



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC Case no. 82 OF 2018

(Formerly Kisii Elcc No. 212 of 2014)

GEOFREY SURE OGADA (Suing as Administrator of the

Estate of JOSHUA OGADA OGONDA (Deceased)).....PLAINTIFF

VERSUS

REUBEN OTIENO DISI.....1ST DEFENDANT

KARILUS ODIE.....2ND DEFENDANT

DISTRICT LAND REGISTRAR HOMA-BAY.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

A. Introduction

1. The property in dispute in the instant suit is LR NO. Kanyamkago/Kawere 1/1176 measuring approximately 5.5 hectares in area (the original parcel of land) now known as LR N. Kanyamkago/ Kawere 1/3852,3853 and 3854 (the 1st, 2nd and 3rd suit parcels of land respectively). The plaintiff, Geoffrey Sure Ogada has originated the suit as the legal representative of the estate of Joshua Ogada Ogonda (the deceased) who was the registered proprietor of the original parcel of land. The said deceased passed on in the year 1994.
2. The plaintiff is represented by learned counsel, Mrs. G. Ndeda of Ndeda and Company Advocates.
3. The defendant appears in person while the 3rd and 4th defendants are not represented in this suit.

B. The plaintiff's case in brief.

4. The plaintiff's suit was originated by way of a plaint dated 3rd September 2014 and filed on the even date seeking the following orders;-

i. A declaration that the 1st and 2nd parcels of land in the name of the 1st and 2nd defendant by the 3rd and 4th defendants is null and void and should be cancelled.

ii. The 1st and 2nd defendants do execute the necessary and relevant conveyance documents to effect registration in favor of the estate of Joshua ogada Ogonda (deceased) as the proprietor of parcel of land Kanyamkago/Kawere 1/ 3852,3853 and 3854 and/or in alternative the Deputy Registrar do execute the necessary and relevant conveyance document incase the 1st and 2nd defendants decline to execute.

iii. An order of permanent injunction restraining the 1st and 2nd defendants from using, trespassing, entering, occupying and/or interfering with the plaintiff's quite possession of the suit land in any manner whatsoever.

iv. An eviction order directed against the 1st and 2nd defendants.

v. General damages

vi. Costs of the suit.

5. Briefly, the plaintiff states that the deceased and the beneficiaries of his estate, among them, the plaintiff, enjoyed peaceful and quite enjoyment of the original parcel of land, registered in the name of the deceased as per copy of the original title (PEXhibit 3). That on 30th March, 1994 the deceased passed on as revealed in a copy of the grant of letters of administration ad litem dated 18th February 2014 (PEXhibit 2). That on or about 14th February 2012, under circumstances unknown to the plaintiff and other beneficiaries of the estate of the deceased and without their consent, the 1st and 2nd defendants illegally and fraudulently caused the subdivision of the original parcel of land into the 1st, 2nd and 3rd suit parcels of land and registered the same in the names of the 1st and 2nd defendants thus provoking the instant suit.

6. The plaintiff pleaded particulars of fraud and or illegality on the part of the 1st, 2nd, 3rd and 4th defendants at paragraph 11 of the plaint. The particulars include that the 1st and 2nd defendants obtained title to the 1st, 2nd and 3rd suit parcels of land when they knew or ought to have known that the same belonged to the deceased and subsequently to his estate. That the 3rd and 4th defendants failed to observe due diligence before causing the subdivisions and their registration in the names of the 1st and 2nd defendants. The plaintiff further stated that there was another suit namely Kisii HCCC No. 130 of 1985 between the 1st defendant and the plaintiff in respect of the same subject matter but it was dismissed for want of prosecution.

7. In his reply to the 1st and 2nd defendant's statements of defence dated 3rd September 2014, the plaintiff stated that the 1st, 2nd and 3rd suit parcels of land emanated from the original parcel of land registered in the name of deceased in 1976 and not LR NO. Kanyamkago/Kawere 1/697. That the deceased died in the year 1994 and no succession cause has ever been done to enable the defendants transfer the original parcel of land in the name of the 1st and 2nd defendants. He reiterated the contents of paragraphs 6,7 to 13 of his plaint.

8. The plaintiff (PW1) testified and relied on PEXhibits 1 to 8 namely copies of death certificate of the deceased (PEXhibit 1) a grant (PEXhibit 2), original title (PEXhibit 3), a certificate of official search which shows that the original land was still registered in the name of the deceased (PEXhibit 4), proceedings in **Kisii HCCC No. 130 of 1985, Reuban Otieno Disi –vs- Joshua H. Ogada (PEXhibit 5)**, another certificate of official search dated 20th June 2014 showing subdivisions of the original parcel of land and registration of the 1st, 2nd and 3rd parcels of land (PEXhibit 6) and green cards thereof (PEXhibit 7 (a) and (b) as well as proceedings and dismissal order in Kisii HCCC No. 130 of 1985 (PEXhibit 8), in support of his evidence. PW1 called his brothers Dr. Samwel Ogondi Ogada (PW2), John Odhiambo Ogada (PW3) and the then Land Registrar, Migori namely George Obondo Oguttu (PW4) as his witness in the instant suit.

9. In her submissions dated 28th September 2019 and filed in court on 30th September 2019, learned counsel for the plaintiff referred to the orders sought in the plaint, cited **sections 45 of the Law of Succession Act (Cap 160) and section 26 (1) of the Land Registration Act, 2016 (2012)** to fortify the plaintiff's claim. She also relied on the following case law:-

a) Alice Chemutai Too –vs- Nickson Kipkirui Korir and 2 others (2015) eKLR on indictment of a title to land

b) Elijah Makeri Nyangwara –v- Stephen Mungai Njuguna and another (2013) eKLR that the purpose of **section 26 (1) (supra)** is the protection of the real title holders of land.

c) Arthi Highway Developers Ltd –vs- West End Butchery Ltd and others Court of Appeal at Nairobi Civil Appeal No. 246 of 2013 (2015) e KLR where title to land was cancelled following its acquisition by fraud.

C. Summary of the 1st and 2nd defendants' case

10. By their statement of defence dated 17th June 2014, the 1st and 2nd defendants denied the plaintiffs claim and sought its dismissal with costs on the grounds that the same is brought in bad faith, bad in law, with unclean hands and an abuse of the court process. They did state that it is the deceased who made fraudulent moves to disprive the 1st and 2nd defendants of their share from the parent parcel of land, LR NO. Kanyamkago/Kawere 1/697 which he illegally transformed to the original parcel of land through a surveyor without the consent of the 1st and 2nd defendants. That the said parent parcel of land was in joint ownership of three (3) persons namely Ngomo Yamo, Okeyo Okore and Otieno Disi alias Reuben Otieno Disi who owned 1/3 (a third) each of the shares as shown in official search dated 30th October 2007 (DEXhibit 1).

11. The 1st and 2nd defendants also stated that a result of the illegal and fraudulent behaviour of the deceased, the 1st defendant complained to the local authorities and eventually filed Kisii HCCC No. 130 of 1985. That the deceased caused the arrest of the 1st defendant (DW1) and one Richard Okeyo Okore, who were charged of trespass into the original parcel of land but were acquitted accordingly.

12. DW1 adduced evidence that he owns the 1st suit parcel of land, LR NO. Kanyamkago/Kawere 1/ 3852 which was formerly the original parcel of land, a subdivision of the parent parcel of land LR No. Kanyamkago/Kawere 1/697. That the 2nd defendant and others own the 2nd and 3rd suit parcels of land. He called his cousin, Karilus Odie (DW2) and relied on list of documents dated 17th June, 2014, namely:-

a) Official search dated 30th October 2007. (DEXhibit 1)

b) Court Proceedings from Migori Law court. (DEXhibit 2)

c) Charge sheet (DEXhibit 3)

13. On 14th October, 2014, the 1st and 2nd defendants filed their submission of even date. The submission is in Kiswahili language with some few words in English language. A copy of a document titled “Partition” and a copy of a notice of appeal dated 11th October 1989 and lodged in the court registry on 16th October 1989 in Kisii HCCC No. 130 of 1985, accompany the submission.

14. Since the submission of the 1st and 2nd defendants is mainly in Kiswahili language, I find abundant help in Article 7 of the Constitution of Kenya, 2010 which in part reads;-

“(1) The National language of the Republic of Kenya is Kiswahili

“(2) The official language of the Republic are Kiswahili and English.” (emphasis laid/imetiliwa mkazo)

15. The language of this court shall be English as provided under **section 23 of the Environment and Land Court, 2015 (2011)** as read with section 2 of the same Act regarding the meaning of the term “Court”. Moreover, the **Civil Procedure Act (Cap 21)** requires that the language of the High court (see also **Article 162 (2) (b) of the Constitution, (supra)** shall be English.

16. **Article 44 of the Constitution (supra)** stipulates the right to language and culture. **Article 48 of the same Constitution provides for access to justice while Article 50 (1) as read with Article 25 (c)** require that the right to fair hearing shall not curtailed. So, in the interest of justice I embrace the submissions made in Kiswahili, the National language and official language of the Republic of Kenya as provided for under **Article 7 (1) and (2) of the Constitution (supra)**. Nonetheless, I proceed with this Judgment in English language alongside very limited interpretation in Kiswahili language and the 1st and 2nd defendants be at liberty to have the same interpreted to Kiswahili language perhaps for their better understanding in the obtaining circumstances. I think it is high time that we have a prescribed law that orders, Rulings and Judgments of court may be made in either in English or Kiswahili in order to realise the fruits of **Articles 7 (1) and (2) and 44 of the Constitution (supra)**.

17. In their 4-paged submission (**hoja yao ya kuraza nne**) the 1st and 2nd defendants argued, inter alia;-

“Mimi shamba niliyonayo ni shamba langu kutoka jadi nimeazaliwa pale tangu mwaka 1942” (the land which I possess is mine since time in memorial and I was born thereon in 1942)

18. The 1st and 2nd defendants further submitted that ;-

“Tume omba mahakama itupilie mbali madai haya ya Godgrey Sure ogada kwa maana hayana msingi aliacha kustaki ambaye angestaki”

We pray to this court to dismiss the plaintiff’s claim which is devoid of foundation as he failed to sue the right person).

D. The 3rd and 4th defendants’ case in brief

19. The 3rd defendant was duly served as revealed in the affidavit of service sworn on 2nd November 2016 by Boniface P.O. Awuoche, a duly authorised process server filed on 14th November 2016. Again, the 3rd defendant was duly served on 8th May 2016 as disclosed in the affidavit of service sworn on 9th May 2018 by a licenced process server, Vitalis Onyango Akuku and filed in court on 9th May 2018.

20. The 4th defendant was duly served as shown in affidavit of service sworn on 24th June 2016 and filed in court on 24th November 2016 by Boniface P.O. Owuoche, a duly authorised process server.

21. The 3rd and 4th defendants failed to file and serve their respective statements of defence within the prescribed period of time or at all. The said defendants did not offer any evidence or submissions, too, in this matter.

E. Issues for determination

22. On 12th September 2014, learned counsel of the plaintiff filed the plaintiff’s list of issues dated 3rd September 2014. The issues are ;-

i. Whether the deceased was the lawful and registered proprietor of the suit land No. Kanyamkago/Kawere 1/1176 (now known as LR. No. Kanyamkago/Kawere 1/3852,3853 and 3854).

ii. Whether the suit land was illegally and fraudulently registered in the 1st and 2nd defendants’ names.

iii. Whether 1st and 2nd defendants’ title to the suit land are null and void?

iv. Whether the plaintiff is entitled to prayers sought in the plaint.

23. I have thoroughly considered the said issues as well as the pleadings, the evidence and the submissions of the respective parties in this suit. Being guided by the Court of Appeal decision in the case of **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**, the issues for determination herein are compressed to three (3) as per the plaintiff’s list of issues save that issue numbers 2 and 3

are condensed into issue (ii) to the effect that whether the registration of the 1st, 2nd and 3rd suit parcels of land in the names of DW1 and DW2 was illegal and fraudulent hence their titles thereto are null and void.

F. Analysis and Determination

24. On the first issue, PW1 stated that the deceased was the registered proprietor of the original parcel of land as discerned from paragraph 7 of the plaint as well as PE Exhibit 3 and 4 namely land certificate and a certificate of official search in respect of the land respectively. During cross examination PW1 stated that his father bought the land from the Ngomo Yamo.

25. The testimony of PW1 was fortified by his brother (PW2) who stated that the deceased obtained title to the original parcel of land. During cross –examination, this witness maintained thus:-

“ My father stated the sale process in 1973 but got a title in 1976. I was present when my father negotiated the sale of the parcel of land. We were at the pastor’s house . You were present as a witness and as a seller. You and Ngomo Yamo were the sellers.”
(emphasis laid)

26. The testimony of PW1 was further reinforced by the evidence of PW4, who stated in part that :-

“The green card for this parcel was opened 23rd November 1974. The proprietor was Joshua Harrington Ogada Ogada and was issued with a title deed on 14th April, 1976. This green card was closed on 22nd November 2012.”

27. On the other hand, DW1 testified that the original parcel of land did not belong to the deceased who took shares of DW1 as per PE Exhibit 7 (a) and (b). That the proprietors of the said land (originally LR NO. 697) are shown in DE Exhibit 1. He denied the plaintiff’s claim in totality.

28. DW2, too, denied the plaintiff’s claim. He also stated that the original parcel of land belonged to his late grandfather, Yamo, who has sons including Ngomo (deceased) who took over the land. During cross –examination, he did state that:-

“I can not tell if Joshuaa Ogada owned the suit land in 1976.”

29. DE Exhibit 1 shows the proprietors of the parent land, LR NO. 697. PW1 denied that his father (deceased) acquired the original parcel of land illegally.

30. PE Exhibits 3 and 4 show that the original parcel of land was registered in the name of the deceased father of PW1 and PW2. It was registered under the **Registered Land Act Cap 300 Laws of Kenya –Repealed Act**. Furthermore, I am aware of **sections 2, 24, 25, 26 and 28 of the Land Registration Act, 2016 (2012)** and **sections 27, 28, and 30** of the Repealed Act concerning registration ownership and overriding interests over registered land.

31. As regards issue number (ii), **section 26 (1) of the Land Registration Act (supra)** provides that a certificate of title can only be challenged on the grounds including of fraud. Furthermore, in the case of **Kimani Ruchine and another –vs- Swift Rutherford Company Limited and another (1976-80) 1 KLR 1500**, Kneller J applied the decision in **Tayebali Adamji Alibhai –vs- Abdulhussein Adamji (1938) EACA 1** and held that the rights and registration in respect of land can be challenged on the grounds, among others, fraud.

32. In the case of **Kuria Kiarie and 2 others –vs- Sammy Magera (2018) eKLR**, it was held that fraud and misrepresentation as grounds for impeaching a certificate of title, be distinctly pleaded and proved ; see also **Vijay Morjaria –vs- Nansingh Madhusingh Darbar and another (2000) eKLR**.

33. The Black’s Law Dictionary 10th Edition defines the term **“Fraud”** as :-

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.

34. Similarly, the Oxford Advanced Dictionary 10th Edition gives the meaning of **“Fraud”** thus :-

“Wrongful or criminal deception intended to result in financial or personal gain;

A person or thing intended to deceive.

35. PW1 specifically pleaded the particulars of fraud and or illegality on the part of DW1, DW2, and the 3rd and 4th defendants at paragraph 11 of his plaint PE Exhibit 6 shows that the original parcel of land was subdivided into the 1st, 2nd and 3rd parcels of land and registered in the name of DW1 and DW2. However, how did they acquire the respective titles.

36. In the case of **Munyu Maina –vs- Hiram Gathiha Maina (2013)**, the Court of Appeal held as follows;

“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title

and show that the acquisition was legal, formal and free from any encumbrances” (emphasis added)

37. Notably, PW1 referred to and produced PExhibit 6 in evidence. In examination in chief, he stated in part;-

“ I obtained an abstract of title (green card) which showed the history of the land. The title 1176 was registered in my father’s name in 1976 but in 2012 the land was subdivided into 3 portions -3852,3853 and 3854. It is not clear how the subdivision was occasioned. Green card produced as 7 (a) and (b).”

38. PW2 confirmed that the original parcel of land was subdivided and transferred from the name of the deceased into three (3) persons, including DW1 and DW2. PW4 affirmed the position of PW1 and PW2 but he was not able to obtain and avail mutation form(s) and transfer forms in support of the acquisition of their titles to the 1st, 2nd and 3rd suit parcels of land by DW1 and DW2.

39. Moreover, DW1 and DW2 did not also produce mutation forms and transfer or any other documents to show how they did obtain titles to the 1st, 2nd and 3rd suit parcels of land. So, is the estate of the deceased vested in DW1 and DW2? The answer is not in the affirmative because DW1 and DW2 are not the legal representatives of the estate of the deceased in view of the Court of Appeal decision in the case of **Trouistik Union International and another –vs- Jane Mbeyu (1995) eKLR, Section 82 (a) of the Law of Succession Act (Cap 160 Laws of Kenya) and PExhibit 2.**

40. It is abundantly clear that DW1 and DW2 are intermeddling with the estate of the deceased as prohibited under **section 45 of the Law of Succession Act (Ibid).** Bearing in mind **Alice Too, Nyangwara, Arthi and Munyu Maina cases (supra)** as well as **section 80 (1) of the Land Registration Act, 2016 (2012)**, the titles to the 1st, 2nd and 3rd suit parcels of land held by DW1 and DW2 as shown in PExhibits 6, 7 (a) and 7 (b), are null and void.

41. **Section 152 A of the Land Act, 2016 (2012)** stipulates that a person shall not unlawfully occupy private land, among others. It is pretty clear that DW1 and DW 2, are trespassers on the 1st, 2nd 3rd suit parcels of land as PW1, the legal representative of the estate of the deceased as per PExhibit 2 is the legal proprietor of the same as revealed in PExhibits 3 and 4.

42. On damages, I am in absolute agreement with the position taken by my senior sister, M. Odero, J that the tort of trespass is one which is actionable without proof of any damage; see **Nakuru Industries Ltd –vs- S.S Mahta and Sons (2016) eKLR**

43. On that score, all the plaintiff is entitled to is a modest amount of general damages. I am of the view and considering the entire case, an amount of **Kshs. 75,000/=** would be appropriate in the circumstances of this case.

44. **Section 13 (7) (a) of the Environment and Land Act 2015, (2011)** mandates this court to grant permanent preservation orders including permanent injunctions ; see also **Nguruman Limited –vs- Jan Bonde Nielsen and 2 others, (2014) eKLR.**

45. In the end, I find that the plaintiff is entitled to the reliefs sought in his plaint. He has proved his claim against the defendants jointly and severally on the balance of probabilities.

46. Thus, Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally, in terms of orders (a) (b) (c) (d) (e) and (f) sought in his plaint dated 3rd June 2014. General damages for trespass assessed at **Kshs. 75,000/=** (Kenya Shillings Seventy Five thousand only) in favour of the plaintiff against the defendants jointly and severally.

47. It is so ordered.

Delivered, SIGNED and Dated in open court at Migori this 3rd Day of DECEMBER 2019.

G.M.A ONG’ONDO

JUDGE

In presence of:-

E. Apondi holding brief for Mrs Gladys Ndeda learned counsel for the plaintiff.

Tom Maurice – Court Assistant