



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC NO. 5 OF 2018**

**FORMERLY KISUMU HCCC NO. 72 OF 2010**

**TERESIA AUMA OWINO.....1<sup>ST</sup> PLAINTIFF**

**MAURICE OMONDI MUGANG’ .....2<sup>ND</sup> PLAINTIFF**

**CAROLINE ADHIAMBO AWINO.....3<sup>RD</sup> PLAINTIFF**

**(All suing as the administrators of the estate of VITALIS OWINO MUGANG’- Deceased)**

**VERSUS**

**JOSHUA O. OCHIENG..... DEFENDANT**

**JUDGMENT**

The Plaintiffs brought this suit vide a plaint dated 4<sup>th</sup> March 2010 seeking judgment against the Defendant for cancellation of the title issued to the Defendant. An order directing the re-restriction of the register with regard to Kisumu/Koru/16 to restore proprietorship back to the Plaintiffs as the administrators of the deceased estate. A permanent injunction restraining the Defendant by himself, his servant or agent from trespassing, entering or carrying out any activity of the said parcel or in any other manner interfering with the suit land aforesaid. Costs of this suit plus interest thereon at court rates.

The Plaintiffs stated that they brought the suit as the administrators of the estate of Vitalis Owino Mugang’ (deceased). The Plaintiffs averred that at all times Vitalis Owino Mugang’ was the owner and registered proprietor of the suit land Kisumu/Koru/16 measuring 6.0 acres. That the deceased was polygamous having married two wives and under Luo Customary rights, the suit parcel was to be divided between the two houses.

The Plaintiffs averred that the deceased divided the parcel into three portions A, B, and C; to which the 1<sup>st</sup> Plaintiff as first wife was allocated Parcel C for and on behalf of her family while Parcel A was allocated to the family of the 2<sup>nd</sup> wife Felista Awino who had predeceased Vitalis Owino Mugang’. That the remaining portion B was to be shared equally. That the internal arrangement was to ensure each household had an ancestral home.

That upon the demise of Vitalis Owino Mugang’ and the unlawful trespass by the Defendant on the parcel, the Plaintiffs discovered that Portion A was sold to the Defendant by the deceased without their knowledge or the knowledge of other beneficiaries of the deceased estate.

The Plaintiffs averred that at the time of the purported transaction, the deceased was sick, a drunkard and not sane for the purposes of contractual transactions. That the Defendant, knowing the condition of the deceased, did not even seek the consent of the other family members knowing that they would not agree to the transaction. That the deceased consent being either not acquired or improperly acquired, the Defendant lacked the proper title and was holding the property fraudulently. That the purported transaction was a nullity having been made in secrecy and with intent to extinguish the Plaintiffs’ right to the said parcel which is their ancestral home.

The Plaintiffs particularised the alleged fraud on the part of the Defendant as – not acquiring any consent from the deceased and/or the administrators of the deceased estate; purporting to transact with the deceased Vitalis Owino Mugang’ knowing very well that the deceased was sick, a drunkard, and not sane for the purposes of contractual transactions; and securing transfer without proper consent from the Land Control Board.

Through his statement of defence filed on 13<sup>th</sup> October 2010, the Defendant’s response was that he gained lawful and open access to the suit

land upon lawful and bona fide purchase for value and that the Plaintiffs were aware of the transaction, present and involved in attesting the sale agreement as witnesses and beneficiaries.

The Defendant averred that the deceased, at the time of sale, was a person of sound mind, well and understood and appreciated the effect and tenor of the transaction. That he was the lawful owner of the suit land on account of the lawful and regular purchase. That the Plaintiffs' claim against him were baseless, unfounded and an abuse of the court process considering the dispute had been resolved by the appropriate Land Dispute Tribunal whose findings were adopted by the court. The Defendant therefore denied that the court had jurisdiction to hear the matter.

### **Plaintiffs' Case**

The 2<sup>nd</sup> Plaintiff testified as PW1. that he knew the Defendant since 2003 and that the Defendant discussed with his father about the sale of land. That when he was admitted in September/October 2003, the two came to him to sign an agreement concerning 2.0 acres of the suit land as witness. That he later learnt there was another agreement concerning 2.5 acres of the suit land. That the copy he signed disappeared. That he did not sign the agreement dated 10<sup>th</sup> February, which was signed by his father and Teresia Auma. That his father died in 2007.

On cross-examination, PW1 stated that he signed an agreement on late September or early October 2003/2004. That he did not have a copy of what he had signed. That his father should have involved them as beneficiaries. PW1 asserted that he was not involved, that he was caused to sign the agreement at Menara Court. That he did not testify at the tribunal but they have appealed at the Provincial Tribunal. PW1 stated that they do not live in portions A, B, C. That he Defendant bought land belonging to his step mother.

The 3<sup>rd</sup> Plaintiff testified as PW2. She stated that she was the daughter to the late second wife of Vitalis Owino Mugang', Felista Awino Owino. That the Defendant bought their land fraudulently as he did the transaction with the first wife's family and ignored the second wife's family. That he was aware because he had come to the second family's house in Nairobi more than once.

PW3 stated that the transfer was done without the consent of the Land Control Board and in the absence of the Plaintiffs or administrators. That she was not sure of her father's involvement and that the Defendant took of her father's drinking.

On cross-examination, PW3 stated that her father forced her physically handicapped brother to sign for the 2 acres agreement. That her mother was not buried on the suit land but in her grandfather's land because her mother had not built a permanent structure on the land. That her father divided the land in 2007 but she did not have evidence of the same.

### **DEFENDANT'S CASE**

The Defendant testified as DW1. He stated that he was introduced to the seller of the land by the DC called Samuel Oburu. That Vitalis sold to him 2.5 acres of the land at Kshs. 180,000/= . That he first paid Kshs. 90,000/= and an agreement signed to that effect witnessed by Joseph Onyango Oliech and Teresia Auma Owino for the seller. That he later paid the balance and a second agreement was signed on 10<sup>th</sup> February 2004, Joseph Onyango Oliech and Teresia Auma Owino witnessing for the seller. That the second agreement confirmed the size to be 2.5 acres.

On cross-examination, DW1 asserted that Vitalis was fine when he sold the land to him, that Vitalis was strong and healthy at the time. That he was not aware of Vitalis' family situation when he met him. That the person who told him that Vitalis was selling land had told him that Vitalis had a wife and children, and that the wife and a son were present when Vitalis was selling the land.

On re-examination, DW1 stated that the seller did not have his reading glasses on when he put his signature on the second agreement, after which he opted to put in his thumbprint.

### **PLAINTIFFS SUBMISSIONS**

Counsel for the Plaintiffs submitted that the deceased having not consented to the transfer, for want of consent of the Land Control Board and letters of consent, the interest of the deceased in the suit parcel had not been terminated.

Counsel submitted that the transfer was effected fraudulently and unlawfully. That, from the records of the sale agreement, it was clear that the deceased did not disclose full facts during the agreement and that the Defendant was not aware the deceased had two wives and children. That it was undisputed that the deceased changed his mind before transfer of the title, and that he did not give his consent to the transfer or for consent of the Land Control Board. That PW1 had testified how he was forced by the Defendant to sign by virtue of his physical disability and dependence on the deceased.

Counsel submitted that the Plaintiffs are dependants of the deceased as per Section 29 of the Law of Succession Act and the sale of the portion of the suit parcel totally disinherited the family of the younger wife. That Vitalis having duly provided for them, the fraudulent transfer of title trying to disinherit the family should be found null and void. Counsel cited the case of ***Elizabeth Kamene Ndolo v George Matata Ndolo [1996] Eklr.***

### **DEFENDANT'S SUBMISSIONS**

Counsel for the Defendant submitted that the suit must fail on account of failure by the Plaintiff to make out a case against the Defendant to the required standard. That the matter was duly heard and determined by the tribunal based on the same complaints by the Plaintiffs. That it was clear that the suit land was bought by the Defendant from the deceased and that he fully paid the purchase price.

## Issues for Determination

### 1. *Import of the decision of the Nyando District Land Dispute Tribunal*

The repealed Land Disputes Tribunal Act provided for the jurisdiction of Land Dispute Tribunals under Section 3 (1) as follows:

“Subject to this Act, all cases of a civil nature involving a dispute as to

- (a) The division of or the determination of boundaries to, land including land held in common;
- (b) A claim to occupy or work land, or,
- (c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.”

The repealed Registered Land Act provided for civil disputes involving land registered under the act under Section 159 as follows:

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in disputes does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of Section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

The Nyando District Land Dispute Tribunal in its decision of 28<sup>th</sup> April 2005 made determinations with respect to the ownership and title to the suit land. Specifically, the Tribunal awarded the land in dispute to the Defendant herein and held that Vitalis Owino Mugang' should process the transfer documents to enable the Defendant obtain a title deed. This decision was clearly out of the scope of the Tribunal's jurisdiction.

As was held by the Court of Appeal in **JOTHAM AMUNAVI -VS- THE CHAIRMAN SABATIA DIVISION LAND DISPUTE TRIBUNAL & ANOTHER, CIVIL APPEAL NO. 256 OF 2002, COURT OF APPEAL SITTING AT KISUMU, (Unreported)**, as cited with approval by Ngenye-Macharia J in **Paul Rono Sang v William Rono Langat [2014] eKLR**, :

“It is clear that the proceedings before the Tribunal related both to title to land and to beneficial interest in suit land. Such a dispute is not, in our view, with the provisions of Section 3 (1) of the Land Disputes Act. By Section 159 of the Registered Land Act such a dispute can only be tried by the High Court or the Resident Magistrate's Court in cases where such latter court has jurisdiction.”

The Court of Appeal in **M'Marete v Republic & 3 others [2004] eKLR** also held:

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

The decision of the Tribunal was therefore null and void and ought not to have been adopted by the Magistrate's Court in Nyando PMC Misc Civil Suit No. 11 of 2017. However, the contribution of the proceedings in that case is that they provide sufficient evidence to indicate that after the signing of the sale agreement, the vendor Vitalis Owino Mugang' had refused to complete the transfer process by going to the Land Control Board and processing transfer documents.

It also emerges from the proceedings of the Tribunal that, after execution of the sale agreements and payment of the purchase price, the Defendant herein was given possession of the suit parcel on which he developed the land and set up a farmhouse.

### 2. *Whether the Defendant obtained a title to the property and whether the title was obtained fraudulently, illegally or unprocedurally*

The Plaintiffs seek orders cancelling the title issued to the Defendant. However, no evidence was adduced by any of the parties to indicate that a title has been issued to the Defendant with respect to the suit parcel. While the onus was on the Plaintiffs to provide this evidence, the Plaintiffs failed to discharge this burden and in fact did not pursue the issue of the alleged issuance of a title to the Defendant in their pleadings or submissions. Section 3(4) of the Evidence Act provides that:

“A fact is not proved when it is neither proved nor disproved.”

Having failed to prove the issuance of a title to the Defendant, there can be no interrogation of whether such issuance was obtained fraudulently, illegally or unprocedurally. The remaining issue for determination is whether the Defendant's possession and occupation of the suit parcel is illegal and therefore necessitates an injunction against the Defendant as prayed for by the Plaintiffs.

3. *Whether the Defendant's possession and occupation of the suit parcel is illegal*

The Plaintiffs have contested the Defendant's claim to the suit parcel on the grounds that the suit parcel had been allocated to the family of the deceased's 2<sup>nd</sup> wife; that consent of Plaintiffs was not sought; and that consent of the Land Control Board had not been obtained, the interest of the deceased has not been obtained. The Defendant has staked his claim on the ground of being a *bona fide* purchaser for value of the parcel, having executed a sale agreement with the deceased and paid the full purchase price for the parcel.

Save for their averments, the Plaintiffs did not table any evidence to demonstrate that the deceased Vitalis Owino Mugang' had allocated the suit land to them into portions A, B, and C and that portion A was allocated to the to the family of the deceased's 2<sup>nd</sup> wife Felista Awino. The Plaintiffs also failed to tender evidence proving that the suit parcel was ancestral land; and that the deceased was of unsound mind when he executed the sale agreement in favour of the Plaintiff. As provided under Section 109 of the Evidence Act, the burden of proving these particular facts lay squarely on the Plaintiffs and they failed to discharge this burden.

Since the deceased was the only registered proprietor of the suit parcel, and there being no overriding interests to impede the sale of the land, the land sale agreements dated 27<sup>th</sup> October 2003 and 10<sup>th</sup> February 2004 were therefore validly executed by the deceased and the Defendant. The Defendant paid the full purchase price to the deceased and commenced possession and occupation of the property, awaiting the completion of the transaction.

When the deceased refused to consent to make an application to the Land Control Board, the Defendant filed a complaint with the Nyando Land Dispute Tribunal which directed the deceased to process the transfer documents to enable the Defendant obtain a title deed. This award was adopted by the Principal Magistrate's Court at Nyando in Misc. Civil Suit No. 11 of 2017. It is unclear whether the deceased processed the necessary documents and whether the Defendant subsequently obtained a title deed as no evidence relating to these issues was tendered by any of the parties.

Regarding the legal status of a sale transaction subject to the Land Control Act in which the purchaser paid the purchase price and taken possession of the property but the consent of the Land Control Board has not been obtained, the Court of Appeal in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** held that:

“As Lord Bridge observed in **Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132**, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.

The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice.”

In the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, the Court of Appeal differently constituted concurred with the **Macharia Mwangi Maina** decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. It held as follows:

“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

In the instant case, the refusal of the deceased to complete the transfer of the property to the Defendant was clearly unconscionable conduct, as he had freely entered into the agreement as the sole registered proprietor, received the full purchase price and gave possession to the Defendant who developed the property and set up a farmhouse thereon. It was not necessary to obtain the consent of the 2<sup>nd</sup> wife's and her family, and the deceased could not renege on the agreement on the ground of failure to obtain such consent. Therefore, even in the event that the consent of the Land Control Board was not obtained, it would be inequitable and unjust to prevent the Defendant from continuing his possession and occupation of the suit parcel on this ground alone in the circumstances of this case. The upshot of the above is that the Plaintiffs have failed to prove their case and the suit ought to be, and is hereby dismissed with costs.

DATED AT KISUMU THIS 10<sup>TH</sup> DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**