



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO. 11 of 2017

RAO (Suing as the next of friend of MOO –Minor).....PLAINTIFF

Versus

HENRY OCHOLA AGUMBA.....1ST DEFENDANT

PETER OUMA OOKO.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 6th February,2017 and filed on 7th February,2017, the plaintiff through Sam Onyango and Company Advocates has sued the defendants jointly and severally for;-

- i. Nullification of the sub-division of Plot No. xxx-Kaler Adjudication and subsequent transfer of a portion thereof known as Plot No. xxxx.
- ii. Cost of this suit.
- iii. Interest on (b) above at court rates.

2. Briefly the plaintiff's case as per the plaint is that during adjudication, the original property, plot number xxx Kaler Adjudication section was only registered in the names of the 1st defendant, Henry Ochola Agumba and the minor, MOO each holding half undivided share thereof. That it was an express term of the aforesaid registration that no transaction affecting the original property was to be undertaken without the authority and consideration of the minor's interest. However, the 1st defendant has caused the subdivision of the original property into two (2) portions namely plot numbers xxxx and xxxx Kaler Adjudication section (the suit property) and registered the same in the name of the said minor and the 1st defendant respectively.

3. It is the plaintiff's further claim that on or about 4th August, 2012, the 1st defendant without the consent and or authority of the plaintiff and the minor entered into a sale of the land agreement with the 2nd defendant wherein the 1st defendant fraudulently sold and transferred to the 2nd defendant the suit property. That in the result, the plaintiff has been deprived of his proprietary rights and suffered loss and damage thus precipitating the present suit.

4. On 10th February, 2017 the defendants were duly served as shown in the affidavit of service sworn on 27th March, 2017 by Mr. Aggrey Ongiri Nyausi Mora, a duly licensed court process server. The defendants failed to enter appearance and or file any defence statement after even subsequent service of hearing notices dated 25th January, 2018 and 15th October, 2018. Thus, the hearing of the suit proceeded ex parte on 13th November, 2018 bearing in mind **Articles 50 (1) and 159 (2) (b) of the constitution of Kenya, 2010.**

5. The plaintiff PW1) testified and relied on her statement dated 7th February, 2017. She further relied on her list of documents dated 6th February, 2017 (P Exhibits 1 to 8) which include a search certificate for land parcel number 2271 and the suit property (P Exhibit 5) and letter from land Adjudication officer Migori County dated 18th March, 2014 (P Exhibit 6) in support of her case.

6. On 13th November,2018 and 10th December, 2018, learned counsel for the plaintiff was given an opportunity to file submissions as provided under **Articles 50 (1) and 159 (2) (b) (supra)**. However, no submissions were ever filed by the said counsel.

7. I have thoroughly examined the plaint and the evidence of PW1 herein. I am guided by the decision in **Galaxy Paints Company Limited -vs- Falcon Grounds Limited (2000)2 EA 385** and since the parties did not frame any issues for determination, I am of the considered view that the issues that fall for determination are whether;-

- a) **Registration of the suit property was initially in the name of the minor and the 1st defendant**

b) There was subsequent fraudulent transfer of the suit property to the 2nd defendant by the 1st defendant

c) The reliefs sought in the plaint are available to the plaintiff in the circumstances.

8. On the first issue, the plaintiff stated at paragraphs 5, 6, 7 and 8 of the plaint that the suit property was registered in the name of the minor and the 1st defendant each holding half undivided share of the property. That any transaction affecting the aforesaid suit property was to be undertaken with the authority and consideration of the minor's interest as expressly stated thereof.

9. On 13th November, 2018, the plaintiff (PW1) relied on his statement filed on 7th February, 2018 and list of documents dated 6th February, 2017 (P Exhibit 1 to 8). In the statement, PW1 stated, inter alia:-

“My grievances were considered and later the said parcel was subdivided into two parcels Nos. xxxx and xxxx.

Parcel No xxxx was solely registered in the name of MOO minor by then to secure his and family interest”

10. P Exhibits 4, 5 and 6, among others, fortify the statement of PW1 regarding the fact of registration. P Exhibit 6 reads in part:

“...Plot No.xxx is registered in the names of Henry Ochola Agumba and MOO each holding half undivided share and the later is a minor”

11. I am aware that the demarcation map and the adjudication record are collectively known as adjudication register under **Section 24 of the Land Adjudication Act, 2016 (2012) (Cap 284)**. Quite clearly, the minor held half undivided share of the suit property as per the adjudication register as confirmed by P Exhibit 6 herein.

12. Under **Article 53 (2) of the Constitution of Kenya, 2010**, a child's best interest are of paramount importance in every matter concerning the child. The present matter concerns the child, MOO.

13. The said child has brought this suit through a consent by next friend who is his mother namely ROO. The consent is dated 6th February, 2017 signed on even date.

14. The minor, MOO is entitled to access to justice and fair hearing under **Articles 48 and 50 (1) of Constructions (ibid)**. By P Exhibit 1, I note that **section 30 (1) of the land Adjudication Act 2016 (2012)** was complied with in this matter.

15. Regarding the second issue, the plaintiff alleged fraud on the part of the 1st and 2nd defendants at paragraphs 9 to 11 of the plaint. Fraud is specifically pleaded and the particulars of fraud alleged are set out on the face of the plaint; see **Abiero -vs- The Thabita Finance Company Limited and another (2001) KLR 496**.

16. PW1 testified that she got surprised that the suit property had been transferred and registered in name of the 2nd defendant. Her testimony was uncontroverted by the defendants.

17. It follows that the transfer of the whole of plot No.xxxx of the suit property to the 2nd defendant by the 1st defendant was fraudulent. In **Samwel Kemere-vs-Land Registrar, Kajiado (2015) eKLR**, the Court of Appeal held, inter alia;

“The Appellants' registration arose on account of a transfer arising from an alleged fraudulent purchase.”

18. On the third issue, I take into account P Exhibits 6 and 7 as well as the plaintiff's statement that the fraudulent transaction be reversed to it's original position. **Sections 26(1) and 80(1) of the Land Registration Act, 2016** apply in respect of registered land and are noted , too.

19. In the premises, the plaintiff's claim is unchallenged and solid. This suit has been proved against the defendants jointly and severally on a balance of probabilities.

20. In the upshot, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders (a) and (b) sought in her plaint dated 6th February, 2017.

DELIVERED, SIGNED and DATED in open court at MIGORI this 24th JUNE 2019.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. D. Juma holding brief for Sam Onyango learned counsel for plaintiff.

Court Assistant – Tom Maurice.