



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 136 OF 2014

THOMAS OCHIENG DWERA

(Suing as Leg. Rep of the

Estate of) **PETER DWERA OMONDIPLAINTIFF**

= VERSUS =

THE REGISTERED TRUSTEES OF

PENTECOSTAL FELLOWSHIP IN KENYA.....DEFENDANTS

J U D G E M E N T

1. By a plaint dated 26th September 2011, amended on 14/8/2012 and re-amended on 17/5/2018 the two plaintiffs sued the defendant claiming land parcel No. Bukhayo/Mundika/2881 measuring 0.04ha. They pleaded that their deceased father Peter Dwera Omondi who was the sole registered owner of the said land had allowed the defendant to use the church structure constructed therein for an indefinite period of time as the defendant looked to buy its ow land.

2. The plaintiff pleaded that the defendant church in Busia approached the deceased Peter Dwera wanting to buy a plot to build a church. That the deceased subdivided the land and gave a portion to James Nyadenge to hold in trust for the defendant church. That it turned out the said James Nyadenge conned the church forcing the church elders to request for a new plot to buy and which request was turned down. The plaintiff denied his father ever sold land to the defendant hence the registration of the defendant as owner of Bukhayo/Mundika/2881 was acquired through fraud.

3. The plaintiff set out the particulars of fraud against the defendant stating thus;

(a) Impersonating deceased.

(b) Forging signature of deceased.

(c) Uttering false consent documents.

(d) Interfering with mutation form.

4. That the defendant caused the land to be registered in its name after the death of Peter. The plaintiff's claim the said registration was done fraudulently and without their authority or consent. They pray for judgement against the defendant for:-

(a) Cancellation of the Title Deed No. Bukhayo/Mundika/2881 obtained by fraudulent means and same be placed back to the plaintiffs who are legitimate heirs of the deceased person one Peter Dwera Omondi and subsequent eviction from the said parcel No. Bukhayo/Mundika/2881.

(b) An order directing the rectification of the register of land parcel No. Bukhayo/Mundika/2881 by striking out the name of the defendant church and the subsequent registration of the plaintiff as the proprietor thereof.

(c) An order directing the eviction of the defendant and demolition of the defendant's structures on parcel No. Bukhayo/Mundika/2881.

(d) Costs of this suit.

5. In contesting the suit, the defendant filed a statement of defence on 31/10/2011 and amended on 12/10/2018. It is pleaded for the defence that Peter Dwera was the sole registered owner of the suit parcel prior to 9/08/1988 but ceased to be such owner upon the sale and transfer to the defendant. That the said Peter Dwera agreed to sell the land to the defendant at a consideration of Kshs.3000/= which money the defendant fully paid in 1987. That consent of the Land Control Board to transfer the property was duly obtained and the deceased executed the transfer documents in favour of the defendant.
6. The defendant pleaded further that the suit herein is statutory time barred since the suit land was sold and registered in its name on 9/8/1988 some 23 years ago. That the defendant has since then enjoyed quiet and uninterrupted possession. The defendant added that the plaintiff lacks locus to bring this suit by virtue of the provisions of the Succession Act. That the suit is incompetent, fatally defective and ought to be struck out with costs.
7. Once pleadings closed, the plaintiff called the evidence of one witness while the defendant called a total of four (4) witnesses. The plaintiff testifying on 15/10/2019 stated that he is the son of Peter Dwera Omondi – deceased while John Odhiambo Dwera – deceased is his elder brother. He adopted his witness statement dated 14/10/2019 as his evidence in chief together with the documents filed as exhibits in support of his case.
8. He stated that his father bought land from Karani Balongo where he settled with his family. That Karani Balongo joined Free Pentecostal Church for worship together with Nyadenge and Ayieko under a tree on the lower end of Karani's plot. The witness continued that Nyadenge approached his father and bought a portion of land and he constructed a house and a posho mill. Consequently, they moved their worship from under the tree into the posho mill house since the mill did not operate on Sundays. Later on, the church built a temporary house on Nyadenge's plot which was used for worship.
9. **PW1** confirmed that his father took Nyadenge to Nambale Land Control Board to give Nyadenge title for the portion so purchased. It is the plaintiff's case that the church people complained to his father why he had given Nyadenge the land meant for the church. That his father advised them to sort out the issue of ownership with Nyadenge.
10. The plaintiff continued that the church then requested his father for a place to buy and build a new church after Nyadenge refused them to continue using his plot. That his father refused to sell but allowed them (defendant) to build a temporary structure to use. The witness said this happened after Peter (plaintiff's father) had sent the plaintiff and John to confirm if indeed Nyadenge had conned the church. Further, he avers that the elders of the defendant signed an agreement (**Pex 1**) recognizing the use of their father's land on temporary basis.
11. The witness continued that when L.R Nos Bukhyao/Mundika/2880, 2881, 2882 was created, no surveyor came to the ground to demarcate their boundaries. That his father fell ill in 1987, was bedridden the whole of 1988 and died in 1989 thus he did not participate in the creation of the 3 portions of land. He stated that his father never responded to the Land Registrar's summons produced as **Pex 2**. **PW1** said he has never seen any agreement showing the defendant bought land from his father. He denied that his father took the defendant to the Land Control Board. The plaintiff produced **Pex 3 – 10** copies of letters addressed to the Land Registrar requesting documents from the lands office regarding the transaction between his father and the defendant. He urged the court to grant the prayers sought in the re-amended plaint.
12. In cross-examination, the plaintiff stated he was born in 1975 although the Identity Card says 1970. That his father died in 1989. That the Land Control Board application form shows Peter Dwera as the owner but the signature is not Peter's. He admitted the signature on the mutation form is genuine. That he reported the fraud to the police but he had no OB number as he was advised the case was Civil.
13. The plaintiff conceded that he had not taken the signatures for forensic examination. He denied the fact put to him that the defendant purchased the suit parcel for Kshs.3,000. That his father did not report a case against the defendant since by then the defendant had not grabbed the suit land. He also did not know where James Nyadenge is. In re-examination, the plaintiff stated that the signature on TOD4 page 2 is not his father's but TOD5 page 4 belongs to his father. This marked the close of the plaintiff's case.
14. George Otieno Ojwang gave evidence as the first defence witness. He stated that he is a pastor. **DW1** adopted his witness statement dated 14/4/2014. That the defendant had a semi-permanent house built on the suit land. **DW1** stated that after the church bought another plot, they left the suit plot to start a school and run Sunday school. He added that one day when he came from Nairobi, he found John Dwera seated on a stool with a panga claiming the land. **DW1** reported the matter to the chief who asked the parties to avail their documents. That the defendant presented their documents but John was not satisfied. The chief referred the matter to the Divisional Officer who also did not resolve the dispute. According to the witness, the land belongs to the church.
15. In cross-examination, **DW1** said he was not a party during the sale of the suit land. That the pastor working at the church then was George Okumu – deceased. **DW1** said he was working at Burumba Church in 1987. That if there was fraud or threats for Peter to give land, he would have known. In re-examination, **DW1** said that the Land Control Board application was signed by Missionary Sivon on behalf of the defendant. That Peter Dwera was not coerced to give land.
16. Rev. Samuel Gichane Kamau testifying as **DW2** said he is the Chair of the Board of trustees of the defendant and a pastor at Londiani Free Pentecostal Fellowship. He adopted his witness statement dated 14/4/2014 as well as produce the documents in the list dated 14/4/2014 as defence exhibits. **DW2** stated that it is within his knowledge that the defendant purchased the suit property in or about 1987 and paid the full price of Kshs.3,000/=. That the deceased and Free Pentecostal Fellowship jointly made an application to the Land Control board on 1/02/1988. That following the said application, a letter of consent was issued on the same date. It is his evidence that since 1988 the defendant has been in quiet and uninterrupted possession of the land. The witness urged the court to strike out the suit for being incompetent.
17. In cross-examination, **DW2** said they got the title through lawful process. That he became a trustee in the year 2005 and found the title in the office. That there was a document showing Peter was paid Kshs.3000/=. The witness did not file a copy of the transfer form or minutes of the Land Control Board to show Peter appeared before them. That they have church elders for the local church but he did not get to know the elders of Burumba Church in 1987. In re-examination, **DW2** stated that it is the trustees of the church who deal with land issues. That the

transfer form is available at the lands office.

18. Aggrey Onduso testified as **DW3**. He also adopted his witness statement as his evidence in chief. The witness said his name appears in **Dex 6**. That the plaintiff's claim is a lie as he has never been charged before any police/court in respect to this land. That the defendant has a title deed issued to her on 9/3/1988.

19. During cross-examination, **DW3** said he is currently serving at Kisii Free Pentecostal Fellowship Church. That he has never served in Busia. That during purchase of the land, the church was represented by the parties and members of the church. **DW3** said he did not know Richard Opiyo Magendo or about the caution entry No. 4 in **Dex 4**. That the Land Control Board consent application was signed on 1/2/1988 and letter of consent issued on 2/2/1988. That a copy of transfer form is at the head office.

20. Pastor Walter Angienda testified as **DW4**. He is the secretary to the Board of trustees of Free Pentecostal Fellowship Kenya. **DW4** said they managed properties of the defendant. That during purchase, they indicate in the agreement with the owner of the land whether it is paid for or it's a donation. That the suit land No. 2881 was bought from Peter Dwera and there are documents showing how the title deed was processed. That he met the plaintiff in court and also visited the plaintiff's mother before she died. That the plaintiff's mother was a member of their church and she had no problem with the sale of the suit land.

21. **DW4** continued that Mzee Dwera also died without raising any complaints. According to the witness, it is the plaintiff who wants to defraud the church of its land. That the transfer documents in respect of this parcel are all available at Busia lands office. The witness urged the Court to dismiss the suit with costs.

22. **DW4** in cross-examination stated that DW1 was a pastor in Burumba Church before he was transferred in 2015. That the church Board and the local pastor are the ones to initiate the process of identifying land to be bought. That Ojwang found when the process had began. **DW4** said he knew some of the church elders involved but most of them are dead. That the land was bought on 1/2/1987. That he did not have a sale agreement but he had a document where Peter Dwera acknowledged receiving Kshs.3000/=.

23. **DW4** continued further that he met Mzee Dwera in 1988. In re-examination **DW4** stated that he received information last night that Domtilla Omondi (Plaintiff's mother) had just died. That it is her who would have raised complaint but she never did. That anyone challenging their title can get copies of transfer form from the lands office since a title deed cannot be issued without a transfer.

24. The plaintiff filed his written submissions on 20/2/2020 and further/supplementary submission on 16/7/2020. The defendant filed hers on 6th July 2020. In the plaintiff's first submissions, he rehashed the oral evidence adduced by the parties. He went further to quote the provisions of section 3 of the Law of Contract Act 1968 submitting that the church never alluded to having drawn any sale agreement and attested by any witness. That the amount of Kshs.3,000 entered on the application for consent depends on the opinion of the person filling the form and cannot be implied that the said sum was paid. That the application form which he said was not signed by his father cannot replace a sale agreement.

25. According to the plaintiff, the church elders were seeking to force the proprietor to give them the plot by the letter dated 16/5/1987. He also took issue with time taken to request for Land Control Board consent i.e. from 1/2/1987 to 1/2/1988 which is 12 months contrary to the provisions of section 6(1) of the Land Control Act. He cited the case of **Munyororo Vs Murage (1988) KLR 180** which held thus;

"Unfortunately I cannot twist the express terms of a statute under the rule of expediency that the end justifies the means. All that can be said is that the consent to the subdivision and sale having not been granted in time, the consent was void."

And **Githu Vs Katibu (1990) KLR 634** where the Court of Appeal stated thus;

"1. An agreement for the sale of agricultural land is a controlled transaction and thereafter caught by section 6(1) of the Land Control Act (cap 302).

2. Under the provisions of section 9(2) of the Act, such an agreement shall become void unless the Land Control Board for the Land Control Area where the land is situated has given the necessary statutory consent.

3. As there was no application for consent made to the relevant Land Control Board, the respondent had no legal interest capable of registration under the Registration of Titles Act (cap 281)".

26. The plaintiff said that he requested for a copy of the transfer form from the lands office but was never given a copy. That the defendants also failed to exhibit a copy of the same in their list. The plaintiff stated that he has established fraud by providing the Court with a copy of the mutation form which bore Peter Dwera's real signature and which signature varied from that on the application for Land Control Board consent. That the defendant cannot brandish a title deed only when there were serious complaints raised by the plaintiff which required rebuttal from the defence. The plaintiff also denied that the defendant was indeed in possession of the suit plot because the defendant's semi-permanent structure has collapsed due to dereliction. The plaintiff urged that his prayers be granted.

27. The defendant on its part also gave a summary of the pleadings and the evidence as presented. It went further to identify the following issues which it addressed as arising for determination;

1) *Whether the defendant purchased the whole of the suit property known as Bukhayo/Mundika/2881.*

2) *Whether the plaintiff has proved any fraud as pleaded.*

3) *Whether the plaintiff's suit is time barred.*

28. On whether the defendant purchased the suit property, it is submitted that there is documentary proof for the same. That the issue of a void consent raised by the plaintiff is misplaced. The defendant continued that the plaintiff has not proved fraud as pleaded against her. In support of its submissions, the defence cited the provisions of section 25(1) and 26 of the Land Registered Act, 2012 and the cases of **Wrek Motor Enterprises Vs The Commissioner of Lands & 3 others Civil Appeal No. 71 of 1997** and **Ritilal G. Patel Vs Lalji Makanji (1957) E.A 314** which discussed the burden & standard of proof required of fraud.

29. The defendant concluded its submissions that the suit is statutory time barred and restated the provisions of section 7 of Cap 22 thus; **“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person”**.

Lastly the defendant urged the court to hold that their title is indefeasible relying on the often cited case of **Dr. Joseph N.K Arap Ng'ok Vs Justice Moiwo Ole Keiwua & 4 others Nai Civil Appeal 60 of 1997**.

30. The plaintiff filed further submissions in response to the issues raised by the defendants' submissions. He reiterated that no sale agreement was produced as evidence of purchase. That the letter dated 6/5/1984 (TOD-1) clearly shows that the church was swindled by Nyadenge. In response to the sanctity of title, the plaintiff submitted that the process of acquiring title is also important. That the defendant never explained why they did not include a transfer form in their documents to court.

31. On when the plaintiff discovered the fraud, it is submitted that by 1988, the plaintiff was a minor and he only discovered the fraud in 2009. The plaintiff added that the defendant's title should be cancelled for relying on a void letter of consent. He also submitted that the applicable law is section 143 of the Registered Land Act Cap 300 (repealed) not the provisions of the Land Registration Act referred to by the defence. The plaintiff urged the Court to favour him with judgment in terms of the re-amended plaint.

32. I have considered the pleadings, the evidence and the submissions rendered. The one issue raised for determination is **whether or not the defendant acquired land title No. Bukhayo/Mundika/2881 through fraud.**

33. It is a rule of evidence that he who alleges a fact must prove its existence (see sections 107 – 109 of the Evidence Act Cap 80). The standard of proof for fraud is set beyond the standard for ordinary civil suits. The Court of Appeal re-affirmed the standard of proof required in the case of **Ndolo Vs Ndolo (2008) IKLR (G&F) 742** and at page 747 where they stated thus;

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. Mr. Billing who led for the appellant before us contended that the learned Judge did not appreciate upon whom the burden of proof lay and the standard of that burden. We think there is no substance in that contention. While the learned Judge did not specifically direct herself on the question of where the burden lay and the standard of the burden, it is clear to us from the tone of her judgment that she was perfectly alive to these issues for she specifically says in her judgment and we quote her;

Similarly, it is the applicant's case that it was the respondent who forged the document in court to my mind the furthest the applicant can go in these proceedings is to allege and prove to the satisfaction of this court that the deceased did not sign the document in court. The issue of who did it and for what reason and what other step should have been taken in a criminal proceedings are matters which are very serious but not before this court ...”

34. The burden of proof in this instance rested upon the plaintiff to demonstrate and/or prove the particulars of fraud alleged against the defendant. In the re-amended plaint, the particulars of fraud pleaded were;

(a) *Impersonating the deceased.*

(b) *Forging the signature of the deceased.*

(c) *Uttering false consent documents.*

(d) *Interfering with the mutation form.*

35. On the first allegation of impersonation of Peter Dwera, the plaintiff did not clearly state how the defendant or its representatives impersonated his father. The plaintiff stated in his evidence that Peter Dwera- deceased died in 1989 which is one year after the defendant acquired title in its name. It is thus untrue for the plaintiff's proposition that the defendant acquired title to the land after the death of his father. The plaintiff's case is also hinged on forgery stating that the defendant forged the signature of the deceased on the application form for the Land Control Board consent. The plaintiff urged the court to compare the deceased signature on the mutation form (which he said was genuine) and the forged one on the L.C.B application form. On the face of the two documents, both are signed off as **“Dwera”**.

36. I am unable to notice any variation on the two signatures for two reasons. First, because this court does not know the signature of deceased ascertain whether or not both signatures belonged to the deceased. Secondly, this court is not gifted with tools both physical and in training to compare signatures and form an opinion that the questioned signature did not belong to the deceased. The plaintiff was ably represented and so had the opportunity of engaging the services of a handwriting expert.

37. The plaintiff pleaded further that the defendant uttered a false consent document. He was under an obligation to prove that the letter of consent said to have been issued by the Land Control Board on 1/2/1988 was falsely uttered i.e. the same was not issued by the Nambale Land Control Board. No evidence was led on this limb as the plaintiff chose to submit that the letter of consent was null and void because it was issued 12 months from the date of the alleged sale contrary to the provisions of section 6(1) of the Land Control Act.

38. The plaintiff further accused the defendant with interfering with the mutation form. In his evidence, he admitted that the signature on the mutation form dated 18/3/1987 was that of his deceased father. The nature of the alleged interference was not elaborated or the role the defendant played during the preparation and registration of the impugned document. The sum total of the plaintiff's evidence on the particulars of fraud alleged against the defendant thus fails the threshold set in law.

39. In the re-amended plaint, it is pleaded that the deceased sold a portion of his land to the church but caused the said portion to be registered in the name of James Nyadenge to hold in trust for the defendant. That the said Nyadenge conned the defendant of this land forcing some church members to request the deceased for another plot to buy. That the deceased rejected the request for sale and instead gave the defendant permission to build temporarily on the land as they looked for alternative land to buy.

40. The plaintiff never gave the particulars of the land which his father caused to be registered in the name of James Nyadenge in trust for the church. He produced green cards for sub-division numbers L.R 2880, 2881 and 2882. L.R No. 2880 remained in the name of Peter Dwera until he was succeeded by John Odhiambo Dwera. L.R No. 2881 was registered in the name of Peter Dwera before the transfer to the defendant effected in 1988 and L.R Nos 2882 was transferred to Nicodemus Owiti Ogwindi by Peter Dwera on 9/6/1987.

41. There was no evidence led that the deceased owned any land in the neighbourhood of the suit land beside Bukhayo/Mundika/2646 which he subdivided into three inter alia the suit title. The allegation of James Nyadenge holding any land sold by the deceased in trust for the church was therefore corroborated. Instead, the allegation of sale to Nyadenge contradicts the plaintiff's claim that his father never sold any land to the defendant. How can he (the plaintiff) allege that Nyadenge conned the defendant of land they bought from the deceased Peter Dwera but proceed to state that the deceased never sold land to the defendant? Pex1 does not lend any credence either because the evidence from both sides refer to sale taking place in 1987 while this document is dated 1984.

42. Can the transaction be nullified for want of a valid sale agreement and or letter of consent from the Nambale Land Control Board? The plaintiff relied on the provisions of section 143 of Registered Land Act Cap 300 (repealed) which provides:

“143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

43. The defendant on its part pleaded that the claim was time barred as it was brought after 12 years contrary to section 7 of the Limitation of Actions Act. I have weighed both arguments and find that raising the absence of;

(i) *Sale agreement*

(ii) *Transfer form*

(iii) *Valid letter of consent*

To nullify a title that was already issued has been belatedly made.

44. The plaintiff cannot claim to know that the defendant changed ownership in 2009 when in his own statement he recorded at paragraph 15 – 19 that he was aware of the defendant's interest in the land from a long time ago. *Inter alia* paragraph 16 of his statement goes like, **“That my father called me and my brother and enquired from us whether we could ascertain that Nyadenge had indeed conned the church people of their plot of land.”**

§ The suit is brought on behalf of the estate of the late Peter Dwera. If the plaintiff was a minor in 1988, the claim on behalf of the estate still accrued from the date of the impugned transaction and not when the plaintiff acquired the age of majority. The time did not stop running because of the death of Peter Dwera thus from 1988 to the time of filing suit in 2011 is in excess of twenty (20) years. Further, the plaintiff mentioned that the defendant is not in occupation because their *“structure collapsed due to dereliction.”* Natural wear and tear in my opinion does not constitute dispossession, nowonder the plaintiff prayed for an order of eviction and demolition of the structure.

45. The law recognises the rights of a person in possession as stated

in section 143 of RLA supra. The Court of Appeal in the case of ***Mwangi & Another vs. Mwangi, (1986) KLR 328***, held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.

46. Be that as it may, the plaintiff has failed to prove any fraud or mistake on the part of the defendant to warrant cancellation of the defendant's title and or rectification of the register. He did not summon the Land Registrar to produce the parcel file so the Registrar would

corroborate his evidence that no transfer form was availed during the registration of the defendant as the owner thereof. The burden cannot shift on the defendant to prove that the process of acquiring the suit title was flawed.

47. In light of the foregoing analysis I make a finding that the plaintiff has failed to prove his case on a balance of probabilities. Consequently, his case is dismissed with costs to the defendant.

Dated, signed and delivered at BUSIA this 1st day of Oct., 2020.

A. OMOLLO

JUDGE