



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 127 OF 2015

WANJALA OJIAMBO MUBWEKA 1ST PLAINTIFF

OJIAMBO PETER RODGERS 2ND PLAINTIFF

VERSUS

LEONARD ONGWENI BARASA DEFENDANT

J U D G E M E N T

1. The suit herein was filed by the Plaintiffs – **WANJALA OJIAMBO** and **OJIAMBO PETER RODGERS** – against the Defendant – **LEONARD ONGWENI BARASA** – on 4/11/2015 vide a plaint dated 3/11/2015. The bone of contention is ownership of land parcel No. BUKHAYO/BUGENGI/7919 said to have been fraudulently subdivided by the Defendant into land parcels Nos. BUKHAYO/BUGENGI/9224 and BUKHAYO/BUGENGI/9225 after the death of the Plaintiff's father. According to the Plaintiffs all this was done before any succession was done.

2. Upon discovering what the Defendant had done, the Plaintiffs sued him before the then existing Land Disputes Tribunal of the area. The tribunal largely found in their favour, with the Defendant being allowed to retain only an acre (put at 0.05 Ha). The tribunal's decision was later adopted as a judgment of court on 18/7/2011 vide Busia CMCC No. 65/2011. At or around that time however, the Defendants seems to have sub-divided the original parcel into the parcels aforesated. The Plaintiffs realised that the original parcel had ceased to exist as a legal entity and the decision of the tribunal therefore could not be implemented. The first Plaintiff then filed a suit – CMCC No. 419/2014 – here in Busia seeking, *inter alia*, a subdivision of one of the resultant parcels – BUKHAYO/BUGENGI/9224 – into three entities.

3. But the lower court is said to have expressed its lack of jurisdiction to handle the matter before it and it therefore became necessary to file this suit. The Plaintiffs are seeking the following prayers in the suit:

Prayer (a): Cancellation of title to L.P. BUKHAYO/BUGENGI/9224 and 9225 and a fresh one be issued in favour of the Plaintiffs therefore evicting the Defendant altogether.

Prayer (b): A permanent order of injunction be issued against the Defendant, his servants, and/or employees from entering the freshly registered parcel or in any manner whatsoever dealing with it.

Prayer (c): Costs of this suit and interests at court rates.

4. The Defendant filed his defence on 11/12/2015. He denied the Plaintiffs claim. According to him, no cause of action is disclosed. Further, he pleaded, *inter alia*, that the proceedings at the Land Disputes Tribunal were conducted without jurisdiction and that an appeal is still pending against the decision of the tribunal; that the land was transferred to him legally; that the Plaintiffs have a related suit in both subordinate and superior courts; and that he has been on the land for about 40 years.

5. The Plaintiffs filed a reply to defence on 21/12/2015 in which they generally controverted the defence filed by the Defendant.

6. This court started hearing the matter on 28/9/2016. The Plaintiff testified as PW1. He said, *inter alia*, that he had first taken the Defendant to the area Land Disputes Tribunal because of his illegal occupation of the land. The tribunal's decision was in his favour, with the Defendant being only awarded a small portion – said to be one acre – where his home stood. That small portion is said to be parcel No. BUKHAYO/BUGENGI/9225. The Plaintiffs have no problem allowing the Defendant to retain that portion. But for the other parcel – BUKHAYO/BUGENGI/9224 the Plaintiffs want it to revert back to their family.

7. The 1st Plaintiff was cross-examined by counsel for the Defendant. He said the Defendant is a neighbour at home and he has known him

since 1973. The Defendant is said to have come to the land in year 2009 when it was still one parcel – No. 7919. He expressed his wish to have title to parcel No. 9224 cancelled and reverted to his late father's names.

8. The 2nd Plaintiff testified as PW2. His evidence is generally in accord with that of 1st Plaintiff but it also has some additions. According to this witness, the Defendant's brother had married his sister and when this happened, the Plaintiff's late father gave a portion of land to that brother and allowed him to build there. Then that brother went to live elsewhere and the Defendant came to live there. This bit was given to counter the impression given by the Defendant to the effect that he had purchased the land.

9. In the course of hearing, some exhibits were availed by the Plaintiff's side. They were:

(1) Grant Ad Litem from the probate court here in order to file this suit (PEX No. 1).

(2) Copy of search certificate showing that the land is registered in Defendant's name (PEX No. 2).

(3) Demand letter written to the Defendant before commencement of this suit (PEX No. 3).

10. When the two Plaintiffs testified, they closed their case. Then counsel for the Defendant rose to inform the court that the Defendant wouldn't testify. The defence was therefore closed without any evidence being adduced.

11. After hearing the matter both sides filed written submissions. The Plaintiff's submissions were filed on 28/11/2017. The Plaintiffs gave an overview of the case. He then submitted that this court has jurisdiction to handle the matter. He went on to point out that when the Defendant secretly purported to subdivide land parcel No. 7919 registered in the name of the Plaintiffs' father when that father was already dead, the Defendant was intermeddling with the estate of a deceased person contrary to the applicable succession law. Further, the Plaintiffs made reference to the proceedings at the then existing Land Dispute's Tribunal and said that both sides submitted to its jurisdiction and the decision made by the tribunal was not appealed against. A point was made too that the Defendant did not give evidence. His evidence was therefore said to be **"hanging without anything to support it"**. The court was ultimately asked to make a finding similar to the one made by the Land Dispute's Tribunal.

12. The Defendant's submissions were filed on 16/1/2018. Like the Plaintiffs, the Defendant started with his own version of the overview of the case. He then explained that the Defendant's case is based purely on legal fundamentals and that is why the defence decided not to call evidence.

13. The Defendant further submitted that the Plaintiffs case is predicated on fraud. The Plaintiffs were faulted for not giving the particulars of the alleged fraud and failing to prove it. Further, the Defendant said that mere issuance of title after the previous owner of the land had died does not, in and of itself, suggest fraud. The matter of title, Defendant submitted, is one of process, not a one-off event. The Defendant seemed to infer that in this matter, the process may have started even before the death of the previous owner. He pointed out that the process is not time-bound.

14. The Defendant further submitted that he is the registered owner of land parcel BUKHAYO/BUGENGI/9225 and is therefore entitled in law to all the rights and privileges related to such ownership. Pointed out by the Defendant also were the steps involved in the process of registration of title, starting with Section 108 of the then applicable Registered Land Act (cap 300) which enjoined presentation to the registrar of an instrument in the prescribed form, to Section 109 of the same statute requiring proper execution of the instrument by the transferor, to Section 110 of the same statute again requiring verification of the instrument by witnesses, and finally to Section 20(1) of the Land Control Act (cap 302) mandating the Land Registrar to refuse to accept any transfer in a controlled section where the requisite consent has not been obtained. It was posited that the registrar could not have legally effected transfer of the original parcel of land (parcel No. 7919) without satisfying himself that the consent of the Land Control Board had been obtained.

15. Ultimately, it was submitted that the orders sought are not capable of being granted. And some reasons were given for this, one being that the owner of parcel No. 9225 remains undisclosed, another was that the owner of that same parcel was not demonstrated to have obtained ownership without due process, and yet another that the court needed to be satisfied that ownership of parcels numbers 9224 and 9225 was obtained by fraud.

16. Overall, the cumulative thrust of the Defendant's submissions was that no fraud or other illegality in the manner of acquisition of the original parcel No. 7919 or even the two subsequent subdivisions – parcels No.9224 and 9225 – was demonstrated by the Plaintiff against the Defendant.

17. I have considered the pleadings, evidence, and submissions of both learned counsel. The Plaintiffs case is first and foremost fact-based. It is only secondly a matter of law. Simply put, the Plaintiffs are saying both in their pleadings and evidence that the Defendant took their land from them. And because of this; they sued him first, at the then operational Land Disputes Tribunal, secondly in the subordinate court here, and thirdly in this matter itself. All this is not a matter of law; they are events or occurrences that took place as a matter of fact. When the defendant then fails to avail evidence to counter some of these events factually, he is ignoring or wishing away a very important aspect of the case.

18. But even as the Defendant proposed to raise legal issues only, his submissions nevertheless raised factual points, made some hypothesis or assumptions about them, and proceeded as if they had acquired the force of incontrovertible truth. Some simple illustrations will suffice: The size of the portion the Plaintiffs seems willing to concede to the Defendant; is it 0.5Ha or 0.05Ha? (see page 7 of the Defendant's submissions). This is raised in the submissions to show alleged inconsistencies in the Plaintiffs case. Is this a legal or factual issue? Indeed it is very much a factual issue. Yet it is raised in submissions purportedly espousing only points of law. But even more than this is the fact that had the defendant given evidence and raised it as a point, the Plaintiffs side would have been afforded the opportunity to clarify it through cross-examination. By raising it in this manner, the Plaintiffs were denied that opportunity. Another example can be seen at page 8

of the Defendant's submissions. To the Defendant, paragraph 5 of the Plaintiff shows the plaintiffs admitting that the suit land was once bought by a relative of the Defendant called Ambrose Ogutu. This is obviously an incorrect averment for that paragraph refers to that relative as having bought only one acre whose size is put at 0.05Ha. Again here, had the Defendant given evidence, the position would have been clarified. That opportunity was denied to the plaintiffs.

19. The point I am making here is that failure to give evidence on the part of the defence was a serious omission. The Defendant's counsel did this yet the defence filed and the written statement of the Defendant seemed to raise considerably weighty factual issues that required canvassing by way of evidence. For instance, the Defendant said he purchased the land; that the previous owner actually facilitated its transfer to him; and that he has lived on the land for more than 40 years. These are all factual issues to be proved or dis-proved through evidence. The defence however, while knowing all this; chose not to give evidence.

20. But even the legal response promised by the Defendant did not avail much. For instance, the Defendant's counsel pointed out the legal steps preceding registration of ownership. He then seemed to say that as the Registrar of lands registered the land in Defendant's name, all these steps can be deemed to have been taken. In other words, the court is supposed to accept a presumption that things were done according to law. Now, where issues are raised concerning the legality of the process, the truth of such a presumption is put in question. What would be expected in a situation like that is that the necessary oral and documentary evidence should have been availed to show well that the whole process was above-board and/or legal. You do not feed a court of law with presumptions or assumption where hard and credible evidence is required.

21. As a further illustration, it is clear that the Plaintiffs allege that the Defendant transferred the land to himself after the death of their father and without first taking out letters of administration. The Defendant countered this by submitting that though title was issued after the death of the Plaintiffs' father, issuance of title *per se* would not prove fraud or wrong doing. Issuance of title, the Defendant submitted, comes after a process. And that process itself may have started before the death of the Plaintiff's late father. The argument seems sound until one realises that it is based on assumption or presumption, not demonstrated facts. One is bound to ask: Where is evidence to back an averment like that? Are there no documents to show? Such transactions require witnessing; are there no witnesses?

22. But concerns about the Defendant's legalistic approach do not end there. One needs to bear in mind the legal maxim: *EX FACTIS JUS ORITUR*, meaning that law arises from a fact. One then has to ask: Are the Defendant's legal arguments, alone and devoid of proven facts, enough to dispute the un-rebutted facts raised by the Plaintiff's? And the answer to this seems to be NO to me. It can further be asked: What is the conceptual basis of the defendant's legal argument? Was the Defendant for instance raising an estoppel, or belatedly raising *RES-JUDICATA*, or otherwise invoking the doctrine of limitation of time? What, pray, is the factual foundation of these arguments? And if the aim is to knock out the plaintiffs' case on legal arguments *stricto-sensu*, why wait until the whole case is heard? Couldn't the Defendant move the court with a view to deciding the case in Limine?

23. I agree with the Defendant's counsel when he submits as follows: **"The Defendant on the other hand never offered any evidence to dispute what the Plaintiffs had given. Failure or refusal to testify rendered the defence worthless"**. What we have on the defence side is only pleadings. Pleadings mostly serve to provide the skeletal framework of a given case. The building blocks of each case is evidence. And this is what the defence is lacking. This is the Achille's heel in the defence case.

24. It is for these reasons that I make a finding that the Plaintiff's case is well proved on a balance of probabilities. The case is insufficiently rebutted or controverted.

25. I realise that the Plaintiffs are willing to concede one acre or parcel No. 9225 to the Defendant. The prayers sought however seem to differ from this position. I therefore venture to tamper with some of the prayers:

Prayer (a) is awarded as follows: Title to parcel No. BUKHAYO/BUGENGI/9224 is to be cancelled. There will be no cancellation of title to parcel No. BUKHAYO/BUGENGI/9225.

Prayer (b) this prayer is granted but only in respect of parcel No. 9224.

Prayer (c) this prayer is not granted as prayed. Instead each side should bear its own costs.

Dated, signed and delivered at Busia this 21st day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Absent

2nd Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiffs: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame