



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 111 OF 2015

BEATRICE ANYANGO WANGA.....1ST PLAINTIFF

ANNE ANYANGO OLOO.....2ND PLAINTIFF

VERSUS

RISPA SHIUNDU ONG'ONG'A.....1ST DEFENDANT

MARGARET INDAKHULI ONGONGA.....2ND DEFENDANT

MARGARET WANJIKU GITAU.....3RD DEFENDANT

J U D G E M E N T

1. The Plaintiffs - **BEATRICE ANYANGO WANGA** - and - **ANNE ANYANGO OLOO** - instituted this suit on 5th October 2015 seeking relief against the Defendants, - **RISPA SHIUNDU ONG'ONG'A**, **MARGARET INDAKHULI ONGONGA** and **MARGARET WANJIKU GITAU** - for fraudulently disinherit their late husbands' estates of their ancestral property known as **L. R NO. SOUTH TESO/ANGOROM/1038** measuring approximately 0.25 ha, subdividing it and appropriating it to themselves.

2. The Plaintiffs pleaded that the original suit property **L. R NO. SOUTH TESO/ANGOROM/1038** was registered in the name of the late **ANDREA ONGONGA OLOO** who died on 1st December 1983. Before his demise he had demarcated the property which they deem to be ancestral land; to be shared between his two sons, **JAMES OLOO ONGONGA** and **FRANCIS WANGA ONGONGA** who are also deceased. The Plaintiffs being the widows of the aforementioned brothers have sued in their capacity as their legal representatives.

3. Three witnesses testified on behalf of the Plaintiffs. PW1, the 1st Plaintiff stated that the 1st and 2nd Defendants were their step-mothers in law, being widows of the late Andrea Ongonga Oloo who died on 1st December 1983. He was the registered owner of the suit property which is developed with rental residential houses, commercial premises and family houses constructed thereon. PW 1 asserted that after the late Andrea's demise, succession process was not undertaken but if it had been, their husbands would have been beneficiaries of the suit property as his rightful heirs.

4. PW 1 testified further that they discovered that the suit property had been subdivided into 3 parcels being **LR TESO/ANGOROM/ 4373**, **4374** and **4375** on 6th September 1995. Searches of the properties at the Lands Office revealed that the 3rd Defendant was the registered owner of 4373 and the 2nd Defendant was the registered owner of 4374 and 4375. On further investigation, it was discovered that the Application to the Land Control Board, the resultant Consent and the Mutation forms of various dates in August to September 1995 were signed by and addressed to the late Andrea yet he had been long deceased by then. The consent particularly stated that the late Andrea appeared before the Board on 3rd August 1995. PW 1 asserted that they were disinherited, and that there was no documentation demonstrating how the property was subdivided and transferred from the late Andrea to one Jennifer Adhiambo Ong'ong'a and the 2nd and 3rd Defendants. She takes issue with the manner in which the transfers were irregularly effected.

5. PW 2, the 2nd Plaintiff adopted PW 1's evidence in its entirety. PW 3, **STEPHEN KAMPA**, testified in his capacity as the Land Registrar, Busia County. He confirmed PW 1's assertions; particularly that the register reflected that the original suit property, **SOUTH TESO/ANGOROM/1038** was first registered in the name of **ANDREW ONGONG'A**. The title deed was issued on 17th July 1998. On 6th September 1995, he subdivided it into three and transferred 4373 to **JENNIFER ADHIAMBO ONGONGA**; and 4374 and 4375 to the 1st Defendant. Further, he confirmed that the Application for the Land Control Board's consent to subdivide as well as the mutation forms were signed by **ANDREW ONGONGA** in August 1995. PW 3 admitted that it was possible that the said documents were false. However, he said that he could not tell whether there was fraud involved.

6. The Plaintiffs produced the following documents as evidence in support of their case:

- (i) Limited Grant Ad Litem – 1st Plaintiff – P.Ex 1
- (ii) Limited Grant Ad Litem – 2nd Plaintiff – P. Ex 2
- (iii) Death Certificate of Andrea Ong’ong’a – P. Exh 3
- (iv) Land Register for SOUTH TESO/ANGOROM/1038 – P. Ex 4
- (v) Certificate of Official Search for SOUTH TESO/ANGOROM/4373 - P. Ex 5
- (vi) Certificate of Official Search for SOUTH TESO/ANGOROM/4374 - P. Ex 6
- (vii) Certificate of Official Search for SOUTH TESO/ANGOROM/4375 - P. Ex 7
- (viii) Application for Land Control Board Consent – P. Ex 8
- (ix) Consent – P. Ex 9
- (x) Mutation form – P. Ex 10
- (xi) Land Registers for SOUTH TESO/ANGOROM/4373, 4374 and 4375 – P. Ex 11 (a), (b) and (c).

7. The Defendants denied the Plaintiffs’ claim, with the 1st Defendant pleading that she was the sole owner of the original suit property and the 2nd and 3rd Defendants pleading that they were bona fide purchasers of their portions without notice of any defects in the titles. DW 1, the 1st Defendant stated that she bought the original suit property from one ‘Onyango’ by her sole efforts using proceeds from selling Chang’a. Since she did not have an Identity Card, the land was registered in the name of her late husband, ANDREW ONGONGA. PW 1 stayed on the property with ANDREW and his other wife, JENNIFER ADHIAMBO ONGONGA whom she later gave a portion of her land.

8. DW 1 claimed that the Plaintiffs are not her children, therefore they are not entitled to the property. They were married to the sons of her co-wife who had her own separate portion of land to which they were entitled. Moreover, DW 1 had already sold the land to 5 people hence no claim lay against her. On cross-examination DW 1 admitted that the late Andrew died on 1st December 1983, the original suit property was transferred to her name but she couldn’t remember when exactly. She claimed that succession was done but again could not remember the case number nor did she produce any evidence as proof of the same.

9. The 2nd Defendant testified as DW 2. She stated that she was a co-wife to DW 1 and that succession was done by DW 1. DW 1 sold her **SOUTH TESO/ANGOROM/4374** and **4375** for **Kshs.9 million** on 26th August 2013. She asserted that she bought the plots legally and that **SOUTH TESO/ANGOROM/4374** no longer existed as it had been subdivided into two plots; **10509** and another whose number she could not recall. DW 2 however admitted that she did not know the number of the original suit property that gave rise to her plots nor did she know how they were transferred to DW 1. Her transfer documents were lost but she paid stamp duty for both plots. DW 2 stated further that the original suit property belonged to DW 1 and JENNIFER ADHIAMBO. She used to collect rent therefrom and the 2nd Plaintiff illegally collected rent therefrom which practice she put a stop to.

10. The 3rd Defendant testified as DW 3. Like DW 2, she claimed to have been an innocent purchaser of **SOUTH TESO/ANGOROM/4373** for value without notice of any defect in its title. DW 3 testified that she purchased the property on 9th January 1996 from her neighbour, **JENNIFER ADHIAMBO ONGONGA** who had acquired it on 6th September 1995. She admitted that she knew **SOUTH TESO/ANGOROM/4373** was a resultant subdivision of **SOUTH TESO/ANGOROM/1038**. DW 3’s observations on the Plaintiff’s version of events when confronted with the mutation form of the original suit property (P. Exh 10) as well as the Death Certificate of the late **ANDREA ONGONGA** (P. Exh 3); were that she could not tell whether the Deceased could have signed documents on 1995 after his demise in 1983. She insisted that she conducted her due diligence before purchasing her portion and there was nobody living thereon at the time. She did not know the 1st and 2nd Plaintiffs. DW 3 stated further that she subdivided **SOUTH TESO/ANGOROM/4373** into two, sold one parcel and remained on the other being **SOUTH TESO/ANGOROM/5983**.

11. The Defendants produced the following exhibits in support of their case:

- (i) Title deed copy for **SOUTH TESO/ANGOROM/4375** – D. Ex 2
- (ii) Title deed copy for **SOUTH TESO/ANGOROM/5983** – D. Ex 3
- (iii) Sale Agreement for **SOUTH TESO/ANGOROM/4373** – D. Ex 4
- (iv) Green card for **SOUTH TESO/ANGOROM/4373** – D. Ex 5

12. The Plaintiffs filed their final submissions on 28th September 2018. While mostly rehashing their version as per their pleadings and

testimony, the Plaintiffs relied on Sections 24 and 26 of the Land Registration Act cap 300. Section 24 thereof confers absolute ownership of land on its registered owner while section 26 provides that a Certificate of Title is prima facie evidence of proprietorship rebuttable on grounds of fraud, misrepresentation or its illegal or unprocedural acquisition.

13. The Defendants' submissions were largely similar. They all surmised their side as per their pleadings and testimony. The 1st and 2nd Defendants' submissions were filed on 23rd October 2018 while the 3rd Defendant's were filed on 19th October 2018. The 1st and 3rd Defendants mentioned that the suit was res judicata and time barred respectively. However, these issues were not raised at the main hearing. It is improper to argue them by way of submissions. Counsels for the 2nd and 3rd Defendants reiterated that the 2nd and 3rd Defendants were bona fide purchasers for value.

14. I have considered the pleadings, oral and documentary evidence availed, and the written submissions on record. The Plaintiffs' case is essentially founded on the right of inheritance which the Defendants fraudulently and unlawfully allegedly conspired to defeat. The 1st Defendant's defence is based on an alleged right of ownership arising from the fact of purchase of the original parcel of land by her using proceeds from sale of chang'a when her late husband – ANDREA ONGONGA OLOO – was still alive. The 2nd and 3rd Defendants on the other hand premised their defences on the fact of bonafide purchase without notice or knowledge of the defect of title.

15. It is trite law that he who alleges must avail proof. The standard of proof in cases of fraud is higher than the usual standard of proof on a balance of probabilities in civil cases and lower than in criminal case, which is usually beyond reasonable doubt. The standard was set long ago in **R.G. PATEL Vs LALJI MAKANJI [1957] EA 314** where the court expressed itself thus:

“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”.

16. The fraud pleaded by the Plaintiffs was attributed to all the Defendants. But there is an apparent disconnect between that position and the evidence availed, with the evidence placing 1st Defendant at the centre of the alleged fraud while the involvement of the 2nd and 3rd Defendant remained hazy or non-existent. Both oral and documentary evidence seem to place transactions by 1st Defendant in or around 1995, with her late husband, who was the original owner, seemingly participating in the transactions. There seems to be obvious fraud attending the transactions. By credible evidence, the 1st Defendant's husband was said to have died in 1983.

17. The 2nd Defendant is not shown to have been part of these transactions. She got her parcels of land from 1st Defendant sometimes in the year 2013. When the Plaintiffs therefore put her together with 1st Defendant on the issue of fraud, clear evidence needed to be availed to demonstrate her participation and/or involvement. The same case applies to the 3rd Defendant. She is shown to have got her land from one Jennifer Adhiambo Ong'ong'a, who was evidently a co-wife to 1st Defendant. Jennifer is deceased. She is shown to have transferred the land to 3rd Defendant in 1996.

18. Strong evidence is required to prove fraud. Mere insinuations or weak inferences will not do. The party pleading fraud should exercise caution. He needs to be certain that there is sufficient evidence to justify the allegations (**see Hon. Dr. Evans Kidero Vs The Speaker of Nairobi City County & Another: Misc Civil Appl. No. 480/2016, NAIROBI**).

19. Ultimately, the clear position that emerges in this case is that while fraud can be attributed to 1st Defendant, that same position cannot be said to hold against 2nd and 3rd Respondents. These two Defendants took the position that they are innocent purchasers for value without notice of defect of title. The Plaintiffs were not able to displace this position.

20. Section 80(1) and (2) is instructive as to what the court should do. It provides as follows:

“80(1) Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The Register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for value consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission fraud, or mistake or substantially contributed to it by any act, neglect or default.

21. The Plaintiffs were duty-bound to show that the 2nd and 3rd Defendants were part of the fraud. Section 80(2) (supra) protects the 2nd and 3rd Defendants unless the Plaintiffs can show that they **“had knowledge”** and/or **“caused”** and/or **“substantially contributed”** to the fraud. The Plaintiffs did not show that and have therefore not displaced the 2nd and 3rd Defendants position.

22. Are the Plaintiffs then to be left without recourse to justice? If the Plaintiffs sufficiently demonstrate entitlement to the original parcel of land, it seems to me that their concerns are covered by Section 81(1) of the Land Registration Act, 2012, which provides as follows:

“81(1) Subject to the provisions of this Act and of any written law relating to Limitation of actions, any person suffering damage by reason of -

(a) Any rectification of the register under this ACT; or

(b) Any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under

this ACT, shall be entitled to indemnity”.

23. It appears to me that in the circumstances of this case, the Plaintiffs can only seek to be indemnified by the state or seek compensation from the 1st Defendant. But even that is subject to sufficient proof of entitlement to the land. I say this because the Plaintiffs may be victims of the often shameless and despicable practices that take place at the Ministry of Lands leading to loss or unlawful change of ownership of land.

24. In this country, we have embraced the Torrens Land Registration System. The philosophy behind the system embodies three principles, namely, the mirror principle of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with land, or search behind the title depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as a result of an inaccuracy.

25. The basic assumption under the Torrens Registration System is that the place of registration will be managed or run by people who are not only accomplished professionals but also possessed of good conscience, absolute honesty, and high integrity. Fraud would obviously not flourish in such a place. But this is the ideal, rather than the reality. Some of our land offices are obviously habitats of sleaze and other vices. The people running them are triple satanic and care nothing about good and/or honest service.

26. Apart from the fact that the Plaintiffs have not proved fraud against the 2nd and 3rd Defendants, I am also constrained to observe that some foundational aspects of the Plaintiffs' case as filed are also wanting. A look at the records shows rather clearly that the 2nd and 3rd Defendants have already subdivided and even sold some portions of their land. There seems to be other players on the ground. It was a serious error of judgement for the Plaintiffs to overlook this. And this is so because such people cannot be condemned unheard. No court will rush to issue orders when information like that is brought to its knowledge. The other people on the ground needed to be enjoined in the suit so that they can also have their day in court. The omission to include them weighs heavily against granting any orders that would upset the Status Quo.

27. The upshot, in light of all this, is that the Plaintiffs' case is not proved to the standard required for proof of fraud and I hereby dismiss it. On the issue of costs, this matter revolves around family issues. It is abit delicate. I order that each side should bear its own costs.

Dated, signed and delivered at Busia this 30th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Absent

2nd Plaintiff: Absent

1st Defendant: Present

2nd Defendant: Present

3rd Defendant: Absent

Counsel of Plaintiffs: Present

Counsel of the 2nd Defendant: Absent

Counsel of the 3rd Defendant: Absent