



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 100 OF 2013

CAROLINE AWINO ODUKE.....PLAINTIFF

= VERSUS =

WERE LABOLO OJANJI.....DEFENDANT

J U D G M E N T

1. This suit was first filed in court on 6/9/2011 vide a plaint of even date. That plaint was later amended, dated 26/10/2015 and filed on 2/11/2015. The Plaintiff – **CAROLINE AWINO ODUKE** – is contesting the ownership of land parcel No. LR. SAMIA/BUBURI/129 (“suit land” hereafter) by the Defendant – **WERE LABOLO OJANJI**. The suit land was said to have been previously owned by the Plaintiff’s late brother – **GEORGE KHATEMA** – who died in 1990. After Khatema’s death, the Plaintiff is said to have entered the land and started using it.

2. Sometimes in the year 2000 the Plaintiff intended to undertake succession process but she discovered that the Defendant had registered himself as the owner of the suit land. The Defendant is said to have instituted a dispute before the then established Land Dispute Tribunal of the area. The dispute is said to have had short-comings, with the deceased owner being shown as a party and the Plaintiff being left out of the process altogether. Even then however, the tribunal entertained the matter and ultimately awarded the suit land to the Defendant. The award of the tribunal was later adopted as judgment of the court and on the strength of that judgment, the Land Registry proceeded to register the Defendant as owner.

3. The Plaintiff accuses the Defendant of fraud. The alleged fraud is said to consist in transfer of the suit land without a valid transfer duly executed by the proprietor; transferring the land without consent of Land Control Board; pretending that there was a valid sale agreement between the Defendant and the proprietor; instituting proceedings at the Land Disputes Tribunal in the name a deceased person; and fraudulently including the Plaintiff’s name at the adoption stage in BUSIA LDT No. 41/2002.

4. The alleged fraud is said to have led to change of ownership of the suit land twice between the Plaintiff and the Defendant while proper transfer should have been to the Plaintiff only on transmission. The Plaintiff pleaded she has sold some two acres to a third party who has gone into possession. The Defendant is said not to be in possession. The Plaintiff would wish to get declaratory order that she is entitled to be registered as the sole beneficiary of the estate of George Khatema in respect of the suit land. The Defendant is said to have no valid interest in the suit land.

5. Two prayers are made in the amended plaint. They are stated to be prayers (c) and (d) and they are as follows: -

Prayer (c): That registration of the Defendant as proprietor of LR. SAMIA/BUBORI/129 be cancelled and the entries made on 3/1/1999, 6/8/2002, and 28/5/2008 be revoked and/or annulled.

Prayer (d): Costs of the suit.

6. When the Defendant was served with the suit as initially filed, he filed a defence on 1/11/2011. When the plaint was amended, he too amended his defence and added a counter-claim. The amended defence and counter-claim was filed on 13/2/2017. The defence is a denial of the Plaintiff’s claim. The Defendant pleaded that he got the suit land lawfully, specifically pursuant to a court order issued in Busia PM Land Case No. 41/2002. He also averred that this case is *RES JUDICATA*, ownership having been decided in the case just mentioned.

7. In the counter-claim, the Defendant averred that both the Plaintiff and the third party he sold the land to are in illegal occupation and therefore are trespassers who should be evicted. The defence and counter-claim seem to be in apparent conflict on the issue of jurisdiction. The defence admits the court’s jurisdiction while the counter-claim takes the opposite view. Even then however, an order of injunction is asked for to restrain the Plaintiff and/or others through him or on her behalf from using the suit land. In the same vein, an order of eviction is asked for. Also asked for are costs. The Plaintiff filed a reply to defence and defence to counter claim.

8. The matter was heard on 24/5/2017. The parties themselves were the only witnesses. The Plaintiff's evidence was generally in accord with her written statement dated 5/9/2012, which she also adopted as part of her evidence. She put forward her case much in the same way it is contained in her pleadings. She averred that she has been in possession and occupation, of the suit land since the death of her brother in 1990. She later discovered that the Defendant had unlawfully registered himself as the owner of the land. It would appear that on the strength of a grant obtained in Succession Causes concerning her late brother's estate, she managed to become the registered owner but the Defendant later on changed the position and became the registered owner. It would appear that the Defendant instituted Land Dispute Tribunal's proceedings and he was awarded the land. The Plaintiff is disputing the proceedings.

9. In the course of hearing, the Plaintiff availed the following exhibits:-

- Death certificate of her late brother (PEX No. 1).
- Green card showing the plaintiff's late brother as the owner of the suit land (PEX No. 2).
- Confirmed Grant for the estate of the Plaintiff's late brother (PEX No. 3).
- Proceedings of the Land Dispute's Tribunal which awarded the suit land to the Defendant (PEX No. 4).
- Court order adopting the award of the tribunal as its decision (PEX No. 5).

10. Cross-examination of the Plaintiff by Ashioya, the Defendant's counsel, shows the Plaintiff denying that she was a party to the Land Dispute's Tribunal proceedings or even to the court proceedings that adopted the tribunal's decision as its own.

11. The Defendant also gave his evidence and he is shown saying, *inter alia*, that one Richard Oduoli, his in law, had bought the suit land from the Plaintiff's late brother. Before Richard died, he is said to have called the Plaintiff and gifted him the land. The Defendant went to the land's office and found that the Plaintiff had registered herself as owner. He placed a caution on the register and then instituted proceeding before the Land Dispute's Tribunal. The tribunal awarded the land to him. The tribunal's decision was later brought to court and adopted as the court's decision. According to the Defendant, the court summoned the Plaintiff but she failed to come.

12. After adopting the tribunal's decision by the court, the Defendant followed the requisite procedure and became the registered owner. Like the Plaintiff, the Defendant's written statements dated 1/3/2013 and 11/11/2013 became part of his evidence. In the course of hearing the Defendant availed the following exhibits:

- His own written statements (DEX No. 1).
- Land Tribunal proceedings (DEX No. 2).
- Order of court adopting Land Tribunal's decision (DEX No. 3).
- Letter opposing an attempt by the Plaintiff to remove the caution placed on the land by the Defendant (DEX No. 4).
- Application to authorise the court executive officer to sign land transfer forms (DEX No. 5).
- Court order allowing the Defendant's application above (DEX No. 6).
- Application to Land Control Board (DEX No. 7).
- Consent given by Land Control Board (DEX No. 8).
- Transfer form (DEX No. 9).
- Receipts showing payment of stamp duty (DEX No. 10).
- Title deed to the land (DEX No. 11).

13. The Plaintiff's counsel, Jumba, cross examined the Defendant. The Defendant is shown admitting that at the time he became the registered owner in 1999, the Plaintiff's brother was dead and he had not done Succession relating to his estate. He also admitted that he named the dead brother of the Plaintiff as a party in tribunal proceedings that took place in the year 2002. Further, the Defendant also agreed that nothing shows that the Plaintiff was called to participate in the tribunal proceedings or even summoned to court during adoption of the tribunal's decision.

14. After hearing, both sides filed written submissions. The Plaintiff's submissions were filed on 27/2/2019. The Plaintiff pointed out various shortcomings relating to the manner the matter was handled. It was pointed out that the Defendant's claim to the land is based on an alleged gifting to him by somebody who claimed to have bought it from the Plaintiff's late brother. By the time a dispute was instituted at the Land Dispute's Tribunal, that person was dead. The Defendant therefore required a grant from a Probate and Administration court in order to proceed before the tribunal. He lacked such grant yet the tribunal entertained his proceedings.

15. The tribunal itself was said to lack power or jurisdiction to entertain proceedings relating to the estate of a deceased person. Only a Probate and Administration court could do. The tribunal could not determine inheritance.

16. The contract of sale that the Defendant allegedly purported to rely on before the Land Dispute Tribunal was said to lack validity because the requisite period within which the consent of Land Control Board should have been obtained using that contract had expired. There was no valid contract therefore that the Land Dispute's Tribunal could have relied on. And even supposing the sale contract was valid, it was between deceased parties and the Defendant required letters of administration to enforce it. He had no such letters.

17. The Plaintiff pointed out that she was not party at the Land Dispute's Tribunal's proceedings. But her name was belatedly and improperly included in the court proceedings that adopted the tribunal's award. She termed that as **"out-rightly fraudulent"**. Further, the tribunal proceedings related to the property of a deceased person. The parties before the tribunal were said to lack capacity to go on with the proceedings. Even the tribunal itself or the court that later adopted the tribunal's award were said to have lacked jurisdiction to entertain the proceedings.

18. The Plaintiff cited and availed the decided case of **CHOITRAN & Another Vs MYSTERY MODEL HAIR SALOON: [1972] EALR 525** (which was also HCC No. 1546 of 1971, NAIROBI) for guidance. In the case Madan J (as he then was) is shown citing with approval the remarks of Lord Denning LJ (as he then was) in the case of **Barnard Vs National Dock Labour Board, [1953] All ER 1113** at page 1119, which were as follows:

"In the vast majority of cases the court will not seek to interfere with the decision of statutory tribunals" but Madan J continued **"but such a tribunal must act in accordance with the law, where it fails to do so the court should not hesitate to intervene"**.

19. This court was asked to allow the Plaintiff's suit and dismiss the Plaintiff's counter-claim.

20. The Defendant's submissions were filed on 20/5/2019. The Defendant submitted, *inter alia*, that the suit here is *RES-JUDICATA* and should therefore be struck out on that account. In the Defendant's view, the exhibits he availed – like the award of the Land Dispute's Tribunal and the court order adopting the award – show that the matter is *RES-JUDICATA*. The Defendant also submitted that the defendant became owner of the suit land through a court process. That process has not been set aside. To the Defendant, the Plaintiff "wishes to have this court convert a plaint into a memorandum of appeal over a matter that was decided 14 years ago". He submitted that that is something unknown in law. The court was asked to dismiss the Plaintiff's case and allow the Defendant's counter claim.

21. I have considered the pleadings, evidence, and rival submissions. Both sides have competing claim of ownership of the suit land. The Plaintiff's claim is based on succession. The Defendant's claim is based on the outcome of the Land Disputes Tribunal where he had taken the matter claiming ownership of the land.

22. A look into the proceedings before me shows that the Plaintiff's late brother – George Khatema – was the original owner of the suit land and one of the parties sued before the tribunal in the year 2002. The death certificate produced by the Plaintiff during hearing as PEX No. 1 shows that George Khatema died on 7/6/1990. When the Defendant therefore sued him before the tribunal, he was suing a dead person. Records also show that the Plaintiff in this suit was not a party in the proceedings before the tribunal.

23. During trial, the Defendant was cross-examined after giving his evidence. He admitted that the owner of the suit land was dead when he sued him before the Land Dispute's Tribunal. In the evidence in chief, the Defendant said that the land was gifted to him by one Richard Oduoli who was his in law. The in-law did so before he died but it would appear that he did so in anticipation of his death because he told the Defendant to take care of his burial. According to the proceedings at the tribunal, the in-law died in the year 2000. What this means is that by the time the Defendant was instituting tribunal proceedings, he needed to have the requisite grant from the Probate and Administration court as he could only claim the suit land through him. No such grant was shown here.

24. The tribunal however proceeded and awarded the land to the Defendant. As pointed out earlier, the Plaintiff was not a party in the tribunal proceedings. Yet in the court proceedings adopting the tribunal award, she is shown as a party. It was not made clear to this court how she became a party.

25. The tribunal itself was faulted for entertaining the matter in the first place. The Plaintiff has said it had no jurisdiction. It is true the tribunal had no jurisdiction to entertain a claim of ownership of land. When one looks at Section 3(1) of the now repealed Land Dispute's Tribunal Act it is clear that the tribunal only had jurisdiction to handle matters involving trespass to land, subdivision of land, or claim to work or occupy land including land held in common. Ownership of registered land was beyond or outside the mandate of what the tribunal could handle.

26. It is clear then that overall, the submissions of the Plaintiff on all these aspects cannot be easily faulted.

27. The Defendant on the other hand submitted that this suit is *RES-JUDICATA*. According to him, it is res-judicata because the subject matter (suit land) was the same, and the parties, in his view, were also the same. But it is easy to disagree with the Defendant on this score. And this is because the Plaintiff herein was not a party in the tribunal proceedings. She seems to have been irregularly added later for the purposes of adoption of the tribunal award by the court. It is also not so because the tribunal was not competent to handle the issue of ownership. *RES-JUDICATA* applies where a competent body or forum adjudicates on a matter or issue.

28. But the Defendant raised a weighty issue namely: That he obtained ownership through a process that has not been set aside. In this suit, the pleadings as contained in the amended plaint cover issues to do with proceedings conducted by the Land Dispute's Tribunal. But the prayer sought only asks for cancellation of entries made in the Land Register. It omits to include a prayer for setting aside the orders of the tribunal or a declaration that the proceedings at the Land Tribunal were unlawful.

29. In order for me to decide what to do, I need to appreciate the applicable law. It is said that a party is bound by his pleadings. I have already pointed out that the Plaintiff has not asked for the setting aside of the tribunal decision. One may argue therefore that because the Plaintiff has not made that prayer, the order of the tribunal and the subsequent processes and orders based on that order should be allowed to remain. But should they?

30. To me, it is clear that the proceedings of the land tribunal were unlawful right from inception. To begin with, the Defendant lacked capacity to institute the proceedings given that his claim was about gifting to him by a deceased person yet he had no grant from Probate and Administration court. The deceased person who allegedly gifted the land to the Plaintiff was said to have bought it from the Plaintiff's late brother. The Defendant is shown to have relied on the alleged fact of that sale in his proceedings before the tribunal. Yet the legality of that sale at the point in time was also questionable given that consent of the Land Control Board had not been obtained. And even if it had, the very exercise of handling the matter before the tribunal lacked legality as the tribunal had no jurisdiction to deal with the issue of ownership.

31. It is clear that when one looks at the whole process leading to issuance of title to the Defendant, one clearly notices illegality upon illegality. The whole process was unlawful. Yet it is clear that one's title to land is only as good as the legality of the process leading to and surrounding its issuance. If the court then decides to endorse the process by leaving it standing, will it be serving the interests of justice? Justice is conscience, nay, conscience of the whole humanity. And justice results from fair interpretation and application of the law. And it is not fair application of the law when a patently illegal process is left standing or clothed with legality because of procedural shortcomings.

32. Fortunately for the court, there are Sections 1A, 1B and 3A of Civil Procedure Act (cap 21) which, as part of administration of justice, require that the court needs to be just in the result it delivers. The Plaintiff in this case had obtained the ownership of the suit land through a lawful process of succession. It is that process that the Defendant supplanted and defeated with his illegal process that started before the Land Dispute's Tribunal.

33. The point I am making is this: The court has to invoke its inherent jurisdiction. In **Total Kenya Limited Vs Kenya Revenue Authority, [2013] eKLR** the court observed that the existence of a specific relief under the rules does not preclude it in specific circumstances from making any other orders under its inherent jurisdiction.

34. It is clear then that the inherent jurisdiction of the court may be exercised in any given case notwithstanding that there are rules governing the circumstances of such cases. The powers conferred by the rules are generally speaking additional to and not in substitution of powers arising out of the inherent jurisdiction of the court. I consider that the matter at hand is one requiring that the inherent jurisdiction of court be invoked.

35. I am persuaded, in light of all what has been laid before me, that the Defendant should not be owning the suit land. The whole process leading to his ownership of the land was replete with serious jurisdictional infractions and devoid of legality. I therefore invoke the inherent powers of this court to declare that the decision of the land tribunal was illegal as it was made without jurisdiction. I further declare that all the subsequent processes leading to issuance of title to the Defendant were illegal. This same position applies to the issuance of title itself. Given this position, I make a finding that the Plaintiff's case is well proved on balance and I hereby grant her prayers (c) and (d) in the amended plaint.

36. The Defendant has a counter claim. His counter-claim is one that must fail. It can only succeed if the Plaintiff's suit fails. The counter-claim is not well proved on balance. I dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Busia this 10th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Present

CA: Nelson Odame