



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 196 OF 2014**

**JOHN JAMES BARASA.....PLAINTIFF**

**VERSUS**

**1. CHARLES OLOO ODWORI**

**2. PAUL MURUNDU**

**3. WILLIAM SHIKUKU CHAIRO**

**4. JOSEPHAT KARANI ODUORI**

**5. AMBOY ODUORI**

**6. SIMEON CHIBOLE ODUORI.....DEFENDANTS**

**J U D G M E N T**

1. By a plaint dated 23<sup>rd</sup> October 2014, the Plaintiff instituted this suit against the Defendants stating that he is the registered owner of LR No. Samia/Buburi/82 measuring 3.2ha which the Defendants have trespassed and unlawfully settled on. It is pleaded that there has been a land dispute between the Plaintiff and 3<sup>rd</sup> Defendant which decision was adopted at the Chief Magistrate's Court at Busia in CMCC No. 13 of 2012. In this claim, the Plaintiff seeks the following reliefs:

**a. An order of eviction against the Defendants and all those persons claiming through them**

**b. Damages for trespass**

**c. Costs and interest**

2. The Defendants filed their joint Defence on 2<sup>nd</sup> July 2018 wherein they denied that the Plaintiff is the registered proprietor of the suit land. That the registered proprietor thereof is Okochi Mujune. The Defendants aver that the registration of Barasa Obuto as the proprietor that eventually changed to John James Barasa through a purported correction of names reeks of fraud. Further, they denied having trespassed onto the property since their occupation thereof was as of right by virtue of the same being ancestral land which their deceased father and grandfather, Okoch Mujune held in trust for the entire family and clan.

3. The Defendants imputed fraud on the part of the Plaintiff particularized thus:

*i. Causing the registration of land parcel no. Samia/Buburi/82 to be transferred in the names of Abuto Barasa in 1978 and John James Barasa in 1994 unprocedurally.*

*ii. Causing to be presented or presenting forged land transfer documents to the land registrar for registration purposes.*

*iii. Getting registered as proprietor of land parcel Samia/Buburi belonging to a deceased person without succession process having been done with regard to the estate of the late Okochi Mujune.*

4. In consonance with the Plaintiff, the Defendants admitted that there was a suit concerning the suit property at the Chief Magistrate's Court which decision they claimed to be binding on all parties as no appeal was preferred. The Defendants prayed that this suit be dismissed with costs.

5. The hearing commenced on 26<sup>th</sup> June 2018 with two witnesses testifying on behalf of the Plaintiff. PW1, Francisca Awino Mika stated that she was married to the Plaintiff, John James Barasa now deceased and she had obtained a limited grant ad litem to represent his estate in the case. She adopted her own statement as well as the deceased's statement dated 23<sup>rd</sup> October 2014 as her evidence in chief. **PW1** narrated that her husband bought the parcel of land number Samia/Buburi/82 from one Okochi Mujune who had no family. She produced the original title deed and green card as **P.exs 1 and 2**. **PW1** continued that the seller, Okochi had a brother called Opondo Mujune. Both of them are now deceased with the late Okochi having been interred on the suit property.

6. It was PW1's case that the defendants are all related to the late Opondo Mujune who had separated with his wife during his lifetime. That they came back to Opondo's land after he died only to find that it had been sold. They then entered the suit property which had no permanent structure and had only been used for cultivation and occupied it. She continued that the 3<sup>rd</sup> Defendant, William Shikuku was Opondo's brother but was not given any land in the area as he had come with his mother.

7. On cross-examination **PW1** admitted that her husband bought land from Mzee Okochi. She did not remember when the sale transaction occurred but confirmed that it was done while she was married to the deceased. **PW1** stated that her husband, John James Barasa son of Obuto but did not have any document showing the change of name from Barasa Obuto after his baptism. She claimed that they filed this suit as they were not satisfied with the decision of the Land Disputes Tribunal adopted by the Chief Magistrates Court.

8. Clement Oduke, a retired senior chief gave evidence as **PW2**. He confirmed that John James Barasa, Okochi and Opondo Mujune were known to him and adopted his statement filed on 30<sup>th</sup> July 2018 as his evidence in chief. **PW2** averred that Barasa Obuto was the same person as John James Barasa which name was changed after his baptism. That when he started working in 1981, Barasa had already bought the land from Okochi Mujune and was using it.

9. On cross-examination, **PW2** admitted that he did not witness the agreement and that the letter of consent dated 15<sup>th</sup> February 1978 from Hakata Land control board stated that the transfer of the property was by gift. Counsel for the Defendants pointed out discrepancies in the transfer document and the green card that showed consideration as Kshs.4,000 and Kshs.4,500 respectively. He was however adamant that the Defendants are all sons of Opondo Mujune. That the seller, Okochi had no children. **PW2** confirmed that the defendants have been residing on the property for about 20 years. That Barasa tried to evict them during his lifetime and there was a case between the parties at the Land Dispute Tribunal.

10. The Defence case also proceeded with two witnesses. **DW1**, Charles Oloo Oduori adopted his statement filed on 14<sup>th</sup> August 2018 as his evidence in chief and produced documents as per the Defendant's List dated 3<sup>rd</sup> July 2018 as **Dex 1 to 6**. His evidence is that his father Oduori was the son of Opondo. That Okochi had no biological children. He however asserted that Barasa got Okochi's land through fraud as the sale agreement was not produced as proof. That when he asked Barasa for the same he replied that he did not have one. **DW1** admitted that he was aware that Opondo and Okochi each had their parcels of land. He stated that both Okochi & Opondo were buried on the suit land where the Defendants reside.

11. **DW1** stated that he previously lived with his mother in Mumias where she worked but the suit property was their ancestral home. He admitted that one Owidi Aida was a purchaser of a portion of the property. **DW1** was however adamant that Okochi never sold any land and it is still registered in his name.

12. William Shikuku Charo (the 3<sup>rd</sup> Defendant) gave evidence as **DW2**. He adopted his statement dated 18<sup>th</sup> September 2018 stating that the land belonged to Okochi Mujune, not James Barasa. He narrated that he was a witness before the Land Dispute Tribunal whose resultant award was adopted as a Court order. That the late Okochi was disabled and only gave Barasa's father his title deed for safe keeping. Upon Barasa's father's death, he entrusted James Barasa to keep the title for him. **DW2** averred that there was no sale which took place between Okochi and the plaintiff.

13. On cross-examination, **DW2** stated that he was the son of Opondo who sold half of his land but Okochi's parcel was not sold. He reiterated that the transfer documents were forged prompting him to file the case before the Land Disputes Tribunal because Barasa was in possession of the title deed to the suit land. He admitted that he had no evidence that Okochi and Opondo gave their titles to Barasa's father for safekeeping. That he brought his children home to the property owned by Okochi in 1982, on which they have built and reside on to date.

14. The Plaintiff and Defendants filed their rival submissions on the 5<sup>th</sup> and 1<sup>st</sup> of October 2020 respectively. I have considered the same as well as the parties' pleadings, evidence and the applicable law and summarize the issues to be determined as follows:

***i. Whether or not the Defendants are trespassers on the suit land.***

***ii. Whether the suit property was held in trust for the Defendants***

***iii. Whether there the property was fraudulently transferred to the Plaintiff***

***iv. Whether the Plaintiff is entitled to orders sought***

15. Section 109 of the Evidence Act Cap 80 provides as follows:

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.***

16. The Plaintiff claims that he bought the suit land and he proceeded to acquire the title in his name. The Defendants on their part denied

that their late grandfather sold the property. According to DW2, the title to the suit land was given to the plaintiff for safe keeping hence they deemed the plaintiff as holding the title in trust for them. The defendants are not denying occupation of the suit parcel which occupation is without the consent of the registered owner. This plaintiff's claim of illegal occupation is proved and it was now incumbent upon the defendants to make a rebuttal. In rebutting the Plaintiff's claim, the defendants stated the suit parcel is their ancestral home as they derive their ownership from their father who was a brother to the first registered owner of the suit parcel is Okoch – deceased and who both parties are in agreement did not have any children.

17. As was held in the case of *Mumo vs Makau (2002) 1EA 170*, trusts are questions of fact which must be established by way of evidence. In *Elijah Ouko Matagaro & another v Roselyne Dola Ouko & 4 others (2017) eKLR* the court cited the decision in *Richard Nyamemba Auka & 2 Others vs Josephine Motarohi & 2 Others* where Okong'o J held as follows:

*“The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved. ... Customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register....”*

18. The obligation to establish customary trusts rested on the Defendants to discharge. The defendants produced adjudication records (*Dex 2*) showing the suit property was registered in Okochi Mujune's name as the proprietor. The records also show that the deceased before his demise in 1997 had transferred the suit land to the plaintiff in 1978 as shown in the Land Control Board consent and transfer form produced as *Dex 1 & 3*. All these time, the Defendants do not state what use they had put the land to that would advance a trustee relationship between them and the late Okoch to prove that he held the suit title in trust on their behalf.

19. The Supreme Court in the case of *Isack M'Inanga Kieba versus Isaaya Theuri M'Lintari & another [2018] eKLR*, expressed itself as follows on customary land rights: **Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie V. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:**

1. **The land in question was before registration, family, clan or group land.**
2. **The claimant belongs to such family, clan, or group.**
3. **The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
4. **The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**
5. **The claim is directed against the registered proprietor who is a member of the family, clan or group”.**

20. The Defendants herein in my view did not lay a basis why Okoch and not Opondo was registered as the owner of the suit land. PW2 in his written statement recorded that Opondo was the elder brother of Okoch. Therefore, if customs was applicable, it was the common practice among Kenyan communities to have the elder son registered to hold in trust for the younger siblings. No explanation was offered why the roles were reversed in this setting. PW2 and DW2 both admitted that Opondo also had his separate land which he sold after his wife and children left him. This evidence was not contradicted by the defence. Further the 3<sup>rd</sup> defendant told court that he brought his children to stay in the land in 1982 which date if true was after the transfer to the plaintiff. In summary, the defence of customary trust has not been satisfactorily pleaded and or proved.

21. The Defendants also imputed fraud against the Plaintiff in the process in which the title got registered in the plaintiff's name. It is trite law that any allegations of fraud must be particularly pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR 742* wherein the Court stated that:

*“...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...”*

22. The Defendants set out the particulars of fraud in paragraph 4 of the statement of defence. In paragraph 4(i) the defence stated that Obuto Barasa and John James Barasa are two persons. PW1 explained that Barasa Obuto and John James Barasa is one and the same person. That Barasa Obuto acquired new names after his baptism resulting into his application for correction of name which correction was effected in 1994. Counsel for the Defendants attempted to highlight discrepancies in consideration as well as change of the Plaintiff's name which to my mind were miniscule and did not meet the threshold of proof required.

23. The second & third grounds accused the Plaintiff of presenting forged documents for registration. The defendants presented *Dex 1 & 3* signed by Okoch Mujune by way of thumb printing. There was no evidence led that the thumb print of the deceased appearing on the two documents was forged. It remained a mere allegation. The fourth ground was that the Plaintiff acquired title without first taking out letters of administration. The Defendants produced as *Dex 4* a death certificate in respect of Okoch Mujune. On the face of the document, it is indicated that Okoch died on 19<sup>th</sup> Feb 1997 due to jaundice. The Plaintiff was registered as owner of the suit land on 24<sup>th</sup> Feb 1978 and later

did a correction of name on 14<sup>th</sup> July 1994. Both entries were made before the demise of Okochi Mujune hence there was no need to take out succession proceedings. I am also inclined to find that the fraud alleged was not strictly proved.

24. Accordingly, I find that the Plaintiff has proved her case on a balance of probabilities and find that she is entitled to the orders sought. In accordance with section 24 & 25 of the Land Registration Act the Plaintiff is the absolute registered owner of the suit land subject to exceptions stipulated therein for which the Defence has failed to make out a concrete case. Trespass is a tort of strict liability and the defendants knowingly constructed and settled on the land that they were not entitled to.

25. On general damages, in *Nakuru Industries Limited vs S S Mehta & Sons [2016] eKLR* the court observed:

*“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”*

26. The Plaintiff did lead evidence to demonstrate that he/she has been denied use of a portion of the suit land as a result of occupation by the Defendants. Definitely, he has suffered loss to entitle him to an award of damages. Therefore, taking into account the age of this matter and the inflationary trends, I shall make an award on general damages to the plaintiff in the sum of Kenya Shillings Three Hundred Thousand (Kshs.300,000) payable by the defendants jointly and severally.

27. Consequently, judgment is hereby entered in favour of the Plaintiff against the defendants jointly and severally in the following terms:

**i. The defendants are hereby ordered to vacate and deliver vacant possession of land parcel LR No. Samia/Buburi/82 to the plaintiff within four months from the date of delivery of this judgment**

**ii. In default of compliance with (i) above the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendants or any person claiming through them from land parcel LR No. Samia/Buburi/82 upon application.**

**iii. General damages awarded in the sum of Kshs.300,000 payable within 60 days hereof. In default execution to issue.**

**iv. The plaintiff shall have the costs of the suit.**

**Dated and signed at BUSIA this 26<sup>th</sup> day of November 2020.**

**A. OMOLLO**

**JUDGE**