



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 204 OF 2012

DAVID OWINO OKONG'O PLAINTIFF

VERSUS

MARY KEKE 1ST DEFENDANT

CHECHO KEKE 2ND DEFENDANT

DANIEL MAGERO 3RD DEFENDANT

EZEKIEL ODUK 4TH DEFENDANT

J U D G M E N T

1. Introduction and Pleadings:

The plaintiff filed the present suit on 13th June 2012 as the administrator of the estate of Samson Okongo Oende (deceased). The plaintiff vide an amended plaint dated 18th March 2014 filed in court on 2nd July 2014 claims that the 3rd defendant in 1986 leased his late father's land parcel **Kamagambo/Kanyimach/155** for a sum of kshs.17,350/= but as his deceased father was illiterate, the 3rd defendant subsequently illegally and fraudulently got the land transferred to him purporting he had been sold the land by the plaintiff's deceased father. The plaintiff further alleges that the subsequent subdivision and transfer of a portion of 2.8Ha to the 3rd defendant and 1.0Ha to Zilpa Ayoma Okong'o wife of the late Samson Okongo Oende (plaintiff's father) was unlawful and fraudulent. The plaintiff further avers the 1st, 2nd and 4th defendants have unlawfully been utilizing land parcel **Kamagambo/Kanyimach/155** and are therefore trespassers.

2. The plaintiff by the plaint prays for judgment and for orders that:-

- (a) Cancellation and/or nullification of the title deeds No. Kamagambo/ Kanyimach/155/901 and 902 (the resultant subdivisions of parcel 155) respectively.**
- (b) Declaration that land parcel No. Kamagambo/Kanyimach/155 is intact and belongs to Samson Okong'o Oende.**
- (c) General damages for trespass against all the defendants.**
- (d) Injunction restraining any further encroachment and or trespassing into the plaintiff's land.**

(e) Cost and interest of the suit.

The 1st and 2nd defendants filed a joint statement of defence on 18th July 2012 where they denied ever trespassing onto land parcel **Kamagambo/ Kanyimach/155** and further denied the plaintiff has suffered any loss on account of any trespass by them. The 1st and 2nd defendants in their joint amended statement of defence under paragraph **6A** state that they are owners of a distinct land parcel No. **Kamagambo/Kanyimach/163** which has no relationship with land parcel **Kamagambo/Kanyimach/155** and further state that land parcel **Kamagambo/Kanyimach/155** is non-existent after it was closed on being sub-divided into parcels Nos. **Kamagambo/Kanyimach/ 901 and 902**. Further the 1st and 2nd defendants asserted that the suit against them is *Res Judicata* Rongo SRMCC No. 243 of 2011; that the suit is time barred by virtue of Section 4 of the Limitations of Actions Act, Cap 22 Laws of Kenya and that the suit discloses no cause of action against them.

3. The 3rd and 4th defendants equally filed a joint statement of defence dated 4th July 2012 on 6th July 2012. The 3rd and 4th defendants denied they had trespassed onto land parcel **Kamagambo/Kanyimach/155** or on any land belonging to Samson Okongo Oende (deceased). The 3rd and 4th defendants further asserted that land parcel **Kamagambo/Kanyimach/155** was non-existent and therefore it was incapable of being trespassed upon. The 3rd and 4th defendants further under paragraph 9 of the defence averred that the suit against them was misconceived, bad in law, and legally untenable and reserved the right to raise preliminary objections on points of law as set out thereunder. No preliminary objection was formally raised and the matter proceeded to full trial and hence the court will determine the suit on the basis of the evidence adduced by the parties.

4. After closure of the pleadings the suit was heard before me on various dates. The plaintiff and two witnesses testified in support of the plaintiff's case. The 3rd, 4th and 1st defendants testified for the defence in that order. The parties filed final written submissions after the hearing closed.

5. The Evidence;

The plaintiff testified as PW1 and his evidence was that he was the son of the late Samson Okongo Oende and that he was born in March 1979. He stated that the 3rd and 4th defendants had been illegally using his late father's land parcel No. **Kamagambo/Kanyimach/155 for farming**. He testified that his father was registered as the owner of the land on 12th September 1979 as per the copy of the title exhibited in the plaintiff's bundle of documents. The witness stated that his father never sold the land to anybody and as evidence of that he stated the original certificate of title was still in his custody and was intact. He showed the original certificate of title to the court which the court confirmed tallied with the exhibited copy. The witness stated that his late father's land had never been subdivided and stated that land parcels Nos. **Kamagambo/Kanyimach/901 and 902** which are exhibited by the defendants were not from land parcel No. **155** since he still held the original title.

6. The plaintiff further denied the claims by the 3rd defendant that the 3rd defendant purchased the land from his father and termed the documents relating to the agreement and transfer of the land and the subdivision of his father's land exhibited in 3rd and 4th defendants' bundle of documents as forgeries and work of fraud. The witness stated his father died in 2009 and that he was buried in Langwe and not at the disputed property. The witness stated that he was not aware that land parcel **No. 163** borders parcel **No. 901** and/or whether the 1st and 2nd defendants were using land parcel **No. 163**. His position was that the 1st and 2nd defendants were also farming on land parcel **No. 155** and therefore were trespassing onto their father's land.

7. PW2, John Okoth Nyakoe testified that he knew Samson Okongo (now deceased). He stated that the deceased was his brother and he died in 2009. He stated that the late Samson Okong'o owned land parcel **No. 155**. He testified that the defendants entered the land and had been farming thereon and notably the 4th defendant has dug some fish ponds on the land while the 1st and 2nd defendants have been cultivating sugarcane on the land. The witness stated that he was not aware that Samson Okongo (deceased) had sold

his land to the defendants. The witness stated the defendants had refused to vacate from the land stating they had purchased the land. Under cross examination the witness affirmed that both the plaintiff's father and his mother were not buried on the parcel of land but at Rangwe. The witness further stated that nobody resides on the parcel of land and that only the 1st and 3rd defendants have been cultivating on the land. The witness further stated that he was not aware that parcel **No. 155** had been subdivided to create land **parcels 901 and 902**. He also stated that he was not aware where land **parcel 163** was located and would not know whether the 1st defendant was cultivating on parcel **No. 163**.

8. PW3, Jared Ouma Okongo the elder brother of the plaintiff testified that the 3rd defendant had only leased land from their father and not bought. He stated that the 4th defendant had built a house on his father's land while the 1st and 2nd defendants were cultivating on a portion of the land owned by his late father. The witness stated that he did not know how the 1st and 2nd defendants came onto the land and/or how land parcels **Nos. 901 and 902** came into being yet they were holding the original title issued to their father in respect of land parcel **No. 155**.

9. In cross examination the witness stated the 3rd defendant leased his father's land in 1987 and he stated his father did not during his lifetime raise any complaint against the 3rd defendant. The witness stated that it was in the year 2000 that he learnt the 1st and 2nd defendants were utilizing a portion of the land. The witness stated he was born in 1975 and hence he was only 5 years in 1980 when the 3rd defendant claims to have purchased his father's land. The witness had no knowledge that there was a case in Kisii Law Courts involving his father and the 3rd defendant involving the said land. He denied he had any information that land parcel **No. 155** was subdivided into land parcels **Nos. 901 and 902**. He maintained land parcel **No. 155** remains intact insisting his father had neither sold nor subdivided the land.

10 .The 3rd defendant Daniel Magero testified as DW1 and it was his evidence that the late Samson Okongo approached him and informed him he wished to sell his land parcel No. **Kamagambo/Kanyimach/155** as he needed some money and wanted him to buy the land. The 3rd defendant agreed to buy the land after verifying the land was in the deceased name as per the copy of title exhibited at page 9 of the 3rd and 4th defendant's bundle of documents. The abstract of title at page 13 bundle of documents confirms the details of the title and ownership and the certificate of official search dated 15th October 1985 verifies the ownership of land parcel **Kamagambo/ Kanyimachi/155**. The 3rd defendant entered into a sale agreement with the late Samson Okongo to buy the said land dated 30th June 1980. The copy of title, copy of abstract of title, copy of search certificate and copy of agreement for sale were produced as **"DEx.1, 2, 3 and 4"** respectively.

11. The 3rd defendant further testified he paid the agreed purchase price of kshs. 17,300/= and additionally gave the deceased 4 cows to enable him to pay bride price for another wife the deceased wanted to marry. The agreement as per the witness was made before the area subchief. The 3rd defendant stated that he bought the deceased entire parcel of land and took possession of the same immediately upon payment and commenced farming sugarcane thereon. He further stated that Samson Okong'o (deceased) and his entire family vacated the land and went to live and reside at Rangwe and that for all the time the deceased was alive nobody interfered with his possession and use of the land.

12. The 3rd defendant further testified that before the land could be transferred to him the wife of the deceased raised objection to the sale prompting the D.O Rongo to arbitrate the dispute. The award of the D.O and the members of the Land Control Board dated 16th October 1986 was filed in the Resident Magistrate's Court Kisii and recommended that land parcel No. **155** be subdivided into two portions of 7 acres and 2½ acres and that the portion of 2½ acres be given to the wife of the deceased. The award annexed to the 3rd and 4th defendants' bundle of documents was produced as **"DEx.5"**. The award was filed in the Senior Resident Magistrate's Court at Kisii as Misc. App. No. 22 of 1986 and the application was listed for hearing on 3rd February 1987. On the said date the record of the proceedings shows the parties were present and both agreed with the award whereupon the court endorsed the award as its

judgment and directed a decree to issue. Again on 28th July 1987 the 3rd defendant and the deceased wife Mrs. Silpa Ayoma Okong'o appeared before the Senior Resident Magistrate, Kisii when the court directed that the Executive Officer (E.O) of the court execute the necessary transfer documents to give effect to the judgment of the court. The court proceedings annexed to the 3rd and 4th defendants' bundle of documents were produced as "DEx.8". Consequent to the court order the Land Control Board issued the letters of consent dated 8th May 1987 and 13th May 1988 annexed to the bundle of documents and produced as "DEx.6 and 7" respectively.

13. The suit property was subdivided in terms of the court order as per the copy of mutation registered on 21st December 1989 included in the 3rd and 4th defendants' bundle of documents at pages 24-27. The transfers in favour of the 3rd defendant and the wife of the deceased were executed by the Executive Officer. The 3rd defendant was issued with title to land parcel No. **Kamagambo/Kanyimach/901** on 21st December 1989 measuring 2.8 hectares. The 3rd defendant asserts that he validly acquired the land and that he has not trespassed onto the plaintiff's land as alleged and the claim by the plaintiff is baseless. The 3rd defendant stated that he followed due process and paid all the necessary dues to obtain the title to his land. The witness in conclusion stated he had sold parcel **No. 901** to the 4th defendant although the process is not fully completed. He further stated the deceased never surrendered the original title to him.

14. The 4th defendant testified as DW2 and he stated that his mother used to farm sugarcane on land parcel **No. 901** and she had agreed with the 3rd defendant who was the registered owner that if he ever opted to sell the land he would give her the option to purchase. The 4th defendant stated that his mother passed on in 2006 and since he had known the 3rd defendant over a long time he expressed his desire to continue farming on the land and also his interest to purchase the land should the 3rd defendant wish to sell. He stated that the 3rd defendant allowed him to commence farming on the land and in the meantime they entered into an agreement where he was to purchase the land for kshs. 2.1Million.

15. The 4th defendant stated however before the sale transaction was finalized the plaintiff commenced the present dispute initially before the Rongo Magistrate's Court where an injunction was issued ex parte which the plaintiff used to forcibly enter onto the land and commence cultivation therein. The suit in the Rongo Magistrate's Court was however dismissed as the court lacked jurisdiction. The 4th defendant stated he is now registered as the owner of land parcel **Kamagambo/Kanyimach/901** as the 3rd defendant effected transfer to him. Title deed dated 14th November 2014 in name of Ezekiel Oduk was produced as DEx.17. The witness stated that when the plaintiff forcibly entered the land in 2012 the land was clear and open and was exclusively used for farming. The plaintiff has however since built a semi permanent structure on the land. The 4th defendant stated that he owns land parcel **Kamagambo/Kanyimach/174** which is adjacent to parcel **901** and that is where he carries on fish farming and not on parcel **155** as alleged by the plaintiff. The 4th defendant further stated that the plaintiff's actions have prevented him from making use of his land without any justification. In cross examination the witness stated he was aware land parcels **901** and **902** were subdivisions out of land parcel **155** and the latter title ought to have been surrendered. He disagreed that land parcel **901** was fraudulently procured or obtained. He asserted that he properly and legally transacted with the 3rd defendant as the registered owner of land parcel **901**.

16. The 1st defendant testified on behalf of herself and the 2nd defendant whom she represented as personal representative following his death. Grant of Letters of Administration dated 8th June 2004 were produced as exhibit "DW3 Ex.1". The witness adopted her witness statement filed in court on 18th July 2012 as her testimony and averred that she resides in land parcel No. **Kamagambo/Kanyimach/163** which is registered in her late husband's name. She stated that she has never encroached and/or trespassed on parcel number **Kamagambo/Kanyimach/155** and has not carried any farming thereon. She further stated land parcel **Kamagambo/Kanyimach/ 155** is non-existent as it was closed upon subdivision to create land parcels **Kamagambo/Kanyimach/901** and **903**. The witness produced in evidence the title deed for parcel **163**, a certificate of official search and abstract of title in respect of

parcel **163** and same were marked “**DW3Ex.2 (a), (b) and (c)**”. Additionally the witness produced title abstract for parcel 155 and mutation form showing the subdivision and the same were marked “**DW3Ex.3(a) and (b)**”.

17. Further the 1st defendant produced a survey map for Kamagambo Registration Section marked “**DW3Ex.4**” to show the delineation of the parcels of land. In cross examination the witness maintained that she had only carried on farming on her parcel number **163** and not any other land stating that she started using her land in 1991. She stated that she never knew Samson Okongo (deceased) and that she knew her neighbours who are the 3rd and 4th defendants herein. She stated she had known the 3rd defendant since 1991 as a neighbour who owned the land adjacent to their land. She further stated she knew the 4th defendant’s mother as she was farming in the 3rd defendant’s land.

18. Analysis and determination;

Having reviewed the pleadings, the evidence and the submissions by the parties the issues that arise for determination are as follows:-

(i) Whether one Samson Okongo Oende (deceased) was the registered owner of land parcel number Kamagambo/Kanyimach/155 and if so whether he sold the land to the 3rd defendant?

(ii) In chase there was a sale by the deceased to the 3rd defendant, whether such sale was completed and effectuated?

(iii) Whether there was a subdivision of land parcel number Kamagambo/ Kanyimach/155 to create land parcels Kamagambo/Kanyimach/901 and 902 and if so whether such subdivision was unlawful?

(iv) Whether the defendants are in unlawful possession of the plaintiff’s land parcel and are therefore trespassers deserving to be restrained?

(v) Whether the 3rd defendant is the legitimate and lawful owner of land parcel Kamagambo/Kanyimach/901?

(vi) Who bears the costs of the suit?

In drawing the above issues, I have taken regard of the different sets of agreed issues filed by counsel for the plaintiff and counsel for the 3rd and 4th defendants and I am satisfied the issues as drawn by the court capture the issues that need to be determined between the parties. I will not analyze and discuss the issues in any particular order or sequence but I will endeavour to answer the issues in the course of my discussion and analysis of the evidence.

19. There is no difficult in disposing of the first part of the first issue whether or not the deceased, Samson Okongo was the registered owner of land parcel **Kamagambo/Kanyimach/155**. Both the plaintiff and defendants have adduced evidence that shows the deceased was registered as owner of parcel **155** and was issued with a certificate of title dated 12th September 1979. The plaintiff produced a copy of the title and even had the original certificate of title issued to his late father. The 1st defendant and the 3rd defendant also produced an abstract of title in respect of land parcel number 155 which showed that the land which measured 3.8Ha. approximately was registered in favour of Okongo Oende on 17th October 1977 and was issued with a certificate of title on 12th September 1979. The 3rd and 4th defendants also produced a copy of certificate of official search dated 15th October 1985 which affirmed the contents of the abstract of title (green card) as of that date. A certified copy of the land register or official search is prima facie evidence that the person’s name appearing in the register is the absolute proprietor of the land he is shown to be the owner. Accordingly therefore I hold and find the late Samson Okongo Oende was registered owner of land parcel number **Kamagambo/Kanyimach/155** on 17th October 1977 and was

issued a certificate of title on 12th September 1979.

20. The 3rd defendant stated that he purchased the land from the deceased and has produced the copy of agreement dated 30th June 1980 (“**DEx.4**”). He stated that the agreement was made before the subchief and that he paid the full purchase price of Kshs.17,350/=. The plaintiff and his brother dispute this agreement. From the evidence that the plaintiff (PW1) and PW2 tendered it appears the basis of disputing the agreement was because their late father had not informed them he had sold the land and he still had the original title which according to them he would have surrendered if he had sold the land. The 3rd defendant explained in his evidence that when he bought the land and had paid the full purchase price he took possession of the land and started to cultivate the same. He further explained that the deceased vacated the suit land together with his entire family and went and settled in Lambwe Valley, Mbita Division. He stated that later in 1986 one of the deceased wives, Zilpa Ayoma Okong’o returned to the land demanding to be given a share and this culminated with the dispute being lodged with the District officer, Rongo Division for adjudication. The D.O and the elders arbitrated the dispute and held that indeed the deceased had sold the land to the 3rd defendant. Nonetheless the elders decided that the deceased wife should be given 2½ acres out of the land since the deceased had deserted her.

21. The plaintiff admitted that he was born in March 1979 and his brother PW3 was born in 1979. PW2 stated he had no knowledge that the deceased had sold the land to the 3rd defendant although he agreed the defendants had been using the land. At the time the alleged agreement was entered into on 30th June 1980 both the plaintiff and his brother PW3 were minors and could not have known what was taking place. They had no legal capacity to participate in any contract. The plaintiff also agreed that when his mother died she was buried at Lambwe and not on the suit land. His father also who died in 2009 was buried at Lambwe and not on the suit land. There is no indication whatsoever that the deceased since 1980 when the 3rd defendant took possession of the suit land ever queried the 3rd defendant’s occupation and possession. The evidence by the 3rd defendant that the deceased and his family moved out of the suit property after selling the land to the 3rd defendant has not been contravened. The D.O and the elders were satisfied that the deceased had sold the land to the defendant. The actions and conduct of the deceased are consistent with him having sold the land to the 3rd defendant. The fact that the deceased had not surrendered the original certificate of title cannot be evidence that he had not sold the land. Under Section 33(1) of the Registered Land Act, Cap 300 Laws of Kenya (repealed) a land registrar could dispense with the production of a title deed. It is my holding and finding that indeed the deceased (plaintiff’s father) had entered into an agreement to sell the land to the 3rd defendant as evidenced by the memorandum of agreement dated 30th June 1980 (“**DEx.4**”).

22. Having come to the finding that the deceased was the owner of land parcel number **155** and that he sold the same to the 3rd defendant it is my view that the process of adjudication of the dispute before the D.O Rongo when the deceased wife raised an issue respecting the transaction was an effort in effecting the sale on the part of the 3rd defendant. At the time the D.O arbitrated the matter he was acting as a competent authority to arbitrate land disputes. The decision by the elders was adopted by the court as judgment of the court. The magistrate’s court was equally a competent court to handle the matter and to the extent that the elders award and/or judgment of the court was not set aside, it was in order for the magistrate’s court to execute its judgment. The order of 28th July 1987 by the Senior Resident Magistrate was made in execution of the judgment and hence the subsequent execution of the transfers and mutation form by the Executive Officer of the court was valid. The suit property was therefore appropriately subdivided pursuant to the order of the court and it is my finding therefore that land parcel **Kamagambo/Kanyimach/155** was lawfully subdivided to create land parcels **Kamagambo/Kanyimach/901** and **902**. That land parcel **Kamagambo/Kanyimach/155** was subdivided is clear from the abstract of title in respect of parcel **155 (DEx.2)** which clearly shows the title was closed on 15th December 1989 on subdivision (New Nos. **901** and **902**). This evidence is conclusive that land parcel **Kamagambo/Kanyimach/ 155** ceased to exist following subdivision. Although it is not clear whether the land registrar called for the surrender of the original title upon registering the subdivision, my view is that if he did not, the omission cannot invalidate the subdivision which was properly and validly

executed pursuant to a court order. The original title became obsolete immediately the subdivision was registered and new subtitles issued. As observed earlier, the land registrar had power to dispense with the production of the title deed. It is my finding and holding that the land parcel **Kamagambo/Kanyimach/155** was subdivided into parcels **901** and **902** and that the subdivision was lawful.

23. Having held that the subdivision of parcel number **155** was lawful it follows that the 3rd defendant who was the beneficiary of land parcel **901** could not be in trespass. The 3rd defendant as I have held bought the suit property from the plaintiff's deceased father and took possession with the consent and/or authority of the deceased. The defendants were not trespassers on the suit land. Indeed there is absolutely no evidence that the 1st and 2nd defendants were cultivating on what used to be parcel 155. The 1st defendant adduced credible evidence that they own land parcel **Kamagambo/Kanyimach/163** which is adjacent to parcel number 901. This is evident from the survey map produced by DW3 as **"DW2Ex.4"**. The defendants cannot be trespassers on parcels of land that they own. The 3rd defendant was registered as owner of land parcel **Kamagambo/Kanyimach/ 901** in 1989 and was cultivating on the land all along. The deceased died in 2009 about 20 years later and during all that period he never attempted to recover the land from the 3rd defendant. His wife was an active participant in the proceedings before the D.O and the court which resulted in the subdivision of the land that the deceased owned and which the plaintiff now claim. The claim in my view is unsustainable as it definitely is statute barred under the Limitation of Actions Act, Cap 22 Laws of Kenya. Section 7 of the Limitation of Actions Act provides:-

"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

24. While the evidence is in abundance that the 3rd defendant has been farming in the suit property since 1980 it is not clear or apparent why the deceased never raised any issue respecting the 3rd defendant's user of the land until he died in 2009 or why the plaintiff waited until the death of his father to bring this action. The action is statute barred and I so hold. The law does not aid the indolent.

25. The 3rd defendant became the legitimate owner of land parcel **901** when he was duly registered as the owner in 1989 following due process and his title was absolute and indefeasible unless it was demonstrated the same was obtained by him fraudulently. The plaintiff alleged fraud against the 3rd defendant in obtaining the title but no evidence of any fraud has been adduced. It is not enough for a party to allege fraud as the plaintiff has done herein. Fraud must be specifically pleaded and proved and the standard of proof is on a higher pedestal than on a balance of probabilities as is the norm in civil cases though the burden is not as high as in criminal cases where proof is beyond a reasonable doubt. In the present matter the plaintiff merely alluded to the documents relied on by the defendants particularly the 3rd defendant not being genuine but offered no proof. The documents relied upon by the 3rd defendant were basically public documents and unless rebutting evidence is brought the documents are admissible as proof of the contents they contain. The burden to prove fraud always remained with the plaintiff as the party who was alleging it and he failed to discharge that burden. He who alleges bears the burden of proof.

26. Considering the totality of the evidence, I am not satisfied the plaintiff has proved his case on a balance of probabilities and I find the same to be devoid of any merit. I dismiss the suit with costs to the defendants.

Judgment dated, signed and delivered at Kisii this 17th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 2nd and 3rd defendants

..... for the 1st and 4th defendants

..... Court assistant

J. M. MUTUNGI

JUDGE