



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 163 OF 2014

DANIEL OKASISI OLGGERERA

MUNYATTA OJURETI.....PLAINTIFFS

= VERSUS =

BARASA EKAPOLONI AUKU.....DEFENDANT

J U D G M E N T

1. This judgment relates to two suits – this one, which is **ELC No. 163 of 2014**, and **ELC No. 56 of 2015** – which were consolidated by consent on 6/2/2017. ELC No. 163 of 2014 has two Plaintiffs – **DANIEL OLGASISI OLGGERERA** and **MUNYATTA OJURETTI** – who are claiming ownership of land parcel No. **SOUTH TESO/ANGOROMO/675** from the Defendant – **BARASA EKAPOLONI AUKU**. ELC No. 56 of 2015 has **DANIEL OKASI OLGGERERA** as the only Plaintiff while **BARASA EKAPOLONI AUKA** is the Defendant. In the suit the Plaintiff is claiming land parcel No. **SOUTH TESO/ANGOROMO/674** from the Defendant. In both suits the Defendant is accused of acquiring the parcels of land fraudulently. Particulars of fraud were given.

2. In both suits too, the prayers were similar and sought to revoke registration of the properties in Defendant’s name thus nullifying his ownership. They also sought a declaration that court proceedings in **Misc. Civil Application No. 11/1987, BUSIA (which relate to ELC No. 163 of 2014)** and **Misc. Civil Application No. 12 of 1987, Busia, (which relate to ELC No. 15 of 2015)** were unprocedural, null and void. In both matters also, provision for costs was also asked for.

3. In the two matters, the Defendant defended himself in a similar fashion, maintaining his position that he acquired the parcels of land through purchase. The Plaintiff and his brothers, he pleaded, sold their parcels of land to him because they were moving to Narok, their home place, and didn’t intend to come back. The parcels of land were bought both in cash and kind. The cash paid was 21,000/= while 9 heads of cattle were given to the sellers. The defences of the Defendant show him pleading that he is now an adverse possessor and also an innocent purchaser for value without any notice of fraud or misrepresentation.

4. During hearing, both sides relied on the written statements they filed and the documents on record. They also gave some oral evidence and were cross-examined. PW1, the 1st Plaintiff, asserted that as joint owners of parcel No. 675, neither he nor the 2nd Plaintiff who is his younger brother by themselves or by proxy had ever sold the property to the Defendant. He denied receiving summons from the Land Registrar and the Court with respect to any case involving the property. However, on cross-examination PW1 stated that he travelled from Busia to Narok in 1967 on a temporary visit to see his relatives. He was aware that the Defendant had placed a caution on the property in 1985. His mentally impaired brother, **ONGARAPUS OJORET** stayed on the land and died in 1999 but when PW1 went to the property in 1998, he was no longer residing on the suit property. PW1 admitted that the Defendant had objected to the late **ONGARAPUS’** intended burial on the suit property. He further testified that **SOUTH TESO/ANGOROMO/673** was still intact and **SOUTH TESO/ANGOROMO/674** belonged to yet another of his brothers, **NDENGE OJORET KOSISI** who sold only that parcel to the Defendant. The 1st Plaintiff is however claiming this parcel too vide Case No. ELC No. 56 of 2015.

5. **ENJISILASI OBARASA OJAKO** testified as PW 2. He stated that he knew the Plaintiffs. His grandfather welcomed theirs, **OLGERERA OJURETI** when he emigrated from Narok to Busia and gave him land. The said **OLGERERA** died in September 1960 and his children went back to Narok leaving the late **NDENGE** and **ONGARAPUS**. **NDENGE** then sold the Defendant **SOUTH TESO/ANGOROMO/674** in 1980 for a consideration of 9 cows. The Defendant however started using all three parcels instead of confining himself to the one he had bought.

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

- a) Green Card for **SOUTH TESO/ANGOROMO/675** – P. Ex 1

- b) Lands Registrar Letters dated 16th April and 23rd July 1987 – P. Ex 2
- c) Handwritten Agreement dated 8th January 1980 – P. Ex 3
- d) District Lands Registrar Summons dated 4th December 1985 - P. Ex 4
- e) Busia Civil Misc. Appl. No 11 of 1987 – P. Ex 5
- f) Applications for consent approved on 8th July 1987 – P. Ex 6
- g) Consent Letter dated 8th July 1987 – P. Ex. 7

7. DW1, the Defendant admitted that the suit property initially belonged to the Plaintiffs who resided on **SOUTH TESO/ANGOROMO/673, 674 and 675** with their brothers, **INDEKE OJURETI** and **ONGARAPUSI OJURETI**. The Plaintiffs approached him to buy their land parcels as they were relocating to Narok. DW1 bought all three properties on 8th January 1980 for a consideration of Kshs.21,000 and 9 heads of cattle. The Agreement was drafted and consideration received by their brother, **INDEKE OJURETI** but all parties were present. The said **INDEKE OJURETI** was to facilitate and deliver transfer documents to the Defendant. However, after receiving the consideration, the Plaintiffs and their brothers left without executing the transfer documents prompting the Defendant to seek redress from the District Land Registrar in 1985.

8. Summons were issued for the Plaintiffs to appear before the District Land Registrar and explain why they had executed a sale agreement but reneged on their obligation to transfer the property. The Plaintiffs failed to do so. Consequently the Defendant was assisted by the Registrar to obtain the consent to transfer all three properties. In addition, the Defendant approached the Court vide three Applications Nos 11, 12 and 13 of 1987 for orders that the three parcels be registered in his name. Once the registration was complete, he remained in actual uninterrupted possession of the parcels for three decades save for one incident when the Plaintiffs attempted to bury the late **ONGARAPUSI OJURETI** on one parcel. He reiterated that he was the legal and rightful owner of **SOUTH TESO/ANGOROMO/673, 674 and 675**.

9. **PIUS WANJALA RABONGO** testified as DW2. He stated that he lives near the properties. DW2 witnessed the sale of the properties and asserted that the Defendant has been in possession of the same to date. He testified further that the sellers are not from the area and he has never seen them since the sale. DW3, **PETER OJIAMBO** reiterated DW2's testimony. He confirmed that the properties were sold for Kshs.21,000 and 9 head of cattle. Boundaries were then removed for the three properties to become one parcel.

10. The Defendant produced the following exhibits as evidence in support of his case:

- a) Title Deed **SOUTH TESO,ANGOROMO/674** – D. Ex 1
- b) Title Deed **SOUTH TESO,ANGOROMO/675** – D. Ex 2
- c) Title Deed **SOUTH TESO,ANGOROMO/673** – D. Ex 3
- d) Land Sale Agreement dated 8th January 1980 – D. Ex 4
- e) District Lands Registrar Summons dated 4th December 1985 – D.Ex 5
- f) Land Registrar's Report dated 16th April 1987 – D. Ex 6
- g) Notice for Removal of Restriction dated 9th December 2013 – D. Ex 7
- h) Chamber Summons Misc. Appl. 11/1987 – D. Ex 8
- i) Chamber Summons Misc. Appl. 12/1987 – D. Ex 9
- j) Chamber Summons Misc. Appl. 13/1987 – D. Ex 10
- k) Land Transfer Fee Receipts – D. Ex. 11 (a) – (g)

11. Parties filed their written submissions. The Plaintiffs' submissions were filed on 8th June 2018. Counsel for the Plaintiff reiterated the Plaintiffs' case and hinged the invalidity and irregularity of the transaction between the plaintiffs and defendant on what they termed glaring flaws in the land purchase transaction. He submitted that the sale agreement of 8th January 1980 was not executed by the purchaser, did not indicate if the land owner was present and became null and void 6 months late as the transfer was not done. Further, there was no proof that the Plaintiffs did receive the summons from the District Lands Registrar, the miscellaneous applications named did not culminate in Court orders and the Defendant did not produce an Application for Consent to Transfer from the District Officer and a Transfer form duly executed by the Executive Officer of the Court as prayed in the Applications. Counsel relied on the cases of **Munya Maina Vs Hivan Gathina Maina (2013) eKLR**, **Chevron K. Limited Vs Harrison Charo Wa Shutu (2016) eKLR** and **Nancy Kahoya Amadiva Vs Expert Credit Limited & Another (2015) eKLR**.

12. The Defendant's submissions were filed on 24th July 2018. Counsel for the Defendant relied on Section 26 of the Land Registration Act in support of the validity of the Defendant's title to the suit property and as proof of his absolute and indefeasible ownership. He quoted the cases of **Naomi Mugure Wachira Vs Samuel Mayaka (2017) eKLR** and on the standard of proof in cases of fraud; **RG Patel vs Lalji Makanji (1957) EA 314, Koinange & 13 Others Vs Koinange (1986) eKLR** and **Mutsonga Vs Nyati (1984) EA 425**.

13. I have read the parties' pleadings, submissions and considered them in light of the applicable law. From the testimony of both the Plaintiffs and the Defence it is clear that there was a transaction involving SOUTH TESO/ ANGOROMO/ 673, 674 and 675, even though the claim is only made with regard to parcels Nos 674 and 675. The Plaintiffs' version that the same was between the Defendant and their late brother who was of unsound mind was not backed by any iota of evidence. Material inconsistencies in the Plaintiffs' version of events became apparent during the hearing. The Plaintiffs at first tried to show that they were unaware of the transfer of property until the year 2013. However, it was revealed that this was not the case. PW1 alluded to the incident in which they tried to inter the remains of their late brother ONGARAPUS on the suit property in 1999 which action the Defendant successfully opposed. Question is: On what grounds did the Plaintiffs believe that opposition was based? Later, he admitted he knew that the property had been transferred but did not have money to pursue legal action at the time. Further, it is unclear how according to PW1 and PW2 the neighbouring properties were validly sold to the Defendant yet the two properties transfer remains in question. In fact in evidence, the 1st Plaintiff seem to concede that parcel No. 674 was also sold to the Defendant.

14. The Plaintiffs produced documents which they claimed to not have received and that they were unaware of before. They also have tasked the Defendant to prove that he acquired the titles to the properties validly which in my view is an attempt to shift the burden of proof onto the Defendant; bearing in mind that this is a case based on fraud whose burden of proof in law is above the balance of probabilities and below that of reasonable doubt. The onus was on the Plaintiff to prove that the parcels of land were acquired fraudulently. It was wrong for the Plaintiffs to assume that the Defendant had a duty to prove there was no fraud.

15. It is trite law that he who alleges must prove. The Evidence Act at section 108 states that **'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'** The Plaintiffs should have enjoined the Busia County Lands Registrar to iron out these "irregularities" emanating from the Register. As the issuer of titles the Registrar remains the authority and the Register the base record upon which this case turns. The Plaintiffs challenged the validity of the title of the properties which the Defendant rebutted by presenting the sale agreement between the parties, summons and letters from the District Lands Registrar as well as Court documents. The case of **Munyu Maina Vs Hiram Gathina Maina (supra)** cited by the Plaintiffs differs from the case at hand in that the Title holder in this case actually went beyond the title documents and to prove that the transfers were legal. I agree with the Defence that section 26 of the Land Registration Act works in their favour.

16. Overall, the Defendant demonstrated well that he bought the parcels of land from the Plaintiff and his brothers. And all the Plaintiffs and their brothers, except one, went to live in Narok. Several decades later, for reasons best known to them, they came back claiming that they never sold the properties. The Defendant however had kept well the relevant documents relating to the transaction and was able to avail them here in court. The evidence of the Defendant connects well with his pleadings. The evidence of the Plaintiff on the other hand is contradictory, wishy-washy and unhelpful. It is therefore not possible to nullify the Defendant's ownership of the properties and the prayer made to that effect is hereby rejected.

17. The court was also asked to declare some proceedings unprocedural, null and void. This is a misdirected endeavour. This court cannot be used to declare proceedings that are not formally before it as void, null or even unprocedural. If the Plaintiffs were minded to challenge those proceedings, there is the right procedure in law. In my view, the Plaintiffs needed to challenge the proceedings by way of formal application to review and/or setting aside, or by way of appeal if the situation so demands. The issue of the proceedings has been approached in the wrong manner. Intervention should have been sought in the very files containing the proceedings.

18. The upshot, when all is considered, is that the two consolidated suits are devoid of merit. I hereby dismiss them with costs to the Defendant.

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

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs: Absent

Defendant: Present

Counsel of the Plaintiffs: Present

Counsel of the Defendant: Absent

CA: Nelson Odame