



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE 34 OF 2017

(Formerly Kisii Elc Case No. 627 of 2016)

FRANCIS OKECH AWINO.....PLAINTIFF

VERSUS

JOHN NYAMBOK AWINO.....1ST DEFENDANT

LAND REGISTRAR HOMA- BAY.....2ND DEFENDANT

JUDGMENT

1. In a plaint dated 24th November 2016, the plaintiff has sued the defendants jointly and severally for orders;-

- a) **A declaration that the registration of the 1st defendant on LR NO. KANYADA/KANYANGO –KILANYA/924 contrary to the confirmed grant is illegal, null and void.**
- b) **An order of cancellation and rectification of the register of all subdivisions out of LR No. KANYADA /KANYANGO – KILANYA/5252, 5255, and 5973 in favour of the plaintiff.**
- c) **Costs of this suit to be borne by the defendants.**
- d) **Any other relief that this court may deem it fit to grant.**

2. The plaintiff claimed that on 7th January 2006, the 1st defendant and himself obtained a certificate of confirmation of grant of letters of administration to the estate of Cornel Awino Wajinga (deceased) in **LR NO. KANYADA/KANYANGO/KALANYA/924** (hereinafter referred to as the suit property) on equal share, in Homa- Bay SRM's court Succession Cause No. 225 of 2004 (P Exhibit 1). The 1st defendant colluded with the agents of 2nd defendant and was registered as the owner of the suit property contrary to the confirmed grant. The plaintiff was under the impression that the 1st defendant was the owner of the suit property which was ancestral land to hold it in trust for himself and the 1st defendant until such time that he could subdivide and transfer his equal portion of the land.

3. On 9th May 2007, the 1st defendant without the knowledge and consent of the plaintiff, subdivided the suit property into three portions namely **LR NO. KANYADA/KANYANGO/KAHIYA/5163, 5163, and 5165** and disposed of portions out of L.R numbers 5164 and 5165. The 1st defendant further subdivided LR. NO. KANYADA /KANYANGO/KILANYA/5163 to LR. NOs. 5252 to 5255.

4. The plaintiff also claimed that defendants' transactions were fraudulent hence irregular, null and void. The plaintiff, further, claimed that he has suffered loss and damage by being disinherited his entitlement to the ancestral land which has a sentimental value. He has pleaded particulars of fraud and irregularity on the part of the defendants,

thus ;

- i. **Registering the suit property LR. NO. KANYADA/KANYANGO-KALANYA/924 contrary to confirmed grant.**
- ii. **Subdividing the suit property LR. NO. KANYADA/KANYANGO-KALANYA/924 without the consent of the plaintiff.**

entries in the register, certified copies of any document, the cadastral map, or plan file in the registry upon payment of the prescribed fee.”

13. On the issue of fraud, Blacks Law Dictionary 9th Edition at page 731 defines it as ;-

“ A knowing misrepresentation of the truth or a concealment of material fact to induce another to act to his or her detriment. Fraud is usually a tort , but in some cases, especially when the conduct is wilful, it may be a crime. A misrepresentation made recklessly without belief in it’s truth to induce another person to act”

14. Moreover, under section 2 of the Limitation of Actions Act (Cap 22 Laws of Kenya), the term:

“Fraud” includes conduct which having regard to some special relationship between the parties concerned is an unconscionable thing for the one to do towards the other”.

15. In **Atieno –V- Thabiti Finance Co. Ltd and another (2001) KLR 496**, the court termed fraud as a generic term embracing all multifarious means which human being devise and which are resorted to by one individual to get advantage over another by false suggestions or by surprise, trick, winning, dissembling and any unfair way by which another is cleared. It stated that fraud must be specifically pleaded and particulars of fraud alleged must be stated on the face of the pleading. It is well settled law that fraudulent conduct must be strictly proved more than a mere balance of probabilities.

16. I note that P Exhibit 3 speaks volumes on the relief sought and in favour of the plaintiff. It reads in part;

“..The land road between Aiko and Francis Okech be opened for use to cater for closed Mutation road. John Nyambok Awino to sign land relevant forms to allow Francis Okech Awino get his parcel number and title deed. Failure of which the Executive Officer of the Court to execute the same.”

17. According to Section 80 (1) of the Land Registration Act , 2012, this court has powers to rectify the register in relating to title to land by cancellation or amendment in case of fraud or mistake. The section states;

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. (Emphasis provided)

18. I find the plaintiff’s case firmly built and not challenged. The plaintiff has proved his claim against the defendants on a balance of probability.

19. Accordingly I enter Judgment in favuor of the plaintiff against the defendants in terms of orders (i), (ii) and (iii) sought in the plaint dated 24th November, 2016.

DELIVERED, SIGNED and DATED in open court at MIGORI this 15th day of February, 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mireri, learned counsel for the plaintiff

Tom Maurice, court assistant