

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELC NO E006 OF 2023

ROBERT **NYAMWEYA**
ONSONGO.....PLAINTIFF

VERSUS

HUNDSO **MASARA** **ONDONGO.....1ST**
DEFENDANT

DISTRICT **LAND** **REGISTRAR** **(NYAMIRA).....2ND**
DEFENDANT

HON **ATTORNEY** **GENERAL.....3RD**
DEFENDANT

JUDGMENT:

The Plaintiff in a Plaint dated 9/5/2023 filed a suit against the 3 Defendants, claiming for the following orders.

1. THAT the Court do enter Judgment against the Defendants jointly and severally for an Order that the 2nd Defendant do cancel the land certificate of land No. CENTRAL KITUTU/ MWOGETO/210 measuring approximately 0.30 Ha registered under the names of Hundson Masara Onsongo, the 1st Defendant, and have the same revert back to the names of the previous registered owner, the Plaintiff herein, for

purposes of proceeding for a succession cause over the Estate of Onsongo Masara - Deceased.

2. Costs of the suit.

It is the Plaintiff's case that the 1st Defendant in 1996 through misrepresentation and/or fraud had the 2nd Defendant transfer Parcel No. CENTAL KITUTU/MWOGETO/210 to himself. The fraud was particularized as:-

- a. No consent was given by his mother /10 children to transfer the land from the late Onsongo Masara to the 1st Defendant.
- b. The late Onsongo Masara had expressed that the land be utilized as " embonga" and that upon his death it be shared between his 2 homes - the home of Teresa Onsongo (now deceased and Bosibori Onsongo (also deceased).
- c. There was no approval by the land control Board and if there was any, it was through fraud/misrepresentation as Consent was never given by Bosibori Onsongo - one of the 2 spouses/ widows of Onsongo Masara.

The Plaintiff also invoked the doctrine of *Res ipsa loquitor*. As a result of the aforesaid misrepresentation/fraud the Plaintiff has suffered loss and damages. The particulars of loss and damage are:

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- a. Destruction of tea branches.
- b. Felled trees.
- c. Damage to the substratum of the subject parcel of land through construction.

On 18/5/2023, the 1st Defendant filed a statement of Defence of even date in which he averred that the suit was statutorily time-barred and also that the Plaintiff lacked locus standi to file the suit. He also denied any fraud/misrepresentation in his acquisition of the Title Deed together with the particulars of fraud/misrepresentation thereof and dismissed the existence of the doctrine of *Res Ipsa Loquitor*, any loss and/or damage to the Plaintiff.

On 15/6/2023, in response to an Application dated 9/5/2023, I granted orders restraining the 1st Defendant from cutting down trees, constructing, selling and/or transferring the parcel of land known as CENTRAL KITUTU/MWOGETO/210 or any part thereof save the picking of tea leaves from the bushes thereon until this suit is heard and determined.

On 3/7/2023 the firm of Ochwangi and Co. Advocates joined the firm of Soire & Company in acting for the 1st Defendant.

On 9/2/2024 the 2nd and 3rd Defendants filed their statement of Defence dated 8/2/2024 in which they denied the contents of the Plaintiff *in toto* and further contended that the Plaintiff has not provided sufficient proof of their claim to ascertain the ownership of the suit property. They further denied the particulars of fraud and/or illegality by any of the Defendants.

They equally denied that the Plaintiff has suffered any loss and/or damage and/or any particulars thereof and that they are wrongly joined in the suit. They are therefore, according to their

Defence, strangers to the contents of the suit. In summary, the 2 Defendants contended that the suit is hopeless, mischievous, unmaintainable, statute - barred and that the reliefs sought are unavailable and therefore the suit, just as the 1st Defendant has sought, should be dismissed with costs.

The Plaintiff took to the witness box on 24/9/2024 and adopted his statement dated 9/5/2023 as his evidence in chief. The statement was to the effect that the 1st Defendant was his brother but the 2 were of different mothers, Bosibori Onsongo and Teresa Onsongo respectively.

The Title Deed in respect of CENTRAL KITUTU/MWOGETU/210 is registered in the name of Hundson since 4/4/1996. Their father died on 5/5/1999 and his mother also followed on 31/12/2011. Before his death, their father had divided his land into 3. CENTRAL KITUTU/MWOGETO/377 given to his mother's house registered in the name of Onsongo Masara on 21/12/1974. CENTRAL KITUTU/MWOGETO/210 was divided into 2 and given to Teresa Onsongo and Bosibori Onsongo to farm until the Plaintiff's father's death then it could be divided into 2.

The first parcel of land was also given to the first house. But the 1st Defendant long before the death of their father in 1999 and through misrepresentation and/or fraud in 1996 moved to the lands office and had CENTRAL KITUTU/MWOGETO/210 transferred to him. This was done without the other family

members' knowledge nor was the consent of the land control board given.

By the time of his death, Onsongo Masara was 95 years old and 92 when the 1st Defendant got Title for parcel No. CENTRAL KITUTU/MWOGETO/210. He was physically and mentally unstable and not in a proper or right sense of mind to transfer the land.

On 4/3/2010 the Plaintiff 's mother placed a caution against the land and planted tea which she has been picking until she died in April, 2022. The 1st Defendant moved to Bosibori side of the suit parcel of land and started felling the eucalyptus trees thereon and also damaging the trees branches as well which matter was reported to the police. He also produced in Court the following documents: -

- a. Death certificate of Onsongo Masara Abraham.
- b. Death certificate of Bosibori Onsongo
- c. Search Certificate of land parcel No. Central Kitutu/Mwogeto/210.
- d. Copy of Title Deed of Central Kitutu/Mwogeto/377 under the names of Onsongo Masara - Deceased.

On cross-examination by Mr. Ochwangi for the Defendants, the Plaintiff said he was aware that the 1st Defendant was taken by his late father to the Land Control Board and that the entire family - 2 houses are all cultivating the land.

On cross-examination by Mr. Wabwire for the state, the Plaintiff said that his father had reported the loss of the Title Deed for

CENTRAL KITUTU/MWOGETO/210 on 8/6/1983 to the police. He said that the Land Registrar was on the wrong.

PW2, Nemuel Makori Nyanginga a retired civil servant and a nephew to the late Onsongo Masara adopted his statement of 26/2/2024. He said that on 10/11/1998 he was the scribe in a meeting held at Onsongo, Masara's home at the 1st wife Bosibori's house attended by the following: -

1. Teresa Onsongo (Deceased)
2. Onsongo Masara (Deceased)
3. Winston Onsongo
4. Wilfred Onsongo
5. Hundson Masara Onsongo (1st Defendant herein)
6. Wilbert Onsongo
7. Robert Nyamweya Onsongo (the Plaintiff herein)
8. Joel Onsongo
9. George Onsongo
10. Chairman of the meeting Bathroba Nyachiro (Deceased)
11. Secretary of the meeting Nemwel Makori Nyangena
12. Timothy Kiage (Deceased)
13. Silvanus Moturi (Deceased)
14. Kabuna Mabati (Deceased)
15. Richari Nyakeri

In the said meeting, a resolution was passed regarding the suit property belonging to mzee Onsongo Masara. In cross-examination by Mr. Ochwangi, the witness admitted that the

minutes did not refer to the land as CENTRAL KITUTU/MWOGETO/210. Both the Plaintiff and the 1st Defendant were present in the meeting. They are his cousins and none of the 2 signed the minutes. The late Onsongo never signed the minutes.

Asked by Mr. Wabwire for the state, Mr. Makori said that he did not know that the 1st Defendant held the Title Deed for the land and while being shown the search of the Title he said that the meeting was held on 10/11/1998 after the 1st Defendant had had the land transferred to him on the 14/6/1996, more than 2 years later.

DW3, Robert Monda Magome a clan-elder of Kenyoro village, relied on his recorded Statement of 29/1/2023. He said he knew the late mzee Onsongo Masara and his 2 wives, Teresa Kerubo and Rebecca Bosibori and that the son is not allowed by Abagusii customs to register the land - Embonga in his name while the mothers are alive.

He said that any Title obtained from the land's office relating to the suit land Embongo must be illegal. Cross-examined by Mr. Ochwangi, Monda Magome said that a son cannot be registered as the owner of a piece of land where there are 2 co-wives and that in the meeting of 16/11/1998, the 1st Defendant never disclosed that he had the Title Deed to the suit land.

When answering a question from Mr. Wabwire for the state, the witness said that both mothers complained about the Title Deed

in 2010 and in re-examination he said that when requested to bring the Title Deed by the family members, the 1st Defendant failed to do so.

Having closed the 1st Plaintiff's case, the 1st Defendant opened the Defendant's case by adopting his statement recorded on 1/3/2024 and also produced the following documents to support his case: -

1. A copy of certificate of death number 118855.
2. A copy of Application for Consent of Land Control Board.
3. A copy of Title Deed in respect of LR No. CENTRAL KITUTU/MWOGETO/210.
4. A copy of farmers card.
5. A copy of the letter dated 29th day of January, 2010.
6. A copy of certificate of official search dated 17th day of April, 2023.
7. Copies of photographs.

He testified that he is the registered proprietor of CENTRAL KITUTU/MWOGETO/210 while the Plaintiff was given the parcel No. CENTRAL KITUTU/MWOGETO/377. He said that his father transferred the suit property to him while he was alive and sound in mind with tea on the land which he has since been picking. He claimed that the eucalyptus trees he cut he had planted them himself.

On cross-examination by Mr. Wabwire for the state, Mr. Masara Onsongo said he obtained the Title Deed to CENTRAL

KITUTU/MWOGETO/210 on 14/6/1996 during the lifetime of his late father after obtaining consent to transfer on 25/4/1996 and paying Stamp Duty and registration fee but that he did not have the receipts for the two in Court. He could also not remember how much he paid for Stamp Duty.

On cross-examination by Mr. Onyancha for the Plaintiff, the 1st Defendant held that he was given this land by his father as a gift and that he did not understand why his father picked on him. Present were his late mother and his brother Wilfred Karaka Onsongo. He never gave his father anything as a thanksgiving or as a consideration for the land.

While answering Questions from the Court, the witness said that he attended the Land Control Board on 25/4/1996. He admitted that members of the other house did not attend the Land Control Board nor were they aware of the gift and that he never informed them until they came to learn on their own in 2010.

Professor Winston Marasi Onsongo, a brother to the 1st Defendant, DW 2 adopted his Statement on 1/3/2024 which is a replica of the 1st Defendant's Statement word for word. In answering Questions from Mr. Onyancha for the Plaintiff, Professor Onsongo said he was never involved in the gifting of L.R No. CENTRAL KITUTU / MWOGETO/210 to his brother since he was away in South Africa and that when he came back later in 1998 to bury his brother, Jackson Momanyi Onsongo, he was never told about the issue of the gift. He later changed and said

that his father in the family meeting confirmed that CENTRAL KITUTU /MWOGETO/210 had been given to the 1st Defendant and that nobody objected to their this and that he was not told the reason for the gift . This was also repeated in re-examination by Mr. Ochwangi.

The very last witness in the case, Mr. Martin Osano, Land Registrar, Nyamira, brought to Court the presentation book and the Green Card from which it is shown that the Register was opened on 13/11/1972 with Onsongo Masara's name on the 1st entry followed by issuance of the Title Deed on 7/1/1995 . Entry No. 3 was the transfer to the 1st Defendant and the issue of the Title Deed to him both on 14/6/1996 - the last entry. He said that he was unable to have the parcel file for the suit land. He was at this stage stood down so that he could look for the parcel file. This was on 9/10/2024 and when he came back on the 23/10/2024 with the parcel file, the only documents he could get from the parcel file were the adjudication register, a search issued on 8/6/1983 and the receipt for the said official search. He also had the Register from the Manga Land Control Board which showed the transfer of the suit land on LCB No. B/9/4/96, the transfer from Onsongo Masara to Hundson Masara Onsongo where the date is 25/4/1996. The Green card likewise shows the land changed hands from the father to the 1st Defendant on 14/6/1996. The Land Registrar says that to him the transfer was normal and that there has never been any complaint over the transaction.

On cross-examination by Mr. Onyancha, the Land Registrar said that it was not indicated that the transfer was by way of a gift and that the Stamp Duty was indicated as Kshs. 16,000/- and that the loss of the Title Deed was indicated to have been 8/6/1983 reported by Onsongo Masara to the O.C.S, Kisii Police Station.

When answering Questions from the Court, the Land Registrar indicated that the parcel file did not contain the consent of the Land Control Board nor did it contain the receipt for Stamp Duty or Registration. These were supposed to be in the parcel file but they were missing. The transfer was conducted in 1996 without the documents, not even the Title Deed. The loss of the Title was never reported to the Lands office and that Mr. Osano only came to know that there was such loss in Court. It was never gazetted.

The first Defendant produced a copy of his late father's Death Certificate serial number 118855 showing that his father died on 8/5/1998 at the age of 93 years. He has also produced a copy of Application for consent of the Land Control Board addressed to the Chairman, Manga Land Control Board. It is dated 20/3/1993. The same is signed by what appears to be by Onsongo Masara as the owner.

I have also looked at Hundson Masara Onsongo's signature in the Replying Affidavit sworn on 18/5/2023 and compared it to the signature of the purchaser in the Application for consent

dated 20/3/1996 and the 2 seem to belong to one and the same person.

The Title Deed copy is not legible at all although the Certificate of Official Search issued on 17/4/2023 indicates that the land, L.R No. CENTRAL KITUTU /MWOGETO/210 was transferred and Title issued to the 1st Defendant on 14/6/1996. No copy of Consent to transfer was produced.

The Land Registrar said the documents produced in Court were given to him by the 1st Defendant i.e. the Green card which the said 1st Defendant was unable to produce himself. In the Parcel file for No. CENTRAL KITUTU /MWOGETO/210 produced by the Land Registrar, Mr. Osano, there was a copy of the presentation book for the period in question. The same is also not clear on the date since the day is missing but it is in June 1996. The Land Registrar could not trace a copy of the Consent to transfer the suit property to the 1st Defendant. Telling the Court that there was a Land Control Board entry in the register showing this transaction is not enough. The 1st Defendant said that he did not have the receipt for Stamp Duty. And he also admitted to the Court that the land was transferred to himself without a Title Deed which had been reported lost. It is incredible that the Land Registrar can transfer a piece of land when there is no Title Deed and after it had been reported misplaced or lost. In such a case, the Land Registrar was legally duty bound to have the Notification of loss of the Title Deed gazetted for the public to be aware and after Notification of the loss within the prescribed

time frame, re-issue a duplicate Title Deed. Among the documents the Plaintiff produced was a Report and official receipt/abstract of the loss of the Title Deed in respect of L.R No. CENTRAL KITUTU /MWOGETO/210 dated 8/6/1983.

The transfer is said to have been applied for vide Application form dated 20/3/1996. When was the Title Deed found if at all? The Land Control Board will ordinarily demand that the Title Deed be presented to it before issuing the Consent. No wonder there was no Consent issued in this transaction. The Land Registrar also issued a new Title Deed to the 1st Defendant without the surrender of the old one. This is of course because the old Title Deed was lost and it had not been found nor the loss gazetted and a duplicate one issued. I do not agree with Mr. Osano that this transaction appeared normal. It was of course not.

The way I understand *Embonga* is that this is the land that a father or head of a family retains for himself after bequeathing the rest to the family as his own and is later shared among his children when he dies. But that does not mean that he cannot as well give it out in his lifetime. But the same has to be done legally.

Secondly, the Land Registrar transferred the land to the 1st Defendant without a Consent to so transfer and even when stood down to get the same, he did not get one from the parcel

file. Accordingly, the transaction was unlawful and the Title Deed must be cancelled under Section 80 of the Land Act as prayed for by the Plaintiff. The same must revert to the name of the Deceased to be held by the Estate of Onsongo Masara pending the distribution of the said Estate.

Judgment dated, signed and delivered at Nyandarua this 18th Day of February 2026.

MUGO KAMAU
JUDGE

In the presence of:

C/A Samson.

Mr. Onyancha for the Plaintiff.

Ms. Nyaata H/B for Mr. Ochwangi for the 1st Defendant.