



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC NO 651 OF 2017

BARRACK ODHIAMBO ODERO suing on behalf of the Estate of

ISAYA ODERO OBONGO.....PLAINTIFF

VERSUS

EZEKIAH KINYANGI BUSAKA.....DEFENDANT

JUDGMENT

A) INTRODUCTION

1. The property in dispute in the instant suit is the whole of title number Kanyamkago/Kajulu/4 measuring approximately three decimal six hectares (3.6Ha) in area (Hereinafter referred to as the suit property). The same is contained in Registry Map Sheet number 42 and located within Migori County.
2. The plaintiff, Barrack Odhiambo Odero suing on behalf of the estate of Isaya Odero Obongo (deceased) is represented by M/s Agure Odero and Company Advocates.
3. The defendant, Ezekiah Kinyangi Busaka is represented by M/s Abisai and Company Advocates.

B) THE GIST OF PLAINTIFF'S CASE

4. By a plaint dated 29th May 2017 and lodged in court on 30th May 2017, the plaintiff has sued the defendant for;
 - a) An order for nullification/revocation of the title deed of the suit property the proper Succession Cause to be filed by the plaintiff herein, the plaintiff thereafter to give the defendant his rightful portion measuring 3 acres as was agreed by the deceased father.
 - b) An order for injunction against the defendant, his agent, assigns, servants from transferring, alienating the suit property hereof pending hearing and determination of the suit.
 - c) Cost of the suit.
5. The plaintiff claims that suit property was initially registered in the name of the deceased. That upon the death of the deceased, the defendant proceeded and illegally acquired title deed to the whole of the suit property. That it has rendered the dependents of the deceased landless and squatters. Thus, the plaintiff mounted this suit further to leave sought and granted in Migori ELCC No. 32 of 2017.
6. The plaintiff(PW1) testified on 17th April 2018 and relied on a grant of letters of administration ad litem issued on 24th May 2017(PEXhibit 1), land sale agreement dated 1st September 1986 (PEXhibit 2A), another land sale agreement dated 1st September 1986(PEXhibit 2B), a certificate of death in respect of the deceased (PEXhibit 3) and certified true copy of the register in regard to the suit property(PEXh4). He called two witnesses namely Lucas Obonyo Odongo (PW2) who relied on PEXhibit 2 and Leudia Anyango Odero (PW3) who relied on her statement dated 21st June 2017.
7. In the plaintiff's submissions dated 21st September 2020 filed on 21st September 2020, **Counsel** cited Article 159 (1) of the Constitution of Kenya,2010, annexed copy of order in Migori ELC Misc. Application number 32 of 2017 for leave to file this suit, framed five (5) issues for determination and analysed them in favour of the plaintiff. The issues include; whether succession was done and whether the whole suit property was sold.

8. Counsel submitted that the deceased passed on in the year 2003. That transfer and registration of the suit property was done on 22nd July 2005 without carrying out Succession in respect of the estate thereof.

9. Counsel relied on the case of **Benedictor Makami Bahati Chairman and 4 others –vs- Ben Muneria Wesonga and 5 others (2018) eKLR** in support of the submissions. That the orders sought in the plaint be granted.

C) THE GIST OF THE DEFENDANT'S CASE

10. By his statement of defence dated 21st June 2017 and filed in court on 23rd June 2017, the defendant denied the plaintiff's claim and sought its dismissal with costs. He stated inter alia, that he lawfully purchased the whole of the suit property from the deceased on 1st September 1986 at a consideration which he paid in full. That upon purchase of the same, he obtained the requisite consent from the area Land Control Board before it was eventually transferred to him.

11. The defendant further stated that immediately the deceased moved to Ndhiwa where he settled with his family. That the defendant has possessed and occupied the suit property for the last 31 years.

12. The defendant(DW1) stated that he has title deed to the suit property upon purchase of the same from the deceased who was the father of PW1. He also stated that he has lived thereon for the last 33 years. He relied on his statement dated 13th June 2017 and list of documents dated 21st June 2017(PExhibits 1 to 6), as part of his evidence.

13. DW2, Elijah Vitishia Vusaka testified that DW1 is his younger brother who bought land from the deceased as per DEXhibit 1. That he witnessed DEXhibit 1. That after the sale, the deceased moved to Kanyamwa.

14. On 15th September 2020, learned counsel for the defendant filed a 9-paged submissions dated 14th September, 2020 together with a list of authorities filed on even date. Therein, counsel gave an introduction of the matter making reference to the orders sought in the plaint, the defendant's defence as well as brief facts of the case and evidence on record. Counsel also framed three (3) issues for determination namely whether the suit was filed out of time without a proper cause, whether the plaintiff has proved this case on the required legal standard and which party is to bear costs of the case.

15. Counsel analysed the three (3) issues against the plaintiff and urged the court to dismiss the suit with costs to the defendant by dint of the proviso to Section 27(1) of the Civil Procedure Act Chapter 21 Laws of Kenya. That the suit was filed out of time, has been challenged at the trial hence it is anon starter. Reliance was made on the Court of Appeal decision in **Oruta and another-vs-Nyamato (1988)eKLR**, among other authorities.

16. Counsel further submitted that the plaintiff has not proved his case to the requisite standard. The **Black's Law Dictionary 9th Edition 2009 page 1535** on the definition of proof, Court of Appeal decisions in **Kinyanjui Kamau v George Kamau (2015)eKLR**, and **Kuria Kiarie and 2 others v Sammy Magera (2018)eKLR**, among others, were cited in support of the proposition that the plaintiff's case fails the required standard of proof.

D) ISSUES FOR DETERMINATION

17. I have carefully considered the entire pleadings, evidence and submissions of the respective parties in this suit. I bear in mind the Court of Appeal decision in **Great Lakes Transport Company(U) Ltd vs Kenya Revenue Authority (2009)KLR 720** in respect of issues for determination in a suit generally.

18. To that extent, I am of the considered view that the following issues fall for determination;

- a) Did the defendant fraudulently acquire title to the suit property?
- b) Is the plaintiff entitled to the reliefs sought in the plaint in instant suit?

E) DISCUSSION AND DISPOSITION

19. On the first issue, PW1 alleged fraud against DW1 in respect of the suit property at paragraphs 4 to 9 of the plaint. The particulars of fraud are set out at paragraph 8(a) and (b) thereof. However, DW1 denied the allegations and challenged PW1 to prove the same.

20. It is trite law that any allegations of fraud must be pleaded and strictly proved to the requisite standard in civil cases; see **Ndolo v Ndolo(2008)IKLR (GeF) 742 and Kuria Kiarie and 2 others vs Sammy Magera(2018)eKLR**.

21. In the **Black's Law Dictionary 10th Edition**, at page 775, the term "fraud" is defined thus;

"A knowing misrepresentation or knowing concealment of material fact made to induce another to actions or her detriment"

22. In addition, I endorse the decision in **Abiero vs Thabiti Finance Company Ltd and another (2001)KLR 496** that "fraud" is a conclusion of law. That it is a generic term, embracing all multifarious means which human beings devise and which are referred to by one individual to get advantage over another by false allegations, or by suppression of truth, and include all surprise, trick, winning, dissembling

and any unfair way by which another is cleared.

23. It was the testimony of PW1 that the deceased sold three (3) acres as per PEXhibit 2A and not the whole of the suit land to him as shown in PEXhibit 2B and DEXhibit 1. That PEXhibit 2A is genuine.

24. During cross examination, PW1 stated, inter alia;

“...The sale of three (3) acres to the defendant does not appear on PEXhibit 2A. My father gave me PEXhibit 2A when he was sick...I tried to challenge him not to sell the whole parcel of the suit land, but he poured hot water on me...”

25. According to PW2, the deceased sold three (3) acres of the suit property to DW1 as per PEXhibit 2A. In cross examination, he stated that three (3) acres are not revealed in PEXhibit 2A with the parties to it and himself duly signed. That the deceased moved out of the suit property in the year 1987.

26. PW3 affirmed the testimonies of PW1 and PW2 that DW1 bought three (3) acres of the suit property from the deceased. That the said acreage is not shown in PEXhibit 2A.

27. During cross examination, she testified;

“...PW1 was not involved in the sale of land. It was unfortunate that my husband died leaving the defendant who stays on the land. He did sell and transfer land to the defendant...”

28. DW1 told the court inter alia, that the deceased moved out of the suit property after the sale of the same and that he has stayed thereon for the last 33 years. That he followed lawful procedure by way of DEXh1, 4 and 5 to obtain title deed to the suit property.

29. In the case of *Munyu Maina vs Hiram Gathiha Maina(2013)eKLR*, 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. The evidence of DW1 was reinforced by DW2 who stated that DW1 bought the suit as disclosed in DEXh1. In cross examination, this witness maintained;

“DW1 bought the suit land at purchase price of Kshs. 53,250/=. There was only DEXhibit 1.”

31. The plaintiff’s allegations are spiritedly opposed by the defendant. It is alleged that the defendant bought the suit property and obtained title deed thereto after the death of the deceased. I am aware of the definition of the term “personal representative” under Section 3 of the Law of Succession Act Chapter 160 of the Laws of Kenya and the relevant powers and duties under Sections 79, 82 and 83 of the same Act. See also *Kothari vs Quaresh(1967)EA 364* and *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama(2014)eKLR*, and *Alfred Njau and others vs City Council of Nairobi(1982-88)IKAR 229*, among other authorities.

32. It is even ground that the deceased passed on as shown in evidence including PEXh1 and 3 and that the suit property was registered in the name of the deceased under the **Registered Land Act Chapter 300 Laws of Kenya** (The Repealed Act). By PEXhibit 2B which is the same as DEXh1 as fortified by DEXhibits 4, 5 and 6, DW1 bought the whole of the suit property from the deceased. PEXhibit 2B and DEXhibit 1 outweighs the authenticity of PEXhibit 2A and meet the requirements under Section 3(3) of the Law of Contract Act Chapter 23 Revised Edition 2012(2002) and as envisaged in *Munyu Maina case(supra)*.

33. The plaintiff asserted that the sale of the suit property to DW1 did not undergo the consent as required under Section 6 of the Land Control Act Chapter 302 Laws of Kenya. However, by PEXhibit 2B, DEXhibits 1, 4, 5 and 6 that assertion is dissolved by the Court of Appeal decision in *Willy Kimutai Kitilit vs Michael Kibet (2018)eKLR*, and *William Kipsoi Sigei vs Kipkoech Arusei and another(2019)eKLR*, and *Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri(2014)eKLR*, on the application of equitable principles as stipulated under Article 10(2)(b) of the Constitution of Kenya, 2010. Clearly, the defendant acquired title to the suit property in consonant with the law.

34. To that end, the defendant’s case is quite firm, cogent and dislodges the plaintiff’s assertion which according to the finding of this court has not been proved against the defendant on the requisite standard as noted in *Ndolo and Kuria Kiarie cases(supra)*. The plaintiff therefore, is not entitled to the orders in the plaint as the defendant’s case prevails.

35. The upshot is that the plaintiff’s case commenced and by way of a plaint dated 29th May 2017 and duly filed in court on 30th May 2017 fails. I proceed to dismiss the same with costs to the defendant.

36. It is so ordered.

Delivered, Signed and Dated at Migori in open Court 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 27TH day of OCTOBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :-

Mr. Jura learned counsel holding brief for Mr. Agure Otero learned counsel for plaintiff

Mr. Singei learned counsel for the defendant

Tom Maurice – Court Assistant