



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 27 OF 2016

PETER CHEGE.....1ST PLAINTIFF

MONICA NYAMBURA.....2ND PLAINTIFF

VERSUS

ADIT OGOT AMBROSE

AMIN OGOT

OPUNDA OGOT

DEMTILLA ADET OGOT.....DEFENDANTS

JUDGEMENT

1. The Plaintiff's herein - **PETER CHEGE** and **MONICA NYAMBURA** - instituted this suit against the Defendants - **ADIT OGOT AMBROSE, AMIN OGOT, OPUNDA AGOT** and **DOMTILLA ADET OGOT** - vide the Plaint dated and filed on 30th March 2016. The Plaintiffs sued the Defendants for illegally using and erecting structures on their piece of land known as LR NO BUKHAYO/MUNDIKA/2681 and they seek an injunction against them barring them from interfering with the suit property as well as an eviction order.

2. The Defendants filed their joint Defence and Counterclaim on 22nd May 2017. They pleaded that the suit property did not belong to the Plaintiffs but was ancestral land and if at all the Plaintiffs had title documents the same were unlawfully and irregularly obtained. They prayed for the cancellation of the Plaintiffs' title to the suit property as well as costs.

3. This case has been the subject of numerous interlocutory applications seeking to preserve the status quo with both parties staking their claim on the suit property. The 2nd and 3rd defendants were deceased when the suit was filed and the 4th Defendant passed on during the pendency of the case. Consequently the case against the three was withdrawn. Parties were heard on various dates from 20th March 2018. PW1, the 1st Plaintiff testified that he and his wife are co-owners of the land parcel known as BUKHAYO/MUNDIKA/2681 which they purchased from one FLORENCE AKINYI OHITO who required the funds for a property she was developing in Bondo. He claims that they conducted their due diligence by conducting an official search at the Lands Registry and physically inspecting it. It was in the name of the said Florence without any cautions or restrictions on the title and had no structures erected upon it save for a boundary. They took vacant possession of the property and were not informed of any civil case pertaining to it. PW2 is the 2nd Plaintiff. She is also PW1's wife. She adopted the evidence of PW1 as her own.

4. **RICHARD ODUOR** testified as PW 3. He stated that the initial registered proprietor of the suit property was his father and that the 1st Defendant is his cousin. The 2nd and 3rd Defendants are children of the 1st Defendant. He testified that the suit property did not initially belong to the 1st Defendant's father as alleged. The ancestral property was in Bondo, Alego and that was where his grandfather was buried. The suit property belonged to his father who owned BUKHAYO/MUNDIKA/2301 and subdivided it into BUKHAYO/MUNDIKA/2681, 2682 and 2683. He then transferred BUKHAYO/MUNDIKA/2681 to PW 3 who later sold it in 2003 to offset his late brother's burial expenses. The land changed ownership twice thereafter. He sold it to one ALFRED OPIYO who sold it to FLORENCE AKINYI OHITO who then sold it to the Plaintiffs. At all material times the Defendants resided on the property adjacent to the suit property. However, PW 3 could not explain the reason for the delay on his registration as proprietor in 2007 yet his father died in the year 2000. He attributed it to a delay at the Lands Office. The Plaintiffs produced the following exhibits in support of their case:

5. DW1, the 1st Defendant testified that the suit property was originally registered in the name of his late father, MICHAEL ONYANGO ADIT who was married to his mother, DOMTILA ACHIENG ADIT OGOT named herein as the 4th Defendant. The late Michael Onyango died in 2000. PW 3 claimed that the deceased never sold land to anybody and succession proceedings were not undertaken to legally distribute his property. He asserted that four family members were buried on the suit property which fact the Plaintiffs should have confirmed physically. However, the late MICHAEL ONYANGO is not buried therein as he was interred at his 1st wife's home in Siaya County.

6. DW1 testified further that PW 3 is his step brother and that he claims entitlement to the property through the late MICHAEL ONYANGO ADIT. He however admitted that he did not have a grant to counter claim on behalf of the deceased's estate. He could not explain how the property was registered in PW3's name and was adamant that the whole process upto the Plaintiffs obtaining the title deed to the property was fraudulent and irregular. He admitted that he never sued the Plaintiffs' predecessors in title; ALFRED OKETCH OPIYO and FLORENCE AKINYI OHITO. DW 1 stated that he does not reside on the suit property but he cut trees therefrom and used them for construction. He admitted to preventing the Plaintiffs from constructing on the property.

7. DW1 was not clear on the situation on the ground regarding the suit property. He initially said that his son CHARLES ONYANGO lives on the suit property and his late mother DOMTILA lived and was buried on it upon her demise. He then admitted that his mother was buried on the property adjacent to it. The Court can only conclude that he was not sure of the identity of the property upon which his mother was buried.

8. The Plaintiffs' final submissions were filed on 26th November 2018. Counsel for the Plaintiffs after briefly rehashing the facts of their case relied on Sections 24(a) and Section 30(3) of the Land Registration Act to the effect that the Plaintiffs as registered owners of the suit property had absolute ownership of the land and the Certificate of Title in their name is prima facie evidence of its validity as reflected in the Register. According to Counsel, no contrary evidence was tendered to challenge the title nor was any overriding interest at the behest of the Defendants established. It was further submitted that the 1st Defendant's counterclaim was instituted by a party who lacked capacity to do so. DW1 admitted to be claiming the suit property on behalf of the late MICHAEL ONYANGO ADIT yet he was not the legal administrator of the deceased's estate nor did he obtain a limited grant ad litem for the same.

9. The Defendant's submissions were filed on 11th December 2018. Counsel for the Defendant only raised the issue of the 7 year delay in obtaining of title to the suit property by PW3; aside from recounting a very brief summary of DW1's version of events. He insisted that the Plaintiffs' did not acquire good title to the property as the land was transferred to PW3 without being subjected to succession proceedings.

10. I have read the parties' pleadings, submissions and the applicable law. It is trite law that he who alleges must prove in accordance with section 107 of the Evidence Act. The Plaintiffs have sought redress against the 1st Defendant from interfering with the suit property of which they are registered owners. They have adduced evidence in terms of Official searches and the Title Deed to the suit property that reflects the same vesting in them absolute ownership of the property to the exclusion of all. The 1st Defendant on the other hand has counterclaimed for the cancellation of the title. He however has not adduced any evidence to challenge its validity. Moreover, his testimony was full of inconsistencies and contradictions as to his relationship with PW 3, his late mothers' burial place and his link or entitlement to the suit property. By saying his mother was buried on 2681 which is the adjacent property he further complicated the otherwise simple issue of the identity of the suit property. On entitlement, he says he resides in Burumba and has a title to his property. What claim does he therefore have on the suit property?

11. I agree with the Plaintiffs that section 28 and 30 of the Land Registration Act is in their favour regarding their ownership of the suit property as well as the sanctity of their title. The issue of the Defendant's capacity to counterclaim goes to its roots. DW1 is a busy body with no *locus standi* to institute and maintain the claim. He admitted to having no grant whatsoever to file suit on the deceased's estate's behalf. The counter claim is a nullity *ab initio*. It cannot therefore be allowed to stand. He has no grant from a competent court of law allowing them to file it. Further, he has never sought redress against the previous owners of the property. It has changed ownership 3 times. In my view, the Plaintiffs conducted their due diligence and obtained a clean title.

12. Besides, and as pleaded by the Plaintiffs at paragraph 4 of their reply to defence and defence to counter-claim, the Plaintiffs seem to me to be innocent purchasers for value without notice of any fraud or defect relating to the title. The fraud alleged by the Defendant cannot be attributed to them. In this country, we follow the Torrens System of registration of titles. The philosophy that underlie that system is based on 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 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 any inaccuracy.

13. It seems to me therefore that if the 1st Defendant really feels that the past registered owners, or the land office that registered them as such owners, were involved in acts of fraud injurious to him, the only option available is to seek compensation or indemnity from them. He cannot turn to innocent purchasers and claim entitlement from them. Infact such purchasers are clearly protected under Section 80(2) of the Land Registration Act, 2012. If the 1st Defendant has any merited claim, the way forward for him is clearly spelt out at Section 81(1) of the same ACT. That is the way to go.

14. The upshot of the foregoing is that the Plaintiff's suit is allowed against the 1st Defendant in terms of prayer (a). Since the 1st Defendant admitted that he does not reside on the property prayer (b) is of no effect. The Counter-claim is dismissed. The Defendant shall bear the costs of the suit.

Dated, signed and delivered at Busia this 18th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs: Absent

1st Defendant: Absent

Counsel for the Plaintiffs: Present

Counsel for the 1st Defendant: Absent

Court Assistant: Nelson Odame