



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 86 OF 2011**

**NAFTALI SIAGE OTENYO ..... PLAINTIFF**

**VERSUS**

**HARRISON AKEYO ..... 1<sup>ST</sup> DEFENDANT**

**DAN AKEYO ..... 2<sup>ND</sup> DEFENDANT**

**BENARD AKEYO ..... 3<sup>RD</sup> DEFENDANT**

**RONALD AKEYO ..... 4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

1. The plaintiff commenced the instant suit vide a plaint dated 11<sup>th</sup> May 2011 filed in court on the same date. The plaintiff claims that on or about the month of May 1994 he was approached by one James Akeyo Awuor (now deceased) to purchase land and he agreed to purchase a portion of land parcel **LR No. Central Karachuonyo/Konyango/1152** then registered in the name of the deceased. The plaintiff states he purchased a portion of 0.25Ha which was subsequently subdivided out of land parcel **1152** and assigned **LR No. Central Karachuonyo/Konyango/2654** (hereinafter referred to as “the suit property”). The suit property was subsequently transferred to the plaintiff and was registered in his name and he presently remains the registered owner.

2. The plaintiff further states that on or about March 2011 the defendants who are sons of the vendor, the said James Akeyo Awuor (now deceased) unlawfully trespassed onto the suit property claiming it formed part of their deceased father’s property. The plaintiff caused the land registrar to visit the site whereat he delineated and fixed the boundaries of land parcels **Central Karachuonyo/Konyango/2653** and **2654** but the defendants nonetheless persist in trespassing onto the plaintiff’s land parcel **LR No. Central Karachuonyo/Konyango/2654**.

3. The plaintiff seeks judgment against the defendants jointly and severally in the following terms:-

**1. Declaration that the plaintiff is the registered and/or lawful owner of LR No. Central Karachuonyo/Konyango/2654;**

**2. An order of eviction against the defendants, their agents and/or servants from LR No. Central Karachuonyo/Konyango/2654;**

**3. Permanent injunction;**

**4. General damages for trespass;**

**5. Costs of the suit;**

**6. Such further and/or other relief as the honourable court may deem fit and expedient to grant.**

4. The defendants filed a joint statement of defence dated 25<sup>th</sup> February 2013. The defendants state that their late father, James Akeyo Awuor (deceased) was the registered owner of land parcel Central Karachuonyo/Konyango/ 152 and was so registered until his death on 16<sup>th</sup> May 1998. The defendants deny that the said James Akeyo Awuor (deceased) sold a portion of his said land to the plaintiff in 1994 as alleged by the plaintiff. The defendants aver that land parcel **Central Karachuonyo/Konyango/1152** was at the time of the death of the said James Akeyo Awour in 1998 still registered in his name and was so registered at the time the 2<sup>nd</sup> and 5<sup>th</sup> defendants petitioned for grant of letters of administration vide PM's court Succession Cause No. 107 of 2010 at Oyugis.

5. The defendants contend that the subdivision of land parcel **Central Karachuonyo/Konnyango/1152** carried out on 14<sup>th</sup> June 2010 and the consequent transfer of a portion thereof to the plaintiff was fraudulent as the same was not in compliance with the Law of Succession Act, Cap 160 Laws of Kenya. The defendants aver that the documents alleged to have been executed by the late James Akeyo Awuor were forgeries. The plaintiff thus deny trespassing onto the plaintiff's land asserting that the plaintiff had no right to cause the subdivision of land parcel **Central Karachuonyo/ Konyango/1152** and deny being liable in damages to the plaintiff.

6. The suit was partly heard by **Okong'o, J.** when the plaintiff testified and closed his case. The plaintiff testified that in 1994, the deceased, one James Akeyo Awuor, informed him he was selling some land and that after negotiations with the deceased, the plaintiff agreed to purchase a portion measuring 0.25Ha out of land parcel **Central Karachuonyo/Konyango/1152** for the consideration of kshs. 20,000/=. The plaintiff testified that his portion was subdivided and was issued a new number **Central Karachuonyo/Konyango/2654** and was transferred to him by the deceased and that he subsequently was issued with a title deed. The plaintiff further stated that the defendants were young when he purchased the property. He stated that he started using the property and was planting groundnuts on the suit property and that the defendants never complained about his occupation and use of the property until 2011, when they destroyed his fence on the suit property which prompted him to make a report to the area chief and the D.O of the area.

7. The defendants in invading the land were claiming that the land belonged to them. The District Land Registrar visited the land at the request of the plaintiff and established the boundary of land parcel **2654** and parcel **2653**, but the defendants did not respect the boundary as established by the land registrar as they destroyed the fencing that the plaintiff fixed. The plaintiff stated that he lawfully acquired the land from the defendants' father and tendered in evidence a letter of consent for subdivision of land parcel **Central Karachuonyo/Konyango/1152** dated 6<sup>th</sup> July 1994 ("**PEX.1**"), copy of mutation form dated 12<sup>th</sup> August 1994 ("**PEX.2**"), Letter of Consent for the transfer of land parcel **Central Karachuonyo/Konyango/2654** from James Akeyo Awuor to Naftali Siale Otenyo dated 3<sup>rd</sup> August 1994 ("**PEX.3**") and a transfer of land form dated 22<sup>nd</sup> September 1994 duly executed ("**PEX.4**"). The plaintiff was issued a title deed for the suit property on 20<sup>th</sup> July 2010 ("**PEX.5**"). The plaintiff testified that he carried out a search on the property before he purchased the portion out of parcel 1152 and produced a copy of official search dated 18<sup>th</sup> May 1994 ("**PEX.6**"). The plaintiff further testified the defendants have persisted in trespass since year 2011 when they started staking claim of ownership to his parcel of land and he seeks their eviction from his land and the costs of the suit.

8. In cross examination by the defendants counsel, the plaintiff stated the defendants were young when the property was sold to him. He reiterated that both he and the seller applied for the land control board, although he did not have a copy of the application form. He stated that he lodged the transfer form for

registration on 15<sup>th</sup> June 2010 and he explained the delay for lodging the same on account of lack of money. He confirmed the vendor had passed away by the time he presented the transfer for registration but indicated the property was still in the name of the deceased at the time he presented the transfer for registration. The plaintiff denied the deceased was ill and/or bedridden in 1994 such that he would have been unable to execute any documents. He denied he forged the transfer and/or caused the unlawful subdivision of the original parcel of land. The plaintiff denied being aware that an administrator of the deceased estate had been appointed.

9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants testified on their own behalf and on behalf of the other defendants. The 1<sup>st</sup> defendant testified that the plaintiff was his neighbour and he knew him to have been a friend of his late father. He stated that he came to learn that the plaintiff was the registered owner of land parcel **Central Karachuonyo/Konyango/2654** in 2010 when he saw a copy of the Registry Index Map when he wanted to file a Succession Cause in respect of his deceased father. He stated that up until 2010, his late father was the registered owner of land parcel **Central Karachuonyo/ Konyango/1152** but when he saw the survey map it indicated the land had been subdivided. The plaintiff indicated he had purchased a portion from his father in 1994. The 1<sup>st</sup> defendant stated that he did not know how the plaintiff processed the subdivision and the transfer to himself yet succession in regard to the defendants' father's deceased estate had not been undertaken. The witness relied on his written statement of evidence filed in court on 25<sup>th</sup> February 2013 and the documents filed by the defendants being certificate of death (**DEx.1**), Letter dated 5<sup>th</sup> October 2011 from the Office of the President (Provincial Administration & Internal Security (**DEx.2**) and Letters of Administration issued in the PMs Succession Cause No. 107 of 2010 on 1<sup>st</sup> December 2010 ("**DEx.3**").

10. In cross examination the 1<sup>st</sup> defendant stated that it was when he purchased a survey map in 2010 that he realized his father's land parcel **1152** had been subdivided and that he was registered as owner of land parcel **2653**. He further stated after he realized the plaintiff had title to land parcel **2654** he ceased trespassing onto the plaintiff's said parcel and restricts his activities to his own parcel **2653**. He denied being in trespass onto the plaintiff's land parcel.

11. The 1<sup>st</sup> defendant admitted that land the land registrar visited the site and established the boundary between land parcels **2653** and **2654**. The witness contended that his father who had died in 1998 could not have transferred the land to the plaintiff in 2010 when the transfer of land parcel 2654 was effected.

12. DW2, Dan Akeyo testified that the chief of their area gave them a letter on 15<sup>th</sup> July 2010 confirming them to be the beneficiaries of the deceased to enable them file a succession cause. The witness testified they had carried out a search on 20<sup>th</sup> April 2010 which confirmed their late father was still the registered owner of land parcel **1152**. The 2<sup>nd</sup> defendant further asserted the plaintiff did not follow due process to get himself registered as owner of land parcel **2654**. The witness affirmed he knew the plaintiff from when he (the 2<sup>nd</sup> defendant) was a young boy but stated he did not know how the plaintiff got his late father's land subdivided and the portion of land parcel **2654** registered in the plaintiff's name. The 2<sup>nd</sup> defendant stated he was about 10 years in 1994 and that he was aware the plaintiff was doing farming on a portion of his late father's land during his late father's lifetime. The witness admitted being aware of the report made by the registrar after he visited the site but maintained that he does not know parcel **2653** insisting that he and his brothers are occupying land parcel **1152** which belonged to their father. It was the 2<sup>nd</sup> defendant's position that the title that the plaintiff holds on land parcel **2654** was fraudulently obtained although the witness stated he had never instituted any suit to challenge the plaintiff's title.

13. The parties filed their final submissions following the close of the trial. The plaintiff filed his submissions on 30<sup>th</sup> January 2017 and the defendants filed their submissions on 15<sup>th</sup> May 2017.

14. Having carefully considered and evaluated the pleadings, the evidence tendered by the parties and the submissions made by the parties, the issues that arise for determination by the court are the following:-

(i) **Whether the plaintiff is the registered owner of land parcel Central**

**Karachuonyo/Konyango/2654 and if so whether he procured the registration fraudulently?**

**(ii) Whether the defendants' deceased father had executed the instrument of transfer in favour of the plaintiff?**

**(iii) Whether the plaintiff ought to have invoked the process of succession under the provisions of the Law of Succession Act Cap 160 Laws of Kenya to effect the registration of the transfer?**

**(iv) Whether the defendants are in trespass on land parcel Central Karachuonyo/Konyango/2654.**

15. The undisputed evidence is that the deceased defendants' father, one James Akeyo Awour was the registered owner of land parcel **Central Karachuonyo/Konyango/1152**. The plaintiff contends that he purchased a portion of 0.25Ha out of the said parcel of land and that the defendants' deceased father executed the necessary transfer of the portion of land after the subdivision was done. The form of transfer of land dated 22<sup>nd</sup> September 1994 on the face of it was properly executed, the transferor's and the transferee's signatures were duly attested as required under the law. The land board consent for the subdivision of land parcel **Central Karachuonyo/Konyango/1152** was given on 6<sup>th</sup> July 1994 (PEx.1). The mutation form for the subdivision of the land was prepared on 9<sup>th</sup> August 1994 and was signed by the District Surveyor on 12<sup>th</sup> August 1994. The land board consent for the transfer of land parcel **Central Karachuonyo/ Konyango/2654** was given on 3<sup>rd</sup> August 1994. The transfer and the mutation forms were not presented for registration until 2010 when they were processed and registered. The plaintiff paid penalty on stamp duty and for late registration and was eventually issued with a title deed on 20<sup>th</sup> July 2010.

16. The defendants admit that presently the plaintiff is registered as the proprietor of land parcel **Central Karachuonyo/Konyango/2654** but they contend that the plaintiff's registration was procured fraudulently arguing that the plaintiff was so registered in June 2010 when their father who it is alleged sold the property to the plaintiff had died way back in 1998. They argue that for the transfer in favour of the plaintiff to have been registered there ought to have been succession proceedings in regard to their late father's estate. They contend they (defendants) commenced succession proceedings in 2010 and as at that time their late father was still the registered owner of land parcel 1152. The defendants have contended that the transfer as well as the letters of consent were forgeries though they have not adduced any evidence in proof.

17. I have carefully evaluated the evidence tendered by the plaintiff including the documents tendered in support thereof and I am persuaded the plaintiff had a sale transaction for a portion of land parcel **Central Karachuonyo/ Konyango/1152** with the defendants' deceased father. The consent for the subdivision issued on 6<sup>th</sup> July 1994 (PEx.1), the mutation form dated 9<sup>th</sup> August 1994 (PEx.2) and the consent to transfer dated 3<sup>rd</sup> August 1994 (PEx.3) are consistent with having been made pursuant to the sale transaction. The deceased executed the transfer of land form dated 22<sup>nd</sup> September 1994 in favour of the plaintiff. The defendants have alleged that the transfer was not executed by their deceased father and claim it is a forgery. The defendants have however offered no proof of forgery. The burden of proof lies with the party who alleges and in the instant case the defendants had the burden to prove that the documents tendered in evidence by the plaintiff were forgeries. Section 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya are clear as to who bears the burden of proof of any facts in a suit. Section 108 provides thus:-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given or either side.”**

Section 109 further provides as follows:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to**

**believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

18. The plaintiff testified that the defendants were young when he purchased the suit land from their father. He stated he had been using the suit land (parcel **2654**) from the time he purchased it up to 2011 without any problems from the defendants. The defendants would appear to have been awoken up in 2010 when they carried out an official search at the lands office which showed their deceased father was still the registered owner of parcel **1152** which included the portion the plaintiff was using. The defendants filed Succession Cause No. 107 of 2010 in Oyugis Principal Magistrates Court and were issued a temporary grant of Letters of Administration on 1<sup>st</sup> December 2010. The defendants contend that the plaintiff could not have validly registered a transfer in respect of the suit land in 2010 without invoking the provisions of the Law of Succession Act, since the property belonged to a deceased person.

19. I have made a determination that indeed the plaintiff purchased a portion of land parcel **1152** which was subdivided into parcels **2653** and **2654**. The deceased executed a transfer in favour of the plaintiff of land parcel **2654** after the consent from the land control board was obtained. The transfer in my view took effect from the date of execution of the transfer on 22<sup>nd</sup> September 1994 and as the transfer related to a specific parcel of land, the said parcel of land ceased to form part of the estate of James Akeyo Awuor (deceased). At the time the deceased died he had already transferred land parcel **2654** to the plaintiff. The transfer was effective from the date of execution of the transfer notwithstanding that the transfer had not been registered. The registration merely affects the register and serves as notice to all persons that the land is owned by the person whose name appears on the register. The law permits and allows the registration of instruments late and for that a penalty for late registration is provided. I therefore hold and find that the transfer executed by the deceased in favour of the plaintiff was validly registered and conferred all the rights of ownership to the plaintiff.

20. Having come to the conclusion that the plaintiff is lawfully registered as the owner of land parcel **Central Karachuonyo/Konyango/2654** and considering that there is uncontroverted evidence through the report by the land registrar (**PEx7**) that the land registrar showed and established the physical boundaries of land parcels **2653** and **2654**, I am satisfied that the defendants have no right to encroach onto the plaintiff's property. Indeed DW1, the 1<sup>st</sup> defendant affirmed being showed the extent of his land parcel **2653** which borders the plaintiff. The 1<sup>st</sup> defendant stated that he ceased trespassing onto the plaintiffs plot after they were shown the boundaries. The defendants have no valid claim to land parcel **2654** as the same does not form part of their late father's estate. The parties should observe and maintain the boundaries as established by the land registrar.

21. I have considered the defendants evidence and submissions but find no basis to agree with them that subdivision of land parcel **1152** was carried out in 2010 and not in 1994. The mutation form "**PEx.2**" clearly shows the same was prepared in 1994 and related to land parcel **1152**. The letter of consent for subdivision dated 6<sup>th</sup> July 1994 ("**PEx.1**") shows it related to land parcel **1152**. The defendants' submission that the land parcel **1152** was subdivided in 2010 is not correct and it is my finding and holding that the subdivision of the land was carried out in 1994 but the mutation form was registered in 2010. The defendants, it would appear, having realized in April 2010 that the plaintiff had not processed the transfer of the portion that he had purchased from their father and which he was using, set out to reverse the sale by seeking grant of letters of administration for the whole of land parcel **1152**. The plaintiff by good fortune had awoken up from his slumber such that by the time the grant of letters of administration were issued on 1<sup>st</sup> December 2010, he had processed his title and land parcel **1152** did not exist as a unit. Once the deceased father sold and caused the subdivision of land parcel **1152** and executed a transfer of the resultant subdivision parcel number **2654** to the plaintiff, he ceased to have any further interest to the said parcel **2654**. His heirs equally could not have any interest. Land parcel **Central Karachuonyo/ Konyango/2654** at the time of death of the defendants' father in 1998 did not form part of his estate since he had already transferred the same to the plaintiff when he executed the transfer.

22. From my foregoing analysis and evaluation of the evidence, it follows that I have answered issues (i)-

(iv) in favour of the plaintiff. The issue that remains for determination is whether the defendants are liable to pay damages to the plaintiff for trespass. The plaintiff testified that he had been using the land until 2011 when the defendants interfered with his usage. The defendants stated land parcel 2654 was presently vacant and the 1<sup>st</sup> defendant stated that since March 2011 when the land registrar pointed out the boundaries of parcel 2653 and 2654 he ceased any encroachment on the plaintiff's parcel of land. I am not satisfied that the plaintiff has laid a sufficient basis to enable the court to make an assessment of damages for trespass as there is no clear evidence that the plaintiff was prevented from using the land after the land registrar fixed the boundaries. Besides, the plaintiff did not give any indication of his output from the plot during the period he claimed to have been making use of the same. I will decline to make an award of any general damages for trespass.

23. On the whole and upon evaluation of the evidence, I am satisfied that the plaintiff has proved his case on a balance of probabilities. I enter judgment in favour of the plaintiff against the defendants jointly and severally on the following terms:-

**(i) A declaration is hereby issued that the plaintiff is lawfully registered as the owner of land parcel Central Karachuonyo/Konyango/2654.**

**(ii) The defendants are hereby ordered to vacate and deliver vacant possession of the land parcel Central Karachuonyo/Konyango/2654 to the plaintiff within 30 days of being served with a certified copy of the decree herein.**

**(iii) In the event of failure to comply with (ii) above upon being served with the decree an order for the forcible eviction of the defendants to issue on application.**

**(iv) The costs of the suit are awarded to the plaintiff against the defendants jointly and severally.**

**Judgment dated, signed and delivered at Kisii this 21<sup>st</sup> day of July, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Godia for Ochwangi for the plaintiff

N/A for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**