



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 71 OF 2013

HELERIKO WABWIRE ORUBIA.....PLAINTIFF

VERSUS

JOHN OPONDO BARASA.....DEFENDANT

J U D G E M E N T

1. This suit was initially instituted in the lower court vide a plaint dated 28/6/2011. The Plaintiff – **HELERIKO WABWIRE ORUBIA** – complained that the Defendant – **JOHN OPONDO BARASA** – was claiming land parcel No. BUKHAYO/KISOKO/1256 (“disputed land” hereafter) of which the Plaintiff is the registered owner. The Plaintiff desired that the court grants him the following prayers:

- (a) A permanent injunction against the Defendant, his servants, workers and/or agents from settling on and/or putting to use the Plaintiff’s L.R. No. BUKHAYO/KISOKO/1256.
- (b) Costs of this suit.
- (c) Any other relief this Honourable court deems just and fit to grant.

2. The Plaint contains a narrative, given from the Plaintiff’s perspective. And the narrative is that the Plaintiff got the disputed land by way of purchase from the seller – **HENRY OMERI ONYAYIDI** – who then owned the then larger parcel No. BUKHAYO/KISOKO/249. The Plaintiff’s parcel was excised from the larger parcel. The size of the purchased parcel was 0.74Ha and the purchase allegedly took place in 1978. From then, the requisite legal processes were undertaken leading ultimately to registration of the Plaintiff as the absolute proprietor.

3. The Plaintiff pleaded that sometimes in 1979, the Defendant’s mother – **NAFULA** – came seeking refuge from Uganda where she had been evicted. The Plaintiff temporarily accommodated her and her children. Then Nafula died in 1997 and was buried on the land. Their mother dead, the Defendant and his two sisters returned to Uganda but the Defendant came back in the year 2011 claiming entitlement to a portion of the disputed land.

4. According to the Plaintiff, the seller of the disputed land is deceased.

5. The Defendant responded to the suit vide defence dated 1/8/2011 and counter-claimed. He denied the Plaintiff’s averments in the plaint, particularly that the Plaintiff purchased the disputed land as alleged or at all or that the alleged seller subdivided the land in favour of the Plaintiff.

6. In the Defendant’s counter-claim, the registration of the Plaintiff as owner was said to be fraudulent, with fraud said to consist in the Plaintiff allegedly passing off as the son of the Defendant’s mother. According to the Defendant, it is actually his own mother who had purchased the land. That is why the Plaintiff was posing as her son. Once the Defendant pulled off this feat, it is alleged that he went on falsifying virtually every other crucial process of registration until he got the title deed.

7. The Defendant denied that the alleged seller of the disputed land is deceased.

8. The Defendant’s counter-claim is founded on the alleged fact that his late mother – **Josephine Nafula** – purchased the disputed land way back in 1973. The seller gave vacant possession immediately and the whole family went into occupation. The Defendant pleaded that the said mother, his own father and two sisters died and were all buried on the disputed land. He averred that he is entitled to the land.

9. The Defendant prayed that the Plaintiff's suit be dismissed with costs (prayer a). He also wants that the Plaintiff's title be cancelled to pave way for him to be issued with a new title as owner (prayer b). Also desired, which is prayer c, is that the court executive officer be empowered to sign all the relevant transfer forms. The court was also asked to award costs (prayer d) and/or grant any other fit or just relief (prayer e).

10. The court started hearing the matter on 19/1/2017. The Plaintiff gave his evidence as PW1. He said, *inter alia*, that he bought a portion of land from the larger land parcel No. BUKHAYO/KISOKO/249. One Henry Omeri Onyaiti was the seller and the portion was bought at a price of 1500/=. Subdivision took place thereafter and the purchased portion became land parcel No. BUKHAYO/KISOKO/1256. The necessary legal process was allegedly followed leading to issuance of title deed to him. The Plaintiff said the Defendant is not related to him.

11. In the course of hearing, the Plaintiff produced various exhibits as follows:

(a) PEX No. 1 - Application for the requisite consent to Land Control Board.

(b) PEX No. 2 - The consent obtained pursuant to PEX No. 1.

(c) PEX No. 3 - Mutation form showing sub-division.

(d) PEX No. 4 - An alleged agreement to sell land.

(e) PEX No. 5 - Green card showing sub-division of parcel No.249.

(f) PEX No. 6 - Title deed issued to Plaintiff.

**(g) PEX No. 7 - Copy of search certificate showing Plaintiff as owner of the
disputed land.**

12. During cross-examination by Ms. Maloba for Defendant, the Plaintiff denied using trickery or fraud to get the disputed land. He denied too that the Defendant's late mother had bought the disputed land in 1973 or that the Defendant's relatives are buried on the land. The Defendant averred that the Defendant's counter-claim has no basis and that the Defendant cannot even inherit his mother's land as he has no letters of administration.

13. The Defendant also gave his evidence on 19/1/2017. According to the Defendant, the Plaintiff is a cousin, the Plaintiff's mother being the elder sister to his own mother. The Defendant therefore faulted the Plaintiff for saying they are not related. The disputed land, he testified, was bought by his late mother, who was illiterate, from HENRY OMERI ONYAIIDI, who was also illiterate, with the Plaintiff, who was literate, being trusted by the mother as a good witness.

14. In 1996, the Defendant's mother died and at her funeral, the Plaintiff is said to have publicly announced having custody of the papers relating to purchase of the disputed land. He announced at the same funeral that he would hand over the papers to the deceased children. The Plaintiff however never fulfilled the promise; instead, he surreptitiously registered the land as his own and the Defendant only came to discover this much later. The defendant said that he and the rest of his deceased mother's family have lived on the disputed land since 1973, with several of the deceased family members already buried on the land. According to the Defendant, it is a lie to say that he and his sisters went back to Uganda after their mother's death.

15. In the course of hearing, the Defendant availed the following exhibits:

(a) DEX No. 1 - Defendant's written statement.

**(b) DEX No. 2 - Agreement for sale of the disputed land between the
defendant's mother and DW2 – HENRY OMERI ONYAIIDI.**

**(c) DEX No. 3 - Minutes of a meeting called before the area chief to resolve the
dispute.**

(d) DEX No. 4 - Land Dispute Tribunal's proceedings

16. During cross-examination by Ashioya for the Defendant, the Defendant agreed that he had not filed a claim for adverse possession and had not also obtained letters of administration for his late mother's estate.

17. DW2 – HENRY OMERI ONYAIIDI – was the seller of the land. He was clear that both disputants are his relatives. His evidence is in his written statement filed in court on 1/8/2011. According to him, he sold the disputed land to the Defendant's late mother. He expressly said that he never sold it to Plaintiff. He also denied being dead as alleged by the Plaintiff. According to this witness also, he never participated in any process to transfer the disputed land to the Plaintiff. In general terms, DW2's evidence is in agreement with what the Defendant told the court.

18. The final witness called by the defence was Josiah Katatsa Buluma, who testified as DW3. He is an uncle to the Plaintiff and he identified the Plaintiff as the son of his sister – NASIRUBI. He is also an uncle to the Defendant, with the Defendant being a son to his other sister – Josephine Nafula Namenya. DW3's evidence is contained in his written statement filed here on 1/8/2011. It is clear from this witness that it is the Defendant's mother who bought the disputed land. It is clear too that the purchaser, the purchaser's husband, and some of the purchaser's children died and were buried on the land.

19. To DW3, the Plaintiff illegally registered himself as owner of the disputed land. It is therefore the Defendant and his brother, not the Plaintiff, who should be owners of the land.

20. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed on 21/5/2018. He submitted, *inter alia*, that he is the registered owner of the suit land, having purchased it in 1978 as a portion of land parcel No. BUKHAYO/KISOKO/249 owned by Henry Omeri Onyaidi, who is deceased. The purchased portion was excised from land parcel No. 249 and given a new number – 1256. It was further submitted that as a goodwill gesture, the Plaintiff allowed the Defendant's mother to temporarily settle on the land after being evicted from her place in Uganda. The mother thereafter died and the Defendant and his sister relocated to Uganda only for the Defendant to come back later to claim the land.

21. To the Plaintiff, he is constitutionally and statutorily protected as registered owner of the land and his interests therefore cannot be defeated. The fraud attributed to him was said not to be proved. Together with the submissions came a ruling in **ELC No. 197/2015, Kisii – MACHAREUS OBAGA Vs KENYA ELECTRICITY TRANSMISSION CO. LTD.** It was a ruling on an application for a temporary restraining order in proceedings pending determination in court. I have tried to get or decipher the relevance of the ruling in this case and the reason for availing it escapes me. It is not helpful at all and it comes across as a weird mis-match with the matter at hand. The Plaintiff submissions do not explain its relevance. This is a matter that is already fully tried. The ruling was for a matter yet to be tried at the time. The ruling was for interlocutory orders. This judgement is for final orders after conclusion of the trial.

22. The Defendant's submissions were filed on 18/4/2018. The submissions gave an overview of the whole case as presented by both sides. Then the courts attention was drawn to the various shortcomings in the Plaintiff's case. It was pointed out, for instance, that the relevant sale agreement was not availed. The Defendant submitted that the law, specifically Section 3 of the Contract Act (cap 23), requires such agreement to be in writing. To drive the point home, the decided cases of **RATILAL GOVA SUMARIA & Another Vs ALLIED INDUSTRIES: CA No. 203/2002, NAIROBI, and AGNETA ATHIENO ONYANGO Vs GEOFFREY KUDONDO & 2 Others: ELC No. 111/2014, BUSIA** were availed.

23. The consent availed as originating from Land Control Board was faulted as the seller denied being party to it. The Defendant alleged that such consent was forged and/or fraudulent and was therefore null and void. His position is that there was no consent. The Plaintiff's claim was therefore said to be founded on an illegality. The case of **KENYA PIPELINE CO. LTD Vs GLENCORE ENERGY (UK) LTD [2015] eKLR** was availed to show that courts of law should not rubber-stamp an illegality.

24. The Defendant was said to have demonstrated fraud in support of his counter-claim. The Plaintiff was said to have obtained the disputed land through fraud. The Plaintiff was said not to have rebutted allegations of fraud. The whole scheme of subdividing the original parcel No. 249 was said to have been designed and executed by the Plaintiff without consent of the owner. The owner was said to have denied selling the disputed land to the Plaintiff and he also denied signatures on documents the Plaintiff presented in court. According to the Defendant, the Plaintiff's title should be cancelled.

25. As regards the prayer for permanent injunction, it was pointed out that to get the prayer, one needs to demonstrate a probability of future infringement and that the ensuing damage would be of serious nature. The Plaintiff was said not to have demonstrated this. Ultimately, the court was asked to dismiss the Plaintiff's claim with cost. In the same vein, it was asked to allow the Defendant's counter-claim and grant the prayers sought.

26. I have considered the suit as filed, the Defendant's counter-claim, evidence tendered, and rival submissions. The Plaintiff's claim is founded on the presumed position that he is the legal owner of the land. At the time of hearing, the Plaintiff was the only witness to testify. He showed his title deed. He showed too various other documents relating to the process of getting the title deed. But the Defendant faulted the process and asserted that the title deed was illegally obtained.

27. The ownership is said to have started through purchase. The seller was Henry Omeri Onyaidi said to be deceased. But the seller turned out to be alive and testified here as DW2. He denied ever selling the land to the Plaintiff. And knowing that the seller was alive, and having even seen him in court, the Plaintiff in his submissions would still insist that the seller was deceased. This was dishonest on the part of the Plaintiff.

28. But the Plaintiff's dishonesty did not stop there. In his evidence in court, he said that he was not related to the Defendant. When the Defendant's turn to testify came, he availed evidence both from himself and others that he is in fact related to the Defendant. It is not clear why the Plaintiff decided to follow the path of lies. That path has never done any good to anyone. There is a **Maxim in law: FALSUS IN UNO, FALSUS IN OMNIBUS**, which translates as - false in one thing, false in everything. It is not clear in this matter what truth, if any, the Plaintiff told the court.

29. Contrast this with defence evidence. Credible evidence was availed to show that the land was initially sold to the Defendant's mother, with the Plaintiff playing the role of a trusted witness during sale. The seller denied ever selling the land to the Plaintiff. He denied too ever participating in the process of transfer of the land to the Plaintiff. The witnesses called by the defence were old people and they impressed the court as genuine and truthful participants or witnesses to what had happened.

30. One's title to land, whether one is considering it under our Constitution or Statutes, is only as good as the process leading to its acquisition. And that process is always viewed in light of demonstrated facts and the applicable law. In **MUNYU MAINA Vs HIRAM GATHIMA [2013] eKLR**, the court of appeal held, *inter alia*, that where a registered proprietor's title is under challenge, it is not enough to

dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title. He would need to show that the acquisition was legal, formal, and free from any encumbrances.

31. The Plaintiff in this case failed to discharge the burden of proving ownership of a challenged title. He was the only witness to testify yet he knew that the Defendant had lined up witnesses who would attack the process of acquisition of title. The same witnesses were able to show that the Plaintiff took advantage of the illiteracy or ignorance of the transacting parties to ultimately gain ownership. This appears to the court to have been wrong. In **MOHAMED Vs BAKARI & 2 others: [2008] 3KLR (EP) 54**, the court held, *inter alia*, that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.

32. In this matter, the Plaintiff failed to demonstrate that he legally acquired the title he holds as proof of ownership of the disputed land. He started his lies in the pleadings and continued to lie in evidence and final submissions. The Defendant on the other hand managed to avail good and credible evidence that displaced the Plaintiff's evidence. My finding, in light of the foregoing, is that the Plaintiff's claim is not proved on a balance of probabilities. I hereby dismiss the claim.

33. I now turn to the Defendant's counter-claim. He wants the Plaintiff's title cancelled. He would like to be issued with title. But his claim is based on the alleged fact that his late mother was the one who bought the land. True, he availed credible evidence to show it but his mother is deceased and the Defendant never bothered to obtain the relevant grant to represent her estate. That is where the weakness of the Plaintiff's case lies. When challenged by the Plaintiff for failure to obtain grant, the Defendant was content to assert that he was brought to court, implying that he needed no grant.

34. But the fact is that the Defendant was brought to court to defend himself, not to lodge a suit. A counter-claim is a suit in its own right and once the Defendant conceived the idea of lodging a counter-claim to claim his late mother's interest, he need to obtain a grant first. Failure to do so was fatal to his case. In **NATHANIEL O. KHISA Vs MARY KHISA NYANYI and 3 others: [2013] eKLR**, the suit was struck out because the Plaintiff had not obtained letters of administration. In **PETER KAMANDE & Another Vs JOSEPH KAMANDE & Another: HCC No. 146 of 2008, NYERI**, Seron J upheld a preliminary objection brought on grounds, *inter alia*, that the Plaintiff had not obtained the requisite grant. And in the **KENYA PIPELINE COMPANY'S** case (supra) availed by the Defendant himself the need to follow the law was emphasized and several cases, including **STANDARD CHARTERED BANK Vs INTERCOM SERVICES LTD & 4 others [2004] eKLR**, **MISTRY AMAR SIGNH Vs KULUBYA (1963) EA 408**, and **HEPTULA Vs NOOR MOHAMED (1984) KLR**, which were cited to drive home the point that it's important to comply with the law.

35. It is for this reason that I am of the considered view that though the Defendant's case seems to be reasonably well-founded from a factual standpoint, it cannot succeed as it has failed to comply with the law. I hereby also dismiss the Defendant's case on that score alone.

36. I have dismissed both the Plaintiff's case and the Defendant's counter-claim. In simple terms, each side has lost the case filed against the other side. There is therefore no need to condemn any side to pay costs. Each side therefore should bear its own costs.

Dated, signed and delivered at Busia this 26th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....