



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 137 OF 2014

KEFINA OYOTA ADHIAMBO.....PLAINTIFF

= VERSUS =

ANASTACIAH AUMA OLUOCH.....1ST DEFENDANT

ROSEMARY AKELLO ABUOR.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff – **KEFINA OYOTA ADHIAMBO** – instituted this suit vide the Plaint dated 8th July 2014 seeking relief against the Defendants, - **ANASTACIAH AUMA ALUOCH** - and -**ROSEMARY AKELLO ABUOR** - for fraudulently acquiring her parcel of land known as **LR NO. BUKHAYO/BUGENG'I/7833** measuring approximately 2.6ha, subdividing it and appropriating it to themselves.
2. The Plaintiff has pleaded that at all material times to the suit she was the registered proprietor of the aforementioned suit property which initially belonged to her late husband, **DIDIMU OYOTA AYEJO** and devolved upon her after his demise through the succession process. She further claims that on 14th February 2013, the 1st Defendant unlawfully caused **LR No. BUKHAYO/BUGENG'I/7833** to be subdivided into two portions, **BUKHAYO/BUGENG'I/10349** and **BUKHAYO/BUGENG'I/10350** measuring 1.9ha and 0.6 ha respectively. The 1st Defendant then went ahead and transferred **BUKHAYO/BUGENG'I/10350** to the 2nd Defendant.
3. The particulars of fraud pleaded against the 1st Defendant included *inter alia* acquiring the original **LR No. BUKHAYO/BUGENG'I/7833** into her names without the consent of the Plaintiff and the relevant Land Control Board; forging the application for the land control board and the letter of consent; stealing the original title deed, grabbing the Plaintiff's land without giving consideration for it and taking advantage of the Plaintiff's old age. The particulars of fraud pleaded against the 2nd Defendant largely impute that the 2nd Defendant worked in cohorts with the 1st Defendant to grab the Plaintiff's land which she ought to have known belonged to the Plaintiff; acquiring land parcel **LR NO. BUKHAYO/BUGENG'I/10350** without giving any consideration to the Plaintiff and failing to take notice of the fact that the Plaintiff resides on the said portion.
4. The Plaintiff avers that the 1st and 2nd Defendant's fraudulent actions have rendered her a landless squatter on her own land prone to eviction and prays for orders to the effect that the registers for **LR Nos BUKHAYO/BUGENG'I/10349** and **10350** be cancelled and the original **LR No. BUKHAYO/BUGENG'I/7833** be registered in her name.
5. The 1st and 2nd Defendants entered appearance on 18th July 2014 and filed their Defence on 7th August 2014. They denied the Plaintiff's averments and pleaded that the Plaintiff lawfully subdivided and transferred the purchased portion of the suit property to the 1st Defendant vide the Land control board's consent obtained in 2005. The Defendants stated that he Plaintiff sold her land following her husband's demise, migrated to Buyofu area for 16 years and eventually returned to the suit property. She then requested for a portion of the suit property from the 1st Defendant which was then donated to her by the 1st Defendant out of generosity to reside on which action saved her from destitution.
6. The Defendants further pleaded the defence of Limitation of Actions on the grounds that the Plaintiff was aware of the particulars of the alleged fraud in 2005 hence the Plaintiff's suit is time barred.
7. The parties were heard on 20th September 2017, 20th February 2018 and 3rd July 2018. **ANJELINA NABWIRE** testified on behalf of the Plaintiff on account of the Plaintiff's advanced age authorized by a Power of Attorney. She stated that she is the Plaintiff's daughter and identified the Plaintiff who was present in Court. She stated further that the Plaintiff is the registered owner of the land in dispute, **BUKHAYO/BUGENG'I/7833**. According to PW 1, the Defendants took the Plaintiff's land illegally. She conducted a search on the property and discovered that the 1st Defendant had transferred it to herself and sold a portion of it to the 2nd Defendant. The new numbers of

the subdivided portions were **LR Nos BUKHAYO/BUGENG'I/10349 and 10350. PW 1** then sought assistance from the Lands Registrar who wrote a letter to the 1st Defendant summoning her to the Lands Office to sort out the issue. The Plaintiff, PW 1 and the 1st Defendant met at the said venue as per the summons. The 1st Defendant's version was that the Plaintiff had sold her 8 acres of land at Kshs. 30,000. She then agreed to give the Plaintiff a small portion thereof to be excised upon a survey that was to be conducted. PW 1 and the Plaintiff refuted these claims culminating in this law suit. PW 1 produced the following exhibits in support of the Plaintiff's case:

- a. P. Exh 1 and 2 – Plaintiff and PW 1's ID cards.
- b. P. Exh 3 – Power of Attorney
- c. P. Exh 4 – Green Card for **BUKHAYO/BUGENG'I/7833**
- d. P. Exh 5(a) and (b) – Certificate of Official Search for **B BUKHAYO/BUGENG'I/10349 and 10350.**
- e. P. Exh 6 – Letter by Registrar of Lands dated 6th September 2013
- f. P. Exh 7 – Demand letter from Maloba Advocates to 1st Defendant dated 28th May 2014.

8. PW1 testified that she was born in 1962 and got married in 1978. She lived in the same area when she was married. Her father, **DIDIMO OYOTA** died on 12th November 1989. She asserted that the 1st Defendant did not reside on the suit property when she was growing up and that **BUKHAYO/BUGENG'I/7833** belonged to her mother. PW 1 however admitted that her late father had many parcels of land and sold property to the 1st Defendant and several other people who have since died. She testified further that her mother had sold only one portion of the suit property measuring half an acre and her late brother, **WAFULA OKUKU** also sold a portion.

9. PW1 averred that the portion of land sold to the 1st Defendant's late husband is distinct from the suit property. It is on the upper part of the property measuring about 6 acres with sisal plants demarcating the boundary between it and the suit property situated on the lower side that measures about 8½ acres. It is out of the suit property that ½ an acre was sold off leaving 8 acres. PW1 also explained the Plaintiff's periodic absence from the suit property when she had moved to Buyofu to live with her other daughter, one Wilmina. It was because the Plaintiff was ailing at the time. When she later returned to the suit property PW 1 built her a semi-permanent house on it.

10. The 1st Defendant (DW1) adopted her witness statement dated 19th February 2018 as part of her evidence. She testified that the late Edward Oluoch was her husband. He first bought land in 1961 from the Plaintiff's late husband being **BUKHAYO/ MUNDIKA/286** measuring 7 acres. The parcel bordered a school which wanted to acquire it hence he resorted to buying a second parcel measuring 6½ acres (about 2.6 ha) from the Plaintiff's husband which was a portion of **BUKHAYO/MUNDIKA/287**, registered **BUKHAYO/MUNDIKA/7833**. It was bought in 1971 for a consideration of Kshs.36,000. DW 1 admitted that she did not pay the Plaintiff the consideration of Kshs.300,000 indicated on the green card for the suit property.

11. DW1 further stated that upon her husband's demise, the Plaintiff sold the remaining portion of the latter parcel and moved to Buyofu area. The Plaintiff then returned sometime later and requested her and her late husband for a piece of land to live on temporarily. They agreed to the Plaintiff's request on condition that she facilitates the transfer of the title deed on the second portion of land that they had bought from her to themselves as she had put a caution on it.

12. The 1st Defendant, her late husband, the Plaintiff and her daughter Anjelina Nabwire then went to the Land Control Board at Nambale which approved their application and issued consent. **BUKHAYO/MUNDIKA/7883** was registered in the 1st Defendant's name on instructions from her late husband, Edward Oluoch. DW 1 explained the delay in going to the Land Control Board to effect the transfer in 2005 was due to the Plaintiff's unavailability and her late husband's illness. The Plaintiff later changed tune and lodged a complaint with the Land Registrar who sent them the letter dated 9th September 2013 calling the 1st Defendant to a meeting.

13. DW1 asserted that the first property as well as the suit property were voluntarily sold to them. She admitted that she did not have the sale agreements to prove the same as the transactions were between her late husband and the Plaintiff's. DW1 later had the suit property subdivided into **BUKHAYO/MUNDIKA/10350 and 10349** and transferred **10350** to the 2nd Defendant. Once again, she did not have a copy of the sale agreement pertaining to this transaction. Interestingly, she could not recall the exact amount she sold the portion for. She estimated it at less than Kshs.1,000,000. DW1 contended that the sale and transfer was above board and prayed that the Plaintiff's case be dismissed with costs.

14. CHURCHILL ONYANGO OSODO testified on behalf of the 2nd Defendant as she was ailing and undergoing treatment at MP Shah Hospital, Nairobi. He produced a registered Power of Attorney authorizing him to do so and relied the 2nd Defendant's witness statement filed on 14th March 2017. He opposed the Plaintiff's prayer to have the 2nd Defendant's title for **BUKHAYO/MUNDIKA/10350** cancelled. DW 2 stated further that the 2nd Defendant is the registered owner of **BUKHAYO/MUNDIKA/10350** measuring 0.6ha having purchased it in 2013 at a consideration of Kshs.1,050,000.

15. The 2nd Defendant then applied to the Land Control Board and was issued with a consent for the subdivision and the property was transferred. DW 2 did not avail copies of the consent and transfer documents in Court. He also asserted that stamp duty was paid but did not have receipts for the same. On cross examination, he stated that he did not know **DIDIMO OYOTA** and **EDWARD OLUOCH**. The 1st Defendant is the one who knew the history of the property. He testified further that the 2nd Defendant owns a house on **BUKHAYO/MUNDIKA/10350** and denied that the plaintiff was her neighbour. DW 1 and DW 2 produced the following documents in support of their case:

- a. D. Exh 1 – Letter to Mundika School Committee dated 6th September 2013.
- b. D. Exh 2 - 8 – Green cards for **BUKHAYO/BUGENG'I/286, 287, 4214, 4321, 6952, 6953 and 6954**
- c. D. Exh 9 – Application for Land Control Board Consent
- d. D. Exh 11 – Letter from Ministry of Lands to 1st Defendant dated 9th September 2013
- e. D. Exh 12 – Title deed for **BUKHAYO/BUGENG'I/10349**
- f. D. Exh. 13 - 15 – Green cards for **BUKHAYO/BUGENG'I/7833, 10349 and 10350.**
- g. D. Exh 16 – Demand letter from Maloba Advocates to 1st Defendant dated 28th May 2014.
- h. D. Exh 17 – Response to Demand Letter from Wanyama Advocates
- i. D. Exh 18 (a) and (b) – Power of Attorney and receipt.

16. Parties submitted their final submissions and authorities in support of their positions for consideration by the Court. The Plaintiff's submissions were filed on 26th July 2018 and the Defendants' were filed on 28th September 2018. I have considered the parties' respective pleadings, documents, submissions and authorities.

17. The Plaintiff has based her case on fraud claiming that the 1st and 2nd Defendants obtained the suit property; **BUKHAYO/MUNDIKA/7833** illegally by forging crucial documents relating to its sale, transfer and subdivision. The Plaintiff's counsel has submitted that the aforementioned suit property was a subdivision from the original parcel post - 1st adjudication being **BUKHAYO/MUNDIKA/287** hence parcel no. 286 that belonged to the 1st Defendant was not in issue. Parcel no. 287 was further subdivided into among others parcel no. 4214 which yielded 4321 that yielded 6952 ultimately resulting in the subdivided property **BUKHAYO/MUNDIKA/7833**.

18. I have reviewed the documents on record and confirm the subdivision history summarized by the Plaintiff's counsel. However, the Plaintiff's counsel contends that the suit property could not have possibly been sold by the Plaintiff following the succession process as it was held in trust for two minors, BABY and WAFULA OKUKU and registered as such. However, the original property **BUKHAYO/MUNDIKA/287** was the property upon which the trust was registered and it underwent numerous subdivisions and disposal of the resultant parcels. Question is: How did it undergo such subdivisions yet a trust existed?

19. The Plaintiff's counsel also faulted the Defendants for not producing sale agreements as well as consents from the respective land control boards yet they did produce a consent, D. Exh 9 approved on 3rd November 2009. On the allegation of fraud the Plaintiff's Counsel pointed out the disparity between the 1st Defendant's version of the purchase price, Kshs.36,000 as opposed to the Kshs.300,000 stated in the green card of the suit property. He contends that the transfer was therefore invalid.

20. The Defendant's counsel after rehashing the Defendant's sequence of events submitted that the issue of that the suit property was held in trust for the minors WAFULA and BABY OKUKU hence the Plaintiff had no legal capacity to transact in it was introduced belatedly by the Plaintiff. The same does not appear in her pleadings. Further, they contend that it is inconsequential as the Plaintiff approached the Court of Equity with unclean hands, having subdivided and disposed of several other parcels of land derived from the original parcel No. **BUKHAYO/MUNDIKA/287** in which the trust was registered. The Defendant's counsel questions the selective application of the same only to the suit property. He asserts that the only trust that exists is a constructive trust where the Plaintiff held the suit property in trust for the 1st Defendant before registration by virtue of the oral sale agreement between the late EDWARD OLUOCH and DIDIMO OYOTA.

21. It is trite law that he who alleges must prove. I agree with the Defendant that the standard of proof in cases of fraud is higher than the usual standard of proof on a balance of probabilities in civil cases and lower than that of criminal cases which are to be proved beyond reasonable doubt as prescribed by the decision in *R. G. Patel Vs Lalji Makanji [1957] EA 314* where the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

22. Most of the transactions relating to the suit property as well as other connected properties were conducted by the deceased husbands of the Plaintiff and the 1st Defendants. This could explain the gaps in both the Plaintiff's and 1st Defendant's version of events. As regards the details of the initial sale agreements and connected procedure, there is regrettably not much to go by. The Court is therefore guided by the documents on record.

23. As is required by Order 2 Rule 10 of the Civil Procedure Rules 2010, the Plaintiff particularized allegations of fraud succinctly on the part of both Defendants. They therefore ought to be strictly proved. Among the particulars were acquisition of land without the consent of the Plaintiff and relevant land control board, forging the application to the land control board as well as its resultant consent and stealing the original title deed, grabbing land without consideration and taking advantage of the Plaintiff's old age. The 2nd Defendant is alleged to have worked in cahoots with the 1st Defendant to grab the Plaintiff's land. Have these particulars been proved?

24. The Plaintiff has attempted to shift the burden of proof onto the Defendants by requiring that they “bring a handwriting expert to prove that the mark on the Land Control Board Consent Application belongs to the Plaintiff.” Moreover, the Plaintiff did not enjoin the respective Land Control Board as well as the Lands Registrar being proper and necessary parties to confirm the genuineness or otherwise of the consents and entries in the green cards pertaining to the suit property. It has also not been explained how the Plaintiff parted with the original title documents to the suit property which she claims in her particulars to have been stolen. Regarding the dealings between the 1st and 2nd Defendant to the detriment of the Plaintiff, it is safe to conclude that no collusion was proved. The 2nd Defendant conducted her due diligence and having satisfied herself that the 1st Defendant was the registered proprietor of the property, purchased a portion of it.

25. From the foregoing, it is clear that the Plaintiff is attempting to resile from a valid transaction that she was party to all along. She has failed to demonstrate fraud and her arguments on the issue of trust are not convincing. Overall the defence side comes across as the one telling the truth. The Plaintiff’s case is therefore found lacking in merits and is hereby dismissed. On the issue of costs, I don’t deem it necessary to condemn the Plaintiff to pay costs. The parties herein are neighbours. Each side should bear its own costs.

Dated, signed and delivered at Busia this 27th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

Counsel of Plaintiff: Present

Counsel of 1st and 2nd Defendants: Absent

Court Assistant: Nelson Odame