the Plaintiff's late father sold it to raise school fees for his children, the Plaintiff explained that his late father was reasonably well endowed – having been employed up to 1987, being a timber dealer, and engaging in subsistence farming – and could not therefore have sold the land to pay school fees as alleged. Besides, the Plaintiff's maternal uncle used to assist in school fees payment and sometimes, bursaries were also available.

12. During cross-examination, the Plaintiff said his late father was conversant with land issues as he was the area village elder. But he also talked of his late father complaining that while with the Defendant, he found himself signing documents without really comprehending what he was doing. Some of the documents evidently related to a succession case – Succession Cause No. 49/1994, BUSIA – that he had filed. The Plaintiff said further in cross-examination that he is claiming the suit land because his late father didn't consult the family while transacting with the Defendant. And he also said that he is alleging fraud against the Defendant because the family was never consulted.

13. PW2 is the brother of the Plaintiff's late father and therefore the Plaintiff's paternal uncle. He said that it is the Plaintiff's late father who was entrusted with subdivision of Land Parcel No. 1259 as he and his other brother were away. But he could recall that he went to Land Control Board at some point and that his other brother, Peter allegedly sold some two acres to the Defendant. He agreed during cross-examination that the Plaintiff's late father could sell land without involving them.

14. PW3 is the Plaintiff's sister. Like the Plaintiff, she testified that her late father was well endowed and therefore could not have possibly sold land to raise school fees. She believed that the Defendant took advantage of her late father's illiteracy and got himself registered as owner of a portion of the land.

15. The Defendant started giving his evidence on 5/3/2018. He testified, *inter alia*, that he got to know the Plaintiff, or at least his name, when the Plaintiff's late father approached his late father proposing to sell a portion of land in order to raise money for school fees payment. The proposed sale was meant to be to the Defendant. When the information was relayed to the Defendant, he agreed to buy. The portion being sold was four(4) acres and the price was 4000/= per acre. A sale agreement was entered into and 4000/= was paid at first, with the balance agreed upon to be paid over time as and when the school fees for Plaintiff's own schooling fell due.

16. At some point, the Plaintiff's late father offered to sell some 1 ½ acres more to the Defendant. The Defendant bought the 1 ½ acres at 6000/=. The Defendant eventually paid all the money and he desired to become a registered owner of the purchased portions. At the time, the larger parcel of land – Parcel No. 1259 – was still in the name of Plaintiff's late grandfather. Succession therefore had to be done and the Defendant financed it. After succession all the necessary steps and processes were followed, with the Defendant ultimately becoming the registered owner of the land now being disputed. According to the Defendant, the Plaintiff's late father willingly participated in everything.

17. It is clear too that the Defendant went into possession and use of the land but all this changed when the Plaintiff chased the Defendant's

workers from the suit land. Upon inquiry however, the Defendant got to learn that this case had been instituted against him and a judgment had been entered against him in his absence and without his participation.

It is clear too that he successfully contested the judgment and that is why the case started afresh. According to the Defendant, the Plaintiff's late father was a willing seller and a willing transferor of the suit land to him. NOT only that, at or around that time, another brother of the Plaintiff's late father, one Peter, also sold some two acres to him. He still owns the two acres. The Defendant asked the court to allow his Counter-claim. He had developed it, he said, by planting sugarcane and practicing some horticulture. During cross-examination, the Defendant maintained his position that the Plaintiff's late father sold him the land. He also said he financed the succession related to the land.

18. After the close of the entire case, both sides were supposed to file written submissions. The Plaintiff's side however did not file submissions despite being given ample time to do so. The Defendant's side filed submissions on 30/4/2020. According to the Defendant, the Plaintiff's case “ **is premised wholly on the man's misdirected view of self-importance and is otherwise an eloquent demonstration of what constitutes abuse of the process of court**”

19. The Plaintiff's suit was said to constitute “ *a brazen attempt by the Plaintiff to wrongfully and unfairly reclaim from the Defendant a parcel of land that the Plaintiff's father lawfully and procedurally caused to be transferred and registered in the Defendant's name*” The Plaintiff was faulted for not proving the particulars of fraud that he enumerated in the Plaintiff, with the evidence on record said to confirm the Defendant's position that he procedurally and lawfully acquired the land. Issue was also taken with the Plaintiff's attempt in his later statement to question Succession proceedings which his own late father had instituted. It was pointed out that the Plaintiff had not yet formally contested the succession proceedings in court. The Defendant submitted that the documents he produced as exhibits effectively displace the Plaintiff's allegations of fraud.

The court was finally urged to dismiss the Plaintiff's suit, allow the Defendant's Counter-claim, and that the Plaintiff be ordered to pay costs of both the suit and the Counter-claim.

20. I have considered the pleadings, the evidence on record, and the submissions filed by the Defendant.

The Plaintiff's suit is based on fraud. A look at the particulars of fraud alleged by the Plaintiff shows that the Plaintiff required to give good evidence showing that his late father had no knowledge of, did not consent, or even participate in the subdivision of Parcel No. 1259. But the Plaintiff did not give such evidence. It was also expected that the Plaintiff would demonstrate sufficiently that the Defendant acquired the suit land unprocedurally or unlawfully; that he did not pay any consideration or money for the land; and/or that he did not obtain consent of the Land Control Board. All this was not shown.

21. Instead, by the Plaintiff's own evidence, fraud consists in the fact that there was no family consultation or participation. On why he is opposed to the Defendant's ownership of the suit land, the Plaintiff had the following to say:

“ I am opposed to ownership of the Defendant as owner of parcel No. 2611 because we as a family of my late father were not involved in the alleged sale of the land to the Defendant.”

Quite clearly, this is not how to prove fraud. Further it behoves the Plaintiff to know that the law as it was at the time did not require his own or the family's knowledge, consent, or participation, in the sale or disposal of the land.

22. The Plaintiff's evidence is in sharp contrast with that of the Defendant. While giving his evidence, the Defendant gave documentary back-up to show how he acquired the land. He for instance showed that Parcel No. 1259 was subdivided after the Plaintiff's own father filed succession proceedings and became administrator of the estate of Plaintiff's grandfather. He thereafter subdivided the land, giving his brothers their respective entitlements and then vested in the Defendant the ownership of the portion that the Defendant had bought. Records of succession proceedings, the sale agreements, documents of change of land ownership, and the necessary paper-trail showing the processes undergone were all made available. The Plaintiff's late father's name and signature features in all the relevant documents.

23. It appears clear that while the Plaintiff and his witness gave evidence based on vague assumptions, the Defendant's oral and written evidence came with the necessary documentary support to drive home his points. The Plaintiff showed nothing to prove that parcel No. 1259 was subdivided without the knowledge, consent or participation of the proprietor or that the Defendant became a proprietor of the portion thereof unprocedurally. There was also no evidence that the Defendant did not pay for the land or that he did not notify, or was required to notify, the proprietor of parcel No. 1259 of its subdivision. The Plaintiff's claim is hinged on vague and generalized inferences. It is not enough to say that the family was not consulted or that the Defendant took advantage of the alleged illiteracy of the seller. Clear evidence was required to show that the land was actually not sold.

24. It appears clear to me that the Plaintiff's side would wish to make the court believe that the documents shown here are unreliable or even fake. There was, for instance, an attempt to point out shortcomings in the application to the Land Control Board. But there is no denying that the Land Control Board acted on the document and issued the required consent. The substance of the consent itself was not faulted; nor was there any allegation or proof that it did not come from the Land Control Board.

25. More importantly however, both the application to the Land Control Board and the consent that issued relate not only to the Defendant himself but also to the Plaintiff's late father and his brothers.

Indeed, it is clear that it is on the basis of the process that the Plaintiff's late father and his brothers became owners of the parcels of land that are not disputed. A question then arises: Can that same process be valid for the Plaintiff's late father and his brothers and not be valid for the Defendant? That is the process that comprised the application that the Plaintiff was faulting and the consent that was issued by the Land Control Board. How can the application or the consent be valid for his father and not be valid for the Defendant? It should be appreciated

that the brothers of the Plaintiff's father are still legal owners of the parcels of land transferred to them. They became such owners using the same documents and/or through the same process. They are not parties to the case and even assuming a compelling case was shown that the documents were fake, the court would still be justifiably hesitant to condemn them unheard. And I say so because declaring the documents invalid or fake would mean or imply that their ownership of their respective parcels of land is also unlawful or invalid.

26. Overall however, it is the weak evidence presented by the Plaintiff's side, that undermines the credibility of his case. No fraud was proved. It was not enough to say that the family was not consulted. It was not enough to allege that the Defendant took advantage of the alleged illiteracy of the seller. Nor was it enough to say that the seller was well-off and could not therefore sell land to pay school fees. The particulars of fraud stated in the Plaintiff needed to be clearly demonstrated. And the evidence to demonstrate that required to be of especially high quality. Such evidence was not made available. Instead, the Plaintiff and his witnesses were trying to imply fraud through insinuations or vague suggestions.

27. In light of all this, I hold, without equivocating, that the Plaintiff's case is not proved to the required standard. I hereby dismiss the case with costs.

28. I now turn to the Defendant's Counter-claim. And as I do so, I bear in mind that I have already found that the suit land was sold and transferred to him.

29. In my view, the Defendant demonstrated well that the Plaintiff is the current title holder of the suit land illegally and fraudulently. He is such owner because he represented to the court that the Defendant had fraudulently acquired the land. After all the evidence is now in, it turns out that the Defendant was not fraudulent after all. What this in effect means is that the Plaintiff was making mis-representations to court. A crucial ingredient of fraud as a tort consists in such mis-representations. But the more compelling factor in favour of the Defendant's counter-claim is that he availed documents showing clearly how he became the owner of the suit land.

30. Further, I agree with the Defendant as alleged in his particulars of fraud in the counter-claim, that the Plaintiff is wrong to claim the suit land as property to be registered in his name. It should instead have been treated as part of his late father's estate. I also agree that the Plaintiff's presence on the suit land constitutes trespass. I hold the view because that land legally belongs to the Defendant. The Plaintiff's forcible entry was therefore a trespass which had a veneer or resemblance of legality through a court process that was set aside.

31. I make a finding therefore that the Defendant's Counter-claim is successful and he is entitled to some orders. I grant prayers (a) (b) (c) (e) (f) and (g) in the Counter-claim. I decline to grant prayer (d) as no convincing or concrete evidence was led to prove it.

Dated and signed at Kericho this 12th day of August, 2020

.....

A.K.KANIARU

JUDGE

Dated , signed and delivered at Busia this 17th day of September, 2020.

.....

A. OMOLLO

JUDGE