



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 183 OF 2013

JOHN OMAMO NDUNDE (*suing as personal representative of the estate of the late*

YOHANA OTABA NDUNDI ALIAS NDUNDE.....PLAINTIFF

VERSUS

MAKAU NDUNDE.....1ST DEFENDANT

JULIUS EMITATI OMUSULA.....2NDDEFENDANT

JUDGEMENT

The plaintiff and the 1st defendant (now deceased) are brothers and sons to the late YOHANA OTABA NDUNDE alias NDUNDE herein after referred to as the deceased herein. The plaintiff avers that the deceased herein died intestate on 18th April 1967 survived by 3 sons namely; CALEB WAKHU NDUNDE (deceased), SOLOMON MAKAU OMURUNGI alias MAKAU NDUNDE and JOHN OMAMO NDUNDE entitled to inherit Land parcel No. L.R. Marama/Buchenya/562 measuring approximately 3.0 acres. The plaintiff further avers that on or about 13th September 2005 together with his brothers demarcated the aforesaid land into two portions and planted boundaries. Each of the three sons are today occupying their portions. Sometimes in 2011 when the plaintiff wanted to commence succession proceedings of the estate of the deceased he discovered that land parcel L.R. MARAMA/BUCHENYA/562 had been subdivided creating 1486 and 1487 purportedly pursuant to a correction of names in the register. With the L.R. No. 1486 having been registered in the names of the 2nd defendant and 1487 to the 1st defendant and later to the plaintiff. The purported change of names entry No. 2 of 18th May, 2007 from NDUNDE to MAKAU NDUNDE in respect of register LR. MARAMA/BUCHENYA/562 was fraudulent, further the subdivision closure of the register and the registration of the plaintiff in respect of land parcel LR. 1487 was equally fraudulent.

Particulars of fraud by the defendants are that they purported to register change of name from Ndunde to MakauNdunde when Ndunde died on 18th April 1967. Dealing with the estate of Ndunde in total disregard to the law in respect of succession. Effecting and registering the purported change of name without any form or instrument. Registering and transferring land to the plaintiff without his involvement or executing any document. Effecting transfer and or subdivision without the relevant land control board consent. Deregistration of the deceased without his involvement and or that of the administrator. Transferring part of the estate to a non beneficiary or heir. Disregarding all requirements of the law and procedures in the alleged change of name, subdivision, registration, transfer in respect of land parcel MARAMA/BUCHENYA/562, 1486 and 1487.

That the defendants were charged vide Butere SRM Court Criminal Case No. 312 of 2011 with the offences procuring execution of documents by false pretences contrary to section 355 of the penal code, uttering a document with intent to defraud contrary to section 357 of the penal code, and then intermeddling with the property of the deceased person contrary to section 45 (1) of the Law of Succession Act, which case is pending. Due to the aforesaid matters the plaintiff and other heirs of the deceased have been disinherited. The 2nd defendant pursuant to the aforesaid fraudulent registration in respect of Land Parcel LR. 1486 is in occupation of a portion thereto. His occupation or use is an act of trespass without any colour of right, thus depriving the plaintiff and his brothers of their right to inherit and own LR. MARAMA/BUCHENYA/562. The plaintiff's claim against the defendants is the cancellations of titles MARAMA/BUCHENYA/1486 and 1487 and restoration of the original title MARAMA/BUCHENYA/562 in the names of Ndunde. An eviction order against the 2nd defendant. Despite demand and notice of intention to sue having been duly issued, the 1st and 2nd defendants have neglected and or refused to comply thus necessitating this suit. The plaintiff prays for judgment against the 2nd defendant jointly and severally for; cancellation of title deed numbers MARAMA/BUCHENYA/1486 and MARAMA/BUCHENYA/1487 and restoration of the original title deed number MARAMA/BUCHENYA/562 in the names of NDUNDE. An eviction order against the 2nd defendant, his agents, servant or assignees and costs.

The plaintiff avers that Land Parcel LR. MARAMA/BUCHENYA/562 was registered in the names of his father, now deceased, and not the defendant. The plaintiff in reply to paragraph 7 of the defence denies the 1st defendant was also known as Ndunde and puts the defendant to strict proof thereof. The plaintiff avers that the defendants purported subdivision and correction of names and subsequent subdivision and registration was fraudulent. The plaintiff avers that the averments in the defence are contrary to the defendants own evidence on oath in

Butere PMCCR case No. 312/2011. The plaintiff avers that this suit is properly before the court, the plaintiff has a cause of action against the defendants. The plaintiff avers that the defence raises no triable issue, is a mere general denial. The plaintiff avers the defence is bad in law. The plaintiff prays for the defence to be struck out, and judgment entered as prayed in the plaint.

The defendants in their defence deny that the plaintiff is the legal representative of the estate of the deceased YOHANA OTABA NDUNDE. The 1st defendant denies that the deceased YOHANA OTABA NDUNDE was also known as NDUNDE, denies that the deceased YOHANA OTABA NDUNDE'S sons were three, denies that at time of the said deceased's death he was the owner of land parcel NO. MARAMA/BUCHENYA/562, denies that the said parcel of land was meant to be inherited by the said deceased's three sons, denies that the said parcel of land was in 2005 demarcated into two portions, denies that each of the three sons to-date occupies his portion and denies they are entitled to the same as pleaded or at all and the plaintiff will be put to strict proof of his allegations. The 1st defendant avers that his deceased father YOHANA OTABA NDUNDE had five sons namely OMOLO NDUNDE, CALEB WKHU NDUDE, MAKAU NUDNDE, JAMES AMBAISI NDUNDE and JOHN MAMO NDUNDE and that at the time of his death the deceased YOHANA OTABA NDUNDE did not own any parcel of land as he had, prior to adjudication, given out his parcels of land to his sons. The 1st defendant avers that the parcels of land which originally belonged to the deceased was at adjudication registered in the name of the son who had been given such land and who became the owner of such parcel of land at adjudication.

The 1st defendant maintains that he is the one who is also known as NDUNDE, not his deceased father, and that at the time of adjudication land parcel No. MARAMA/BUCHENYA/562 was registered in his name NDUNDE which he in 2007 lawfully and procedurally corrected to MAKAU NDUNDE and at such time the said parcel of land was his sole property. The 1st defendant further avers that after correcting his name in the register of his title No. L.R. MARAMA/BUCHENYA/562 he properly, procedurally and legally sub-divided the same into two creating title Nos. MARAMA/BUCHENYA/1486 and 1487 and that he subsequently lawfully and procedurally sold and transferred land parcel No. MARAMA/BUCHENYA/1486 to the 2nd defendant at a consideration which he received in full. The 2nd defendant avers that vide a lawful agreement he purchased the whole of land parcel NO. MARAMA/BUCHENYA/1486 measuring approximately 0.80 hectares from the 1st defendant at a consideration which he paid to the 1st defendant in full and the 1st defendant legally and procedurally transferred title and possession thereof to the 2nd defendant in 2009 and to-date the 2nd defendant occupies and utilizes the said parcel of land exclusively, lawfully, openly, notoriously and peacefully and being an innocent purchaser for value without notice he is entitled to such possession and use. The defendants vehemently deny that the correction of name from NDUNDE to MAKAU NDUNDE in respect of L.R. No. MARAMA/BUCHENYA/562 was fraudulent, deny that the closure of the said title and or sub-divisions thereof were fraudulent and deny all the particulars of fraud pleaded.

The defendants aver that if they were charged as pleaded, which is denied, they were both acquitted as the purported charges were baseless, unfounded, spiteful and improper and aver that since L.R. MARAMA/BUCHENYA/562 was not the property of the deceased Yohana Otaba Ndunde his alleged but unnamed heirs, who are denied, were not disinherited. The defendants vehemently deny the contents of paragraphs 10 and 11 of the plaint and in particular deny that the 2nd defendant is a trespasser on land parcel NO. MARAMA/BUCHENYA/1486, deny that the plaintiff or his brothers are heirs to L.R. NO. MARAMA/BUCHENYA/562 or at all and aver that in view of the foregoing the plaintiff is not entitled to an order for cancellation of title NOS. MARAMA/BUCHENYA/1486 or 1487 or restoration of MARAMA/BUCHENYA/562 or an order of eviction of the 2nd defendant or any remedy at all. The defendants aver that the plaintiff lacks the *locus standi* to sue the defendants and that this suit is incurably defective, a non-starter, incompetent, mischievous and untenable and they will at the earliest opportunity apply to have this suit struck out for being a deep-sea fishing expedition, bad in law, frivolous, vexatious and for being an abuse of the due process of the court. The defendants pray that this honourable court be pleased to dismiss this suit with costs.

This court has carefully considered both the plaintiff and the defendants cases and the pleadings therein. The defendants aver that the plaintiff lacks the *locus standi* to sue the defendants and that this suit is incurably defective. The plaintiff in his testimony produced PEx 1 produced a limited grant of letters ad litem issued on the 12th June 2013 to prove that he is the legal representative of the deceased YOHANA OTABA NDUNDE alias NDUNDE issued by Justice Said J. Chitembwe. I find that his appearance is proper before this court and will proceed to determine the case.

The plaintiff gave evidence that the change of names entry 2 of 18th May 2007 from Ndunde to Makau Ndunde in respect of register LR. MARAMA/BUCHENYA/562 was fraudulent. Further the subdivision/closure of the register was equally fraudulent. The plaintiff pleaded particulars of fraud in the plaint. The plaintiff filed together with the plaint list of documents dated 25th June, 2013 and all the documents therein. The defendant filed the defence dated 21st February 2014. The plaintiff filed a reply to defence dated 28th February 2014.

On the 6th November 2017 the plaintiff and two of his witnesses testified and closed his case. The 1st Defendant is deceased and the plaintiff withdrew the case against him. The 2nd defendants never offered any oral evidence and failed to attend court though he was served and their case was closed.

It is not in dispute that the 2nd defendant the registered proprietor of LR. No. title LR Marama/Buchenya/1486. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

This court in considering this matter referred to the case of **Elijah Makeri Nyang'ra –vs- Stephen Mungai Njuguna & Another(2013)eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. HonJustice MunyaoSila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

From the evidence on record, YohanaOtabaNdunde alias Ndunde died on 18th April 1967.He was survived by 3 sons-Caleb WakhaNdunde (now deceased), Solomon MakauEmurungi alias MakauNdunde – the 1stdefendant(now deceased) and John OmamoNdunde, the plaintiff.Ndunde-owned land parcel LR. No. MARAMA/BUCHENYA/562, which he acquired on first registration on 28th February 1963.This is evidenced from the adjudication register and the register produced in evidence(PEx3(a) and 4). I find that the registration of MakauNdunde as change of names – entry No. 2 of 18th May 2007 in respect of the said land was illegal and or fraudulent as MakauNdunde was the son of Ndunde, thus not the same person(PEx 3(a)). Change of name applies to the same person unlike in the current case.I also find that subsequent subdivision of LR. MARAMA/BUCHENYA/562 creating 1486 and 1487 and subsequent transfer to the plaintiff and the 1st defendant and later the 2nd defendant was illegal/fraudulent as it was pursuant to the illegal/fraudulent change of names aforesaid.

In the Criminal Case – ButerePMCCR Case No. 312/2011 Republic vsMakauNdunde& Julius EmuitatiOmusula and the court found inter alia.

“Naturally flowing from the illegal and forgery that caused the change of names all the other transactions subsequent to the change of names and flowing from the change of names are illegal”

From the proceedings in the aforesaid Criminal Case (PEx2). The 1st defendant admitted that Ndunde was his father, the registered owner of MARAMA/BUCHENYA/562. According to him he did not know who caused the change of name and the subsequent subdivision of the subject. The proceedings and judgment in the criminal case were produced as exhibits.

It is clear entry 2 of 18th May 2007 in respect of MARAMA/BUCHENYA/562 of MakauNdunde – was by way of C/Names (PEx3 (a) copy of the register). The instrument used of this change of names could not be traced. However what is not in dispute change of name applies to the same person, contrary to what is in the present case. In any event the registered owner was dead, and no succession had taken place.The registered owner of LR. MARAMA/BUCHENYA/562, Ndunde died intestate in 1967. All parties confirmed there was no succession done so far.

The defendants did not offer any evidence to counter the plaintiff's evidence. The 2nd defendant's title LR Marama/Buchenya/1487(PEx3 (b) copy of the register)is illegal as already found in the aforesaid criminal case and the evidence on record and I also come to the same conclusion from the evidence before me. The 2nd defendant based on the aforesaid illegal title moved onto the said land, hence the prayer to have him evicted.I find that the plaintiff has proved his case on a balance of probabilities and is entitled to the reliefs sought. I therefore grant the following orders;

1. Cancellation of title deed numbers MARAMA/BUCHENYA/1486 and MARAMA/BUCHENYA/1487 and restoration of the original title deed number MARAMA/BUCHENYA/562 in the names of NDUNDE.
2. The 2nd defendantis given 3 (three) months from today's date to vacate the suit parcel better known MARAMA/BUCHENYA/1486and in default eviction order to issue forthwith.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE