



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NUMBER 222 OF 2017

(Formerly Kisumu Elcc no. 110 of 2016 and Kisii Elcc No. 367 of 2016)

PAMELA AKINYI BWANA..... PLAINTIFF

VERSUS

DOMNICUS MAIL ADERA.....1ST DEFENDANT

SAMSON MANOA MAIL.....2ND DEFENDANT

CALLMAS ADERA OTHO.....3RD DEFENDANT

JAPHETH ANGILA ATINGA.....4TH DEFENDANT

JUDGMENT

A) INTRODUCTION

1. The property in dispute in the instant suit is the whole of Title number North Sakwa/Kadera Kwoyo/102 including the resultant parcels of land measuring approximately thirty-one decimal five hectares (31.5 Ha) in area (the suit property herein). The same is contained in Registry Map Sheet number 9 and located in Migori County within the Republic of Kenya.

2. The plaintiff namely Pamela Akinyi Bwana is represented by the firm of Mwamu and Company Advocates.

3. The 1st, 2nd, 3rd and 4th defendants are represented by the firm of G.S Okoth and Company Advocates further to a Notice of change of Advocates dated 15th July 2020 and filed in court on 23rd July 2020 pursuant to Order 9 Rule 5 of the Civil Procedure Rules, 2010. Previously, they were represented by M/S Apondi and Company Advocates, M/S Odondi Awino and Company Advocates, M/S Odhiambo Ogutu and Company Advocates and P.R Ojala and Company Advocates, at various times.

4. Initially, this suit was lodged at Kisumu Environment and Land Court but was transferred to Kisii Environment and Land Court on 6th October 2016. Subsequently, the suit was transferred to this court on 20th February 2017 for hearing and determination.

B) THE PLAINTIFF'S CASE IN BRIEF

5. By a plaint (Fast Track) dated 17th May 2016 and filed in court on 19th May 2016, the plaintiff has sued the defendants jointly and severally for;

a) An order to issue revoking the subdivision of the suit property and consequent registration of the resultant parcels of land.

b) A permanent injunction restraining the defendants, their agents, servants, assigns, relatives and those working under them from trespassing and or encroaching and dealing in any other manner with the suit property until the estate of Adera Ongoro is properly distributed.

c) Costs of this suit.

6. The plaintiff's complaint as per the plaint is that she is a beneficial user of the suit property being her ancestral land which belonged to her late grandfather in law, Adera Ongoro (Deceased 1). That the defendants have since irregularly and illegally subdivided and registered the

suit property without the knowledge and involvement of the plaintiff. That the resultant parcels of land thereof are LR Nos. North Sakwa/Kadera Kwoyo/963, 964 , 965, 966, 967 and 968 (1st to 6th resultant parcels of land respectively). That as a result, the plaintiff has been denied her right to use and possess the suit property hence provoking the present suit.

7. On 3rd March, 2020, the plaintiff (PW1) testified and as part of her evidence, relied on her statement filed in court on 18th July 2018 herein. She also relied on her further list of documents dated 17th February 2018 and filed 18th February 2018 (PEXhibits 1 to 21).

8. In support of her testimony, PW1 called two (2) witnesses: a teacher, Lawrence Ayugi Adera (PW2) and a police officer, Evans Onyango Otho (PW3). The said two (2) witnesses relied on their respective statements filed in court on 18th July 2018, as part of their evidence.

9. On 3rd March 2020, the plaintiff and the defendants were given latitude to file and serve submissions. However, only the plaintiff's counsel filed submissions dated 12th August 2020 making reference to the orders sought in the plaint, brief facts of the case and framed three (3) issues for determination including whether the suit property was fraudulently and illegally transferred to the defendants and whether the titles thereto should be cancelled. Counsel analysed the issues in favour of the plaintiff(PW1). To fortify the submissions, counsel cited persuasive authorities including **Zacharia Wambugu Gathimu and another vs John Ndungu Maina(2019)eKLR, and Henry Mungi Ndungu vs Winnie Njeri Ndungu(2018)eKLR.**

C) THE GIST OF THE DEFENDANTS' CASE

10. In their statement of defence stated 28th June 2016 and filed in court on 29th June 2016, the 1st, 2nd and 3rd defendants denied the plaintiff's claim and sought dismissal of the suit with costs. They stated that the suit property was regularly and legally subdivided by all the beneficiaries of the estate of deceased 1 and the same was shared as per the wishes of his entire family and beneficiaries.

11. The defendants further stated that the plaintiff was aware of the subdivisions and registration of the suit property and the resultant parcels of land in the names of the defendants. That the plaintiff participated in the said subdivisions and registration. That the defendants occupy their respective resultant parcels of the suit property.

12. On his part, the 4th defendant, too, denied the plaintiff's claim and sought dismissal of the suit with costs in his statement of defence dated 28th June 2016 duly filed in court on 29th June 2016. He stated that he regularly acquired the 5th resultant parcel of land after the same had been subdivided, sold and transferred to him and the 1st, 2nd and 3rd defendants by the plaintiff's husband, Mourice Otho Adera (Deceased 2), who was also the husband of PW2. That the suit property was legally and regularly subdivided and the 5th resultant parcel of land sold to him to the knowledge of PW1.

13. The defendants duly aware of the hearing of the suit, opted not to attend court to give evidence on 3rd March 2020. On that score, this court remarked;

“The defendants’ case deemed closed as sought herein in the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010.....”

14. The defendants further failed to file and serve submissions in this matter as observed in paragraph 8 hereinabove.

D) ISSUES FOR DETERMINATION

15. It is settled law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see the Court of Appeal decision in **Galaxy Paints Co. Ltd-vs-Falcon Grounds Ltd (2000)2EA 385** and restated in **Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720.**

16. Having duly considered the plaint, the statements of defence and the testimonies of PW1, PW2 and PW3 alongside the plaintiff's submissions, I am of the considered view that the issues that fall for determination in this suit are;

- a) At the outset, is this court possessed of the requisite jurisdiction over the present suit?
- b) Depending on the outcome in issue (a) hereinabove, who is the registered proprietor of the suit property?
- c) Was the suit property irregularly and illegally subdivided and registered as found in issue (b) hereinabove?
- d) Is the plaintiff entitled to the reliefs sought in the plaint?

E) DISCUSSION AND DISPOSITION

17. As regards the issue of jurisdiction, the 1st, 2nd and 3rd defendants clearly stated in their statement of defence at paragraph 10 that:

“Jurisdiction of this Honourable court is not admitted and the 4th defendant will object to this matter being heard by this Honourable court as there is a competent court to handle this matter at Kisii Environment and Lands Court where the subject matter is situated.”

18. Similarly, paragraph 11 of the 4th defendant's statement of defence reads:

“Jurisdiction of this Honourable court is not admitted and the 4th defendant will object to this matter being heard by this Honourable court as there is a competent court to handle this matter at Kisii Environment and Land Court where the subject matter is situated.”

19. The Black's Law Dictionary 10th Edition at page 980, defines the term “Jurisdiction” thus:

“A court's power to decide a case or issue a decree.”

20. On her part, PW1 stated otherwise. In paragraph 12 of the plaint, she stated that this court has jurisdiction to hear and determine this suit.

21. It is abundantly clear from the pleadings that the defendants have questioned the jurisdiction of this court to entertain the instant suit. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors (1969)EA 696*, the Court of Appeal held, inter alia;

“...a preliminary objection consists of a point of law...pleaded or which raises by clear implication out of the pleading.....Examples are an objection to jurisdiction of the court, plea of limitation,.....”

22. In another celebrated case of *Owners of Motor Vessel “Lillian S” -vs-Caltex Oil Kenya Ltd (1989)KLR 1*, Nyarangi JA held;

“...Jurisdiction is everything.....jurisdiction must be acquired before judgment is given...”

23. In the obtaining scenario, I subscribe to the Court of Appeal decision that a preliminary objection is a threshold question which calls for a definitive, determinative and prompt pronouncement; see the case of *Kakuta MaiMai Hamisi-vs-Peris Pesi Tobiko and 2 others (2013) eKLR*.

24. Articles 6(3) and 48 of the Constitution of Kenya, 2010 stipulate the right of access to justice. As noted in paragraph 3 hereinabove, the present suit was **originally filed and transferred for hearing and determination**. It is pretty discernable from the pleadings and evidence herein, that the cause of action arose within the jurisdiction of this court.

25. Moreover, by the nature of the suit and pursuant to Articles 162(2)(b) of the Constitution(supra) as read with Section 13(1) and (2) of the Environment and Land Court Act, 2015(2011), this court is seized of jurisdiction in respect of the current dispute; see also the Supreme Court reasoning in *Samwel Kamau Macharia and another-vs-Kenya Commercial Bank Ltd and 2 others (2012) eKLR*, and *Republic-vs-Karisa Chengo and 2 others (2017)eKLR*.

26. On the second issue, PW1 stated at paragraph 3 and 4 of the plaint that the suit property was ancestral land and originally belonged to deceased 1 as mirrored in his statement. It was so admitted by the 1st, 2nd and 3rd defendants in their statement of defence at paragraph 3. However, the 4th defendant denied the said allegation in his statement of defence.

27. The statement of PW2 which forms part of his testimony reads:

“...Land parcel number North Sakwa/Kadera Kwoyo/102 belonged to my grandfather Adera Ongoro (deceased)...”

28. Quite clearly, from PExhibits 1 and 3, deceased 1 died on 7th November 1983. The suit property was registered in his name under the Registered Land Act Chapter 300 Laws of Kenya (the Repealed Act) as at 2nd April 1960 as revealed in PExhibit 4. Consequently, the suit property was subdivided into the 1st to 6th resultant parcels of land and LR No. North Sakwa/Kadera Kwoyo/ 969 registered in the name of the 1st defendant, PW1, 1st defendant, Joseph Odero Adera, 4th defendant, 2nd defendant and 3rd defendant respectively as shown in PExhibits 5, 6, 12 to 18 herein.

29. In that regard, were the said subdivisions and registrations lawful? In the case of *Munyu Maina-vs-Hiram Gathiha Maina (2013)*, the Court of Appeal held that:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.....and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”

30. It was the contention of PW1 that the defendants are irregularly and illegally registered as proprietors of the resultant parcels of land. She pleaded particulars of illegality and irregularity at paragraph 5 of her plaint.

31. Additionally, it is trite law that any allegations of fraud must be pleaded and strictly proved to the standard of proof required which is obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities but certainly not one beyond any reasonable doubt as in original cases; see *Ndolo-vs-Ndolo (2008) IKLR (G & F) 742*.

32. Undoubtedly, fraud and misrepresentation are grounds of impeaching a certificate of title as stipulated under Section 26(1) of the Land

Registration Act, 2016 (2012). However, the same must be distinctly pleaded and proved as held in ***Kuria Kiarie and 2 others vs Sammy Magera (2018) eKLR*** and ***Ndolo case (Supra)***.

33. The testimonies of PW1, PW2 and PW3 reveal that the subdivisions and registration of the suit property by the defendants were fraudulent and illegal. By PExhibit 3 as well as the definition under Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and the Court of Appeal decision in ***Trouistik Union International and another-v- Jane Mbeyu and another (1993) eKLR***, PW1 is the legal representative of the estate of deceased 1. It is evident that she was not involved in the partition of the suit property and registration of the 1st to 6th resultant parcels of land thereof as shown in PExhibits 5, 6, 12 to 18. As such, the purported subdivisions and registration thereof fit in the exceptions under Section 26 (1) of the Land Registration Act (**supra**).

34. It follows that the plaintiff is entitled to the orders sought in the plaint in view of Sections 26 and 80 of the Land Registration Act, 2016(2012) and duly endorsed decisions in ***Zacharia Gathimu and Henry Ndungu cases (supra)***. The defendants' statements of defence are unsubstantiated. So, the plaintiff has proved her case against the defendants jointly and severally to the requisite standards.

35. The upshot is that judgment be and is hereby entered for the plaintiff against the defendants jointly and severally for orders (a), (b) and (c) as sought in the plaint dated 17th May 2016 and filed in court on 19th May 2016

36. It is so ordered.

Delivered, Signed and Dated at Migori in open Court and through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 17th day of SEPTEMBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :-

Mr. Jura holding brief for Mwamu learned counsel for the plaintiff

The 3rd defendant

The 4th defendant

Court Assistant – Tom Maurice.