



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 741 OF 2015 (FORMERLY CIVIL CASE NO. 162 OF 2011)

RISPER APIYO ANDERE.....1ST PLAINTIFF

JAMES OMONDI WANDERE.....2ND PLAINTIFF

JULIUS ONYURO NORMAN WANDERE.....3RD PLAINTIFF

FRANCIS WANYIGO WANDERE.....4TH PLAINTIFF

VERSUS

JOSHUA AYORO OBONYO.....1ST DEFENDANT

JAMES ROBERT OUKO ONYANGO.....2ND DEFENDANT

JUDGEMENT

1. Risper Odiyo Wandere, James Omondi Wandere, Julius Onyuro Norman Wandere and Francis Wanyigo Wandere, the 1st to 4th Plaintiffs respectively, commenced this suit against Joshua Ayoro Obonyo and James Robert Ouko Onyango, the 1st and 2nd Defendants respectively, through their plaint dated 3rd August 2011 and filed in court on the 4th October 2011, seeking for the following:

a) That the title to land parcel Kisumu/Kasule/1436 (2081- 2099) held by the 2nd Defendant be cancelled and the land be registered in the Plaintiffs' names.

b) Costs of the suit be provided for.

c) Any other relief as the court may deem fit and just to grant.

2. Joshua Ayoro Obonyo, the 1st Defendant, opposed the Plaintiffs' suit through his statement of defence dated 3rd May 2012 and filed in court on the 24th September 2013 in which he prays for the Plaintiffs' suit to be dismissed with costs, that the subdivisions from Kisumu/Kasule/1436 by 2nd Defendant be cancelled, and permanent injunction against the Plaintiffs and 2nd Defendant be issued. The 2nd Defendant though duly served through an advertisement in the Daily Nation newspaper of 15th November 2012, did not enter appearance or file defence.

3. That the hearing commenced on the 26th June 2014 when the 2nd Plaintiff testified as PW1. He introduced himself as a son to the 1st Plaintiff, and a brother to the 3rd and 4th Plaintiffs. He testified that the Land Parcel Kisumu/Kasule/1436, which has since been sub-divided into 2081 to 2099, belonged to his late father, Norman Wandere who died in 1995. That his late father had gone to Tanzania in 1956 with his family. That when they returned they settled on the land at Nyalenda. That they built houses using trees they cut from the other land at Tindo, which is the suit land, without anybody raising any complaints. That his late father had inherited the two parcels from his father (grandfather to PW1). That thereafter Norman became sickly for about nine years and died in 1995. That when the Plaintiffs wanted to build on their land at Tindo (suit land) in 2008, they learnt that somebody called Joshua Ayoro, the 1st Defendant, had registered himself as the owner. PW1 testified how they reported to the Chief who summoned the 1st Defendant but there was no settlement. That the said Joshua Ayoro is the 1st Defendant and after failing to get a settlement, the chief referred them to Kisumu Land Disputes Tribunal. That the tribunal ruled in their favour. The 2nd Plaintiff informed the court that their grandfather had given one Nyandeba a small portion of the suit land to use after she was divorced, and that the 1st Defendant took advantage of their absence from the country to register the land in his name during the adjudication in 1978. That during the subsequent hearing of the 12th February 2018, the 1st, 3rd and 4th Plaintiffs adopted the evidence of the

2nd Plaintiff (PW1) before closing their case.

4. The 1st Defendant testified as DW1. He told the court that he had sold land parcel Kisumu/Kasule/1436 to the 2nd Defendant who however did not pay him. He further told the court that the land initially belonged to his father and that it is now in his name. He told the court that he is neither related with the Plaintiffs nor does he share a boundary with them, and therefore does not know why they sued him. During cross-examination, DW1 denied knowing Norman Wandere. He also disputed PW1's claim that his grandfather had given his (DW1) father a parcel of land different from the suit land. DW1 confirmed that he got registered with the suit land while in Tanzania. He conceded that the land initially belonged to Wanyingo, but denied that it had been given to PW1's grandfather. The 1st Defendant called Vincent Ongari Nguya as a witness, who testified as DW2. He told the court that he was born in 1990 and that the suit land belonged to DW1.

5. The following are the issues for determinations;

- a) **Whether Plaintiffs have established that the Defendants got registered with the suit land through fraud and illegally.**
- b) **Whether the Plaintiffs have established that they are entitled to be registered with the suit land.**
- c) **Who pays the costs.**

6. The Court has clearly considered the evidence adduced by the Plaintiffs and the 1st Defendant and come to the following findings;

a) That the dispute over ownership of land parcel Kisumu/Kasule/1436, (2081-2099), between the parties in this suit was first heard by Kisumu East District Land Dispute Tribunal in Case No. 18 of 2010, as confirmed by the certified copy of the proceedings attached to the Plaintiffs' list of documents dated 4th October 2011. That the proceedings contains the testimonies of the four Plaintiffs, which is more or less the same testimony the 2nd Plaintiff gave before this court and was adopted by other Plaintiffs. There is also the testimony of one Naphtali Ogendo Wanyingo born in 1920. He told the court that the land in dispute belonged to Wanyingo Odamba, who was the father-in-law to 1st Plaintiff. That the said Wanyingo divided the suit land into two and gave the portion facing river to his sister, Nyadamba, who is mother to the 1st Defendant, and the upper portion to his son, Norman Wandere, who is the husband and father to the Plaintiffs respectively. The other witness was Johannes Akendo Wanyingo, born in 1927 and he confirmed the evidence given by Naphtali Ogendo Wanyingo. The proceedings also contain the testimony of the 1st Defendant, which is also more or less similar to what he told this court. The 1st Defendant's witness called Petro Achar Nyamugut born in 1933, also testified. He told the court that the land in dispute belonged to the 1st Defendant.

b) That the Kisumu East District Land Disputes Tribunal considered the evidence before it, and awarded the land to the four claimants who are the Plaintiffs herein, in their ruling/order of 8th March 2011. That the award was then adopted in Kisumu Chief Magistrates court in Land Case No. 35 of 2011, and a decree dated 20th May 2011 issued. That when the Plaintiff presented the decree to the Land Registrar for registration, they were advised to file a suit in this court.

c) That the copy of the green card for land parcel Kisumu/Kasule/1436 availed by both the Plaintiffs and 1st Defendant through their lists of documents confirms that the land was first registered on the 14th July 1989, in the name of Joshua Ayoro Obonyo, the 1st Defendant. That it also indicates that the 1st Defendant transferred the land to James R. O. Onyango, the 2nd Defendant, on the 8th May 1990. That the 2nd Defendant, had the title closed on the 15th May 1990, upon being sub-divided into parcels 2081 to 3005. The Plaintiffs' prayer is however for only the Kisumu/Kasule/2081-2099, which are some of the sub-divisions from Kisumu/Kasule/1436. That is what the court discerns from paragraphs 4 and 9 (a) of the plaint dated 3rd August 2011.

d) That Land parcels Kisumu/Kasule/2081 – 2099, that the Plaintiffs have sued over, are reportedly registered with the 2nd Defendant. That is what the Plaintiffs averred in their pleadings. That averment has now been confirmed through some of the certificates of official searches filed by the Plaintiffs on the 14th June 2018, following the court direction of the 2nd May 2018. The certificates of search obtained on the 29th May 2018 for parcels Kisumu/Kasule/2081 to 2096 and 2099 shows that the parcels were all registered in the name of James Robert Ouko Onyango, the 2nd Defendant, on the 15th May 1990, which is the same day the title for Kisumu/Kasule/1436 was closed, as confirmed by the copy of the green card.

e) That the 2nd Defendant, though served through substituted service, (advertisement), did not enter appearance or file defence. That even though the 1st Defendant testified that he is the one who had sold the parcel Kisumu/Kasule/1436, from which more parcels were sub-divided from, to the 2nd Defendant, he was not a legally recognized representative of the 2nd Defendant in this proceedings. That Superior Court decisions like that of the Court of Appeal in **Virjay Morjaria vs Nansingh Darbar & Another [2000] eKLR** have held ***“that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”*** That in the case before the court, the Plaintiffs only pleadings on fraud is at paragraph 4 of the plaint which is as follows;

“4. That sometimes back, and for unknown reasons, the Defendants jointly and or severally fraudulently obtained title deed for parcel No. Kisumu/Kasule/1436 (2081-2099) and illegally started putting up thereon thereby occasioning a case between the Plaintiffs and them which was heard and determined by Land Disputes Tribunal where upon it was ordered that the said title deed held by the second defendant be cancelled forth with and a new one be issued in the name of the Plaintiffs.”

f) That the 1st Defendant responded to the Plaintiffs' claim at paragraph 4 to 12 of the defence dated 3rd May 2012. That paragraph 12 (2) and (3) contains what appears to be a counterclaim against the 2nd Defendant and the Plaintiffs. That however, the receipt No. 5451425 of 24th September 2013, under which the 1st Defendant statement of defence, list of documents and documents were filed, does not have any indication that the counterclaim was paid for. That accordingly, the court finds that the 1st Defendant counterclaim is not properly before the court and further, that there is no evidence that the same was served upon the 2nd Defendant. The 1st Defendant's counterclaim is therefore struck out.

g) That further to (e) above, even though the Plaintiffs did not specifically set out the particulars of fraud attributed to the Defendants in the acquisition of the title for Kisumu/Kasule/1436, from which the parcels the Plaintiffs claim were sub-divided from, the record shows that the 2nd Defendant, who is registered as the proprietor of the said land since 15th May 1990, has not offered any defence. That in his testimony, the 1st Defendant in answer to a question, agreed that the land had been registered in his name during adjudication in his absence, while he was in Tanzania. The evidence tendered by the 2nd Plaintiff, (PW1), was that they were using the land from 1987 when they came from Tanzania with their father who later died in 1995 without any challenge. That when they went to construct on the land in 2008, they learnt the land had been registered with 1st Defendant. That they reported to the chief and later filed a claim with the Tribunal, before coming to this court. That the aunt to the 1st Defendant had settled on a small portion of that land with the permission of their grandfather, and that the rest of the land was given to their father. That the testimony given before this court and the tribunal shows that the interests of the Plaintiffs' family over the suit land were overlooked and not registered during adjudication. The Plaintiffs' family were away in Tanzania. The 1st Defendant did not himself appear to know how he got registered with the land. That the title the 1st Defendant held to Kisumu/Kasule/1436, and the title the 2nd Defendant holds to the same title upon transfer from 1st Defendant, and over the sub-divisions claimed by the Plaintiffs, are under challenge through this suit. That though the Plaintiffs did not particularize the acts of fraud they allege against the Defendants, the court is aware of the Court of Appeal finding in **Munyu Maina vs Hiram Gathiha Maina C.A No. 239 of 2009** in which it was 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. It is this instrument of title that is in challenge 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 including any and all interests which need not be noted on the register.”

h) That the 2nd Defendant did not come to court to defend his title. The 1st Defendant did not avail any sale agreement, transfer document, or Land Control Board Consent under which he sold and transferred the land to the 2nd Defendant. That further, the 1st Defendant did not establish the basis under which he became entitled to be registered with the land during the adjudication process, unlike the Plaintiffs interests that was supported during the tribunal hearing, through witnesses who were there during the process. The tribunal proceeding and award were filed and adopted in Kisumu Chief Magistrates court in Land case No. 35 of 2011, and a decree issued on 20th May 2011. The decree was however not executed and it appears the Plaintiffs filed this suit in an effort to have the tribunal award executed. There is no evidence that the Defendants had challenged or appealed against the Tribunal award.

i) That the two Court of Appeal decisions in **Munyu Maina vs Hiram Gathiha Maina (supra)** was made on 10th December 2013, after the Constitution 2010, while that in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (supra)**, was of 1st December 2000, before the Constitution of Kenya 2010. That as **Article 159 (2) (d) of the Constitution** requires the court to administer justice without undue regard to procedural technicalities, and as the Defendants have not offered evidence to show that they obtained the said titles legally and formally, the court finds their title to Kisumu/Kasule/2081 to 2096 and 2099 has been successfully challenged by the Plaintiffs in accordance with **Section 26 (1) of the Land Registration Act No. 3 of 2012**.

j) That though the Plaintiffs claimed parcels Kisumu/Kasule/2081 to 2099, they did not avail documentary evidence to confirm who is currently registered with the titles for parcels Kisumu/Kasule 2097 and 2098. They have also not prayed for parcels Kisumu/Kasule 3000 to 3006 in their plaint, though they provided their copies of certificates of official searches. The court cannot grant the Plaintiffs the parcels they did not pray for or those whose ownership (registration status) was not confirmed to be in the Defendants names.

7. That flowing from the foregoing, the court finds that the Plaintiffs have proved their case against the Defendants on a balance of probabilities and orders as follows:

a) That the registration of the 2nd Defendant as the proprietor of Kisumu/Kasule/2081 to 2096 and 2099 be and is hereby cancelled.

b) That the Plaintiffs be registered as the proprietors of Land Parcels Kisumu/Kasule/2081 to 2096 and 2099 upon cancellation of the name of the 2nd Defendant as ordered in (a) above.

c) That the Defendants do pay the Plaintiffs the costs of the suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiffs Present

Defendants 1st present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE