



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 84 OF 2015**

**BONFACE ONYANGO OKHAYO..... PLAINTIFF**

**= VERSUS =**

**BEATRICE AYUNGA OJIAMBO.....1<sup>ST</sup> DEFENDANT**

**FABIANAS WANYAMA.....2<sup>ND</sup> DEFENDANT**

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

1. The Plaintiff – **BONFACE ONYANGO OKHAYO** - filed this suit on 18/8/2015 vide a plaint of even date. The suit is against the two Defendants – **BEATRICE AYUNGA OJIAMBO** (1<sup>st</sup> Defendant) and **FABIANAS WANYAMA** (2<sup>nd</sup> Defendant). The dispute between the parties relate to a piece of land once registered as **SAMIA/BUTABONA/1161** and subsequently sub divided into parcels Nos. **SAMIA/BUTABONA/1625** and **SAMIA/BUTABONA/1626**. Parcel no. 1161 was initially owned by one **OKELLO ANYANGO ORITA**, who was the Plaintiff's grandfather and the 1<sup>st</sup> Defendants father. During Okello's lifetime, parcel No. 1161 was transferred to 1<sup>st</sup> Defendant. The bone of contention revolves around this transfer. It was illegal and fraudulent according to the Plaintiff. It was rightful and lawful according to 1<sup>st</sup> Defendant.

2. When ownership of parcel No. 1161 became vested in the 1<sup>st</sup> Defendant, she caused its subdivision into two parcels – parcel No. 1625 and parcel No. 1626. The 1<sup>st</sup> Defendant retained ownership of parcel No. 1625. She sold parcel no. 1626 to the 2<sup>nd</sup> Defendant. According to the Plaintiff that sale was also fraudulent.

3. The 1<sup>st</sup> Defendant was said to be fraudulent because of transferring parcel No.1161 to herself without following due procedure, forging transfer forms, failing to obtain consent from the area Land Control Board, failing to inform other beneficiaries before subdividing the land, and abusing the trust reposed in her by the late Okello Anyango Orita. The 2<sup>nd</sup> Defendant on the other hand was said to be fraudulent in working with 1<sup>st</sup> Defendant to subdivide the land, not obtaining consent of Land Control Board, and failing to involve the Plaintiff or other family members before subdividing the land. The other family members are variously named as Christopher Masina Okhayo, Stephen Otieno Okhayo, Hellen Atieno Okhayo, and Pamela Akinyi Okhayo – all of whom are said to be at risk of being evicted as they have been rendered landless and/or squatters.

4. The Plaintiff prays for the following:

(a) Cancellation of title Nos. **SAMIA/BUTABONA/1625** and **SAMIA/BUTABONA/1626**.

(b) The original title **SAMIA/BUTABONA/1161** be reverted to the names of the late Okello Anyango Orita.

5. The 1<sup>st</sup> Defendant filed her defence on 4/9/2015. Her defence tells a different story. According to her, the late Okello Anyango Orita originally owned a much larger parcel of land which, at the time of adjudication came to comprise land parcels No. **SAMIA/BUTABONA/101** and **SAMIA/BUTABONA/102**. The Plaintiff's father was the late Orita's son. He was gifted parcel No. 102 at the time of adjudication. Orita retained registered ownership of parcel No. 101.

6. The late Orita had three (3) wives – Nakiroya, Nambaja and Nasonga: The mother of the Plaintiff's father was Nakiroya and Nakiroya also had another son – Ouma. Ouma was allegedly given land near some hill while the Plaintiff's father was given parcel No. 102. Orita then subdivided parcel No. 101 into parcel Nos. 1161, 1162 and 1163. Parcel No. 1163 was sold to one **ALUCHO** and parcel No. 1162 was given to **PETER OGUTU** who was Orita's son by Nambaja. The 1<sup>st</sup> Defendant was the daughter of Nasonga and Nasonga had no sons. He decided to give parcel No. 1161 to 1<sup>st</sup> Defendant and transferred it to her.

7. The 1<sup>st</sup> Defendant denied that her ownership of parcel No. 1161 came about in an illegal or unlawful manner or that the subsequent subdivision of the same parcel into parcel No. 1625 and 1626 was fraudulent. She averred that all the people mentioned in the plaint by the Plaintiff were from Nakiroya's house to which the plaintiff's late father belonged.

8. The defence of 2<sup>nd</sup> Defendant was filed on 4/9/2015 and pleaded, *inter alia*, that he is the registered owner of parcel No. 1626, having lawfully bought it from 2<sup>nd</sup> Defendant long after the alleged subdivision of the then existing larger parcel (parcel No. 1161) had taken place. He further pleaded that the land was vacant when he bought it. He went into possession as a bonafide purchaser and is therefore opposed to cancellation of his title. He also mentioned an existing or pending case – CMCC No. 468 of 2014 between himself and four others, Plaintiff included.

9. The court started hearing this matter on 16/10/2017. The Plaintiff testified as PW1 and was the only one to testify. The 1<sup>st</sup> Defendant, he testified, is his aunt as she is a sister (he meant step-sister) to his father who died in the year 2002. The Plaintiff showed a probate and administration grant issued to him in respect of his late father's estate. Using that grant, he filed this case. He further said that his grandfather, who was father to 1<sup>st</sup> Defendant and his late father, owned land parcel No. SAMIA/BUTABONA/101. The grandfather had three (3) wives – AUMA NAKILOYA, NAMANJA OKELLO, and TERESA AGUTU NASONGA.

10. The Plaintiff then availed the green card of the land in dispute (parcel No. 1161) then owned by his grandfather but shown to have been transferred to 1<sup>st</sup> Defendant on 15/2/1995. The grandfather, Plaintiff said, died in the year 2000 and no succession for his estate has yet been done. It is clear from his evidence too that parcel No. 1161 came from subdivision of parcel No. 101. Thereafter, parcel No. 1161 itself was subdivided into parcels Nos. 1625 and 1626. The 1<sup>st</sup> Defendant became owner of parcel No. 1625 while the 2<sup>nd</sup> Defendant became owner of parcel No. 1626.

11. According to the Plaintiff, there was cheating and it is not true that parcel No. 1161 was given to 1<sup>st</sup> Defendant as a gift. He and other family member, he said, have been living on the land and are still living on it and are not aware that it was given to 1<sup>st</sup> Defendant. He said that there is no written agreement showing the transaction.

12. The Plaintiffs further evidence is that land parcel No. 101 was supposed to be subdivided among the three wives of his late grandfather, with his late father being entitled to a portion as a son of one of the wives. But that did not happen. They live on parcel No. 1161 though. And his late father separately owned parcel No. 102. He reiterated that he has neither seen a written agreement gifting the land to 1<sup>st</sup> Defendant nor a consent from Land Control Board endorsing the alleged gifting.

13. The Plaintiff was cross-examined by Juma J.V. for the Defendants. He said he only knew his grandfather owned parcel No. 101 and was not aware that parcel No. 102 was also his land and was gifted to his late father during adjudication. He admitted that his late father had a brother called Ouma but denied that the brother was given his own land near a hill.

14. The court started hearing the defence case on 16/10/2017. Like the Plaintiff, the two Defendants testified and did not call any witnesses. The 1<sup>st</sup> Defendant testified as DW2 and adopted her written statement as evidence. Her written statement is dated 1/9/2015 and is generally similar in substance to her defence. DW2 was cross-examined by M/S Maloba for Plaintiff. She said the land was gifted to her by her late father. They went to Land Control Board and to the land officer together. She admitted selling a portion of the land to 2<sup>nd</sup> Defendant later.

15. The 2<sup>nd</sup> Defendant testified as DW1 and like DW2, adopted his written statement as evidence. The statement is dated 1/9/2015 and is in general accord with his defence. This witness was cross-examined and he reiterated that he bought the land from DW2. He said further that by the time he bought his portion the land was already subdivided.

16. After hearing, both sides filed written submissions. The Plaintiffs submissions were filed on 2/3/2018. The Plaintiff gave a snapshot of his case, outlining the composition of the family of the late Okello Anyango Orita and averring that the late Orita owned parcel No. 1161 which the 1<sup>st</sup> Defendant has subdivided and illegally sold to 2<sup>nd</sup> Defendant. According to the Plaintiff, the late Orita died intestate **“leaving the estate of SAMIA/BUTABONA/1161 which should have undergone succession and all beneficiaries and their shares ascertained”**.

17. The Plaintiff submitted that the Defendants perpetrated fraud and their transactions violated the law. They were faulted for not showing Land Control Board documents. They also did not show sale agreement. The titles the Defendants hold were said to be products of fraud. The court was asked to make a finding that the Plaintiffs' case is proved on a balance of probabilities and the orders sought therefore should be granted.

18. The Defendants submissions were filed on 2/3/2018. An overview of the case was given. He then pointed out that the Plaintiff himself admitted that his grandfather – Okello Onyango Orita – was the father of the 1<sup>st</sup> Defendant. He was also the father of his late father. He owned parcel No. 1161, which is a subdivision of a larger parcel – parcel No. 101 – which he earlier owned. The grandfather had three wives. The Plaintiff's late father was a son to one wife. The grandfather gifted parcels of land to two wives who had sons. The third wife, who was the 1<sup>st</sup> Defendant's mother, was not given any land. But later on, the Plaintiff's grandfather decided to give the land to 1<sup>st</sup> Defendant who is from the third wife or house. The Plaintiff's own father was given parcel No. 102 which was registered directly in his name during or after adjudication. The brother of the Plaintiff's father was given land near the hill.

19. The court was urged to find that there was no fraud.

20. I have considered the pleadings, evidence, and rival submissions. The Plaintiff's case is based on fraud. In his pleadings, the Plaintiff gave particulars of fraud attributed to each Defendant. During trial I expected to be shown well that the 1<sup>st</sup> Defendant fraudulently transferred the disputed land to herself before fraudulently subdividing it and selling a portion to 2<sup>nd</sup> Defendant. I also expected to be shown transfer forms forged by her. The Plaintiff however did not show this. He merely alleged and left the court to infer. The documents he

availed – for example the green card (PEX No.2) – do not show that the 1<sup>st</sup> Defendant transferred the disputed land to herself. They show instead that the land was transferred to her by her late father when that father was still alive.

21. The Plaintiff suggests in his evidence that that couldn't possibly have happened as they were still around and were not involved or informed. I find this reasoning farfetched. The land belonged to the grandfather. At that time, the law allowed him to deal with it as he pleased since he was the absolute proprietor. If he decided to transfer it to the 1<sup>st</sup> Defendant, it was perfectly within his mandate to do so. Nothing in all the evidence availed enables the court to infer that the 1<sup>st</sup> Defendant perpetrated fraud.

22. And it is the same with the fraud alleged against the 2<sup>nd</sup> Defendant. He is said to have worked in cahoots with the 1<sup>st</sup> Defendant to subdivide the disputed land. During trial however, nothing suggesting collusion with 1<sup>st</sup> Defendant or joint effort to subdivide the disputed land was shown. The court was left to make an inference but the evidential material upon which to make such inference was not availed.

23. I note that a lot was said about lack of written agreements and lack of consents of Land Control Board on the part of the Defendants. This much needs to be appreciated and understood: It is the Plaintiff, not the Defendants, to demonstrate lack of such documents. The Plaintiff alleged. He was duty-bound to prove. The Defendants have title to the portions of land the Plaintiff is claiming. The truth of the matter is that when it is shown that the Defendants are the registered owners, there is a rebuttable presumption that due process was followed to obtain the titles.

24. I expected that the Plaintiff would avail evidence from the area Land Control Board that the process was never handled there. It was not enough for the Plaintiff to allege that consents were not obtained and then shift the burden of proof to the Defendants to show there was consent. He needed first to persuade the court that there was no consent by availing evidence to that effect. The court would then have treated the issue of consent as one in which the Defendants could be treated to have special knowledge that only they can avail. Failure to avail the consent would then be construed against the Defendant.

25. But it is not only the Land Control Board that should have been involved by the Plaintiff. The lands office too should have been involved. Normally, before registration of ownership or issuance of title deed, the land office requires that all documents leading to such registration of issuance are availed to it. Such documents are then listed and also put in a parcel file for safe keeping. The Plaintiff would want the court to wish away all this and assume that no such documents were taken to the land's office. This again was wrong on the part of the Plaintiff. He actually needed to avail evidence that no such documents were taken to the lands office.

26. Why do I say all this? I say all this because, as pointed out earlier, the Plaintiff's case is based on fraud. It is trite law that allegations of fraud must be strictly proved. Great caution needs to be exercised while pleading fraud or dishonesty. The pleader needs to be sure that there is sufficient evidence to justify the pleadings (see for example the case of **HON. DR. EVANS KIDERO Vs THE SPEAKER OF NAIROBI CITY COUNTY & Another: Misc. Civil Appl. No. 480/2016, NAIROBI**).

27. And the standard of proof for fraud is not the usual one observed in civil proceedings. In civil matters, the proof is usually on a balance of probabilities. In case of fraud however, it has long been held that the standard of proof is higher than that. For instance, in **RG PATEL Vs LALJI MAKANJI [1957] EA 314**, the court observed, *inter alia*:

**“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”.**

The law is therefore is this: *DOLUM EX INDICIIS PERPICUIS PROBARI CONVENIT*: (fraud should be proved by clear proofs). One would find this same position expressed in cases of **GUDKA Vs DOHIA: CA No. 21 of 1980**, and **RICHARD AKWESERA ONDITI Vs KENYA COMMERCIAL FINANCE CO. LTD CA NO. 329 of 2009**. A much more recent case is **DENIS NOEL MUKHOLO OCHWADA & Another Vs ELIZABETH MURUNGARI NJOROGI & Another: CA No. 298 of 2014, NAIROBI**.

28. When all this is considered, it can be easily understood that it was not enough for the Plaintiff to make mere allegations of fraud against the Defendants as he did and then shift the burden of proof to them. He needed to do more. He failed to do more. He never proved fraud. He only alleged or suggested it. The Defendant were never bound to prove anything. The law is clear: *FACTUM NEGANTIS NULLA PROBATIO* (no proof is incumbent on a person who denies a fact).

29. But even without all this, I need to point out that even if the proof were to be on a mere balance of probabilities, the explanation given by the defence seems to me more persuasive. A clear history was given. I found the Plaintiff being abit evasive as to how his late father came to own parcel No. 102. His submissions simply stated that parcel No. 102 was not part of this case. But the defence is clear that that parcel must feature in the equation of how the late Okello Onyango Orita distributed his parcels of land among his large family. It also seems to me curious that the Plaintiff could not tell what entitlement the house of the late mother of the 1<sup>st</sup> Defendant was given by the late Orita. The late Orita gifted the land to 1<sup>st</sup> Defendant. No written agreement was required. It is enough that he did it himself. He was fair; not unfair. The Plaintiff seems to be motivated by greed, or something close to it.

30. I now come to a totally different issue. It is different because no side raised it. Parcel No. 1161 belonged to the late Okello Onyango Orita. It is trite law that if you want to urge a claim in court concerning the estate of a deceased person, you need to have a probate and administration grant for that estate. The grant the Plaintiff availed (PEX No.1) was for his late father's estate. Parcel No. 1161 didn't belong to that estate. Infact, the Plaintiff's own father, were he alive, would need to have a grant for Orita's estate if he were minded to urge a claim in court. The Plaintiff herein got a limited grant for his late father's estate and wrongly assumed that that grant entitled him to file a claim concerning Orita's estate. The right grant would be that of Orita's estate.

31. The Plaintiff was wrong; plainly wrong. It would have been understandable if his late father was the legal representative of Orita's estate. But that is not the case, the Plaintiff's late father is only said to have owned parcel No. 102. The grant held by the Plaintiff can only

cover that land or any other asset directly owned by his late father. It does not entitle him to go beyond or outside that estate. Parcel No. 1161 is certainly beyond and outside that estate. What all this means is that the Plaintiff lacked *LOCUS* to urge this claim here. His approach to the issue of grant was wrong.

32. The upshot is that the plaintiff's claim must fail. And it fails not only for want of merit but also because it does not meet the requirements of law. The claim is therefore hereby dismissed with costs.

**Dated, signed and delivered at Busia this 7<sup>th</sup> day of May, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

1<sup>st</sup> Defendant: Present

2<sup>nd</sup> Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants: Present

Court Assistant: Nelson Odame