



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 82 OF 2014 – FORMERLY HCC 24/2012

ODINGA MAKAKA

ROBERT MAKAKA

HESBORN MAKAKA.....PLAINTIFFS

VERSUS

1. LUCIE NAMBO PAMBA

(Suing as the Administrator of the Estate of

HANNINGTON OUMA PAMBA (DECEASED)

2. NABWIRE PAMBA

3. GEOFFREY JOHN PAMBA

4. HUMPREY MALOBA PAMBA

5. WILBERFORCE ONYANGO PAMBA

6. JOSPHAT WANYAMA PAMBA

7. PATRICK OBOTE PAMBA

8. JOSEPH OKOCHI PAMBA

9. JUDITH NAKOCHI PAMBA.....DEFENDANTS

JUDGEMENT

1. This suit was initially brought here vide a plaint dated 4/4/2012 filed on the same date. That plaint was later amended and re-filed on 11/2/2015. The Plaintiffs - **ODINGA MAKAKA, ROBERT MAKAKA** and **HESBORN MAKAKA** - have sued the nine (9) Defendants -**LUCILE NAMBO PAMBA, NABWIRE PAMBA, GEOFFREY JOHN PAMBA, HUMPHREY MALOBA PAMBA, WILBERFORCE ONYANGO PAMBA, JOSPHAT WANYAMA PAMBA, PATRICK OBOTE PAMBA, JOSEPH OKOCHI PAMBA** and **JUDITH NAKOCHI PAMBA** – because they feel shortchanged in the matter of ownership of the original land parcel No. SAMIA/BUDONGA/232

measuring 45 Ha.

2. According to the Plaintiffs, the Defendants late father - Edward Pamba - was a brother to their own father - Rusto Makaka - who died in 1972 leaving them under the care of Defendants father. Edward Pamba was also a brother to FRANCIS OPALA BWONGI, who died in 1971. The land is said to have been registered in the name of Edward not only for himself but also in trust of the two other brothers.

3. In the year 2002, Edward died. The Defendants are then said to have fraudulently and/or unlawfully subdivided the land and transferred it to themselves. This is said to have been done without even undergoing the requisite succession process, given that the land at the time belonged to a deceased person. The Plaintiffs claim there is a constructive trust in their favour. They want the subdivisions and transfers cancelled so that registration can revert to the late Edward Pamba. They further want the land re-registered with 20Ha going to the family of Rasto Makaka, 5Ha to the family of Opala Francis, and 20Ha to remain with the family of the late Edward Pamba. Claimed also are costs of the suit.

4. Two defences were filed. The first one by 1st, 2nd and 3rd Defendants was filed on 12/6/2012 and is dated 10/6/2012. This one was filed in response to the suit as initially filed. When the plaint was amended later however, the 1st, 2nd, and 3rd Defendants did not file another defence. This first defence therefore is deemed to be a defence to the amended plaint. The second defence was filed on 4/3/2015. It is a defence for 5th, 7th, 8th and 9th Defendants. The 4th and 6th Defendants did not file a defence.

5. The two defences filed are generally similar. According to the Defendants, their late father - Edward Pamba - was the registered owner of land parcel No. SAMIA/BUDONGO/232 which, on the ground, has some specific unequal portions belonging to representatives of his step brothers - RUSTO MAKAKA, FRANCIS OPALA and MAIGA BWONGI. As the registered owner, the Defendants late father therefore held the land in trust for these families.

6. A time then came when the Defendants late father became advanced in age. He subdivided the land, setting aside a portion for his nephews while transferring another portion - SAMIA/BUDONGO/2055 to DAVID OMONDI MAKAKA and ODINGA MAKAKA, apparently persons of the Plaintiffs family. At that time too, the Defendants late father transferred some portions to his own children.

7. It was averred further that even before adjudication, the land had on the ground been subdivided in several portions according to the wives of the late great patriarch of the family, one BWONGI, who was the father of the Defendants late father and others. The portions were unequal and the Plaintiff were allocated the portion belonging to their grandmother, who was one of the wives.

8. One person, a child of one of the wives, had no child. His brother, one Maiga, is said to have settled in Uganda. But the share belonging to their mother, one Wasya Nafofoyo, is still there and is held by the Defendants. According to the Defendants too, this suit is time barred, having been caught up by provisions of the Limitation of Actions Act. A further averment was that the Plaintiffs have no capacity to bring the suit as they are not representatives of the late original owner. The Defendants denied that they fraudulently subdivided the land or forged documents after the deaths of their late father.

9. In the second defence, the existence of 4th and 6th Defendants was denied.

10. The hearing of the case took place on various dates. HESBORN MAKAKA, the 3rd Plaintiff, testified on 29/10/2014. He adopted his sworn statement filed here on 11/7/2014 as his evidence. Additionally, he produced various copies of green cards to show how the land has been subdivided. The cards also show the various owners of the new sub-divisions. It is good to have a look at the statement of HESBORN. According to him, his late father – Rusto Makaka – died in 1977. He was one of three brothers, the other two being Edward Pamba, the Defendants father, and Francis Opala. The three brothers and their families lived on parcel No.232. But there are two other families who have lived on the land for a long time. These are families of the late Edmond Oluma and the late Washington Abangi.

11. The land was registered in the names of the Defendants father on behalf of the others, he being the eldest son. Sometimes in the year 2000, the families of the late, Oluma and Abangi sued one of the Defendants brothers at the then Land Disputes Tribunal alleging an intention or attempt to evict them on the basis that they were strangers on the land. That attracted the curiosity of the Defendants and in the year 2002, a search at the lands offices revealed the subdivisions that they are now complaining of. The sub-divisions had left out four (4) other families living on the land and were said to have been done after the death of the Defendants father.

12. According to HESBORN, no succession had been done and no actual or physical survey had been done on the ground. The subdivisions were said to exist only on paper.

13. HESBORN was cross-examined by counsel for the defendants. He accepted that he had not filed a succession case for his late father's estate. And apart from him and the other Plaintiffs, there is another brother, Charles, thought to be alive but has not been traced since 1983. There are also children of deceased brother and sisters whose consent the Plaintiffs have not obtained to represent their interests in this case. Hesborn accepted too that there are other beneficiaries that they did not include in this suit.

14. And noting that Lucile Nambo Pamba (1st Defendant) is sued as administrator of the late HANNINGTON OUMA PAMBA, a question was put to HESBORN as to whether he could show that Lucile was such administrator. The answer was in the negative. He was also asked about the transfer documents that led to the entry in the copies of green cards that he produced. He could not avail any. Also unexplained by HESBORN was why the office of Land Registrar was not included in the suit though being the one that effected the transfers. He could not also tell who the administrators of the Defendants late father were.

15. The next person to testify, was ROSE WERE WANYAMA who appeared as 4th Plaintiff in the original plaint but was left out as a party in the amended plaint. She testified as PW2 on 29/10/2014, long before the amended plaint was filed. It is not clear whether her omission as a party in the amended plaint was inadvertent or intentional but her written sworn evidence is dated 8/4/2013. She said she is the only sibling of the late Francis Opala Bwongi. She is married and does not stay on the land. According to her, there are other families living on the land. She said too that when her late mother died in 2010, one of the Defendants destroyed her homestead. He is cultivating her late mother's land. Rose wants to inherit the portion that her late father, FRANCIS, was entitled to. She asserted that she is the rightful heir.

16. Like Hesborn (PW1), Rose (PW2) was cross-examined. Asked whether she could show a grant to represent her late father's estate, Rose was frank to say she had none.

17. PW3 was MILTON MANASE OKUMU. He was the area village elder and said his evidence was on behalf of Makaka Pamba (there is no record of a Pamba called Makaka). This witness gave a background and history that generally gels with that of the Plaintiffs. According to him, the Plaintiffs should get what they have prayed for. On cross-examination, this witness could not tell the acreage of the land. He could not also tell whether Nandaveka Primary School, Nandaveka CPK Church, and Bukiri Primary School were gifted the portions of land where they stand by the late father of the Defendants. Also said by him was that the land has no boundaries and has never been subdivided. The Plaintiffs case was closed on 29/10/2014. By the time it was closed, ROBERT MAKAKA (2nd Plaintiff) and Odinga Makaka (1st Plaintiff) had not testified. And there was no indication that any of those who gave evidence on the Plaintiff's side testified on their behalf.

18. The Defendants case was heard on 23/1/2017. It is only the 3rd Defendant – GEOFREY JOHN PAMBA – who testified. He said that the parties in the case were a niece (1st Defendant), a sister (2nd Defendant) while the others were step brothers. He adopted his sworn written statement of 12/9/2013 as his evidence. He also produced as exhibits his bundle of documents filed on 5/11/2014 (Defendants exhibits Nos 1 (a), (b), (c), (d), (e) and (f). According to 3rd Defendant the land was sub-divided in 1998. The sub-division was done by his late father together with the larger family of the late BWONGI. The 3rd Defendants sworn statement is clear that it is made on behalf also of 1st and 2nd Defendants.

19. The statement states, *interalia*, that his late father – Edward Pamba – had Rusto Makaka, Francis Opala, Maiga Bwongi, and Wanyama Bwongi as brothers. Parcel No. 232 had specific portions which the said brothers and their respective mothers were cultivating. Edward Pamba died on 28/2/2002, having already subdivided the land into several portions, which included land parcel No. LR SAMIA/BUDONGO/2055 for the Defendants. It is therefore false to allege that the Defendants subdivided the land.

20. The land is said to be subject to Abaluya land inheritance customs which decree that in a polygamous set-up land is inherited according to portions which each wife has cultivated. The 3rd Defendants also averred that neither he nor the other defendants should be held accountable for actions or omissions of their late father.

21. There was cross-examination done which saw the 3rd Defendant saying, *interalia*, that the entire family of Bwongi, including the Defendants family, was involved in sub-division. He also said that though parcel No. 2055 earmarked for Makaka's family appears in the register to be owned by the Pamba family, those in the Pamba family whose names appear in the register have sworn affidavits in this suit renouncing such ownership. He continued to say that the error in the land register concerning ownership of parcel number 2055 was not committed by the Defendants but by the Land's office. The 3rd Defendant further averred that the Pamba family has not yet obtained letters of administration for the estate of their late father.

22. Written submissions have been filed by both sides. The Plaintiffs' submissions were filed on 20/2/2017. The Defendants' submissions were also filed on the same date.

23. According to the Plaintiffs, the issue to be addressed have to do with their locus to sue the Defendants, whether the sub-division of the land was regular, procedural and lawful, whether they are entitled to share the suit land, and costs of the suit.

24. On the issue of Locus, the Plaintiffs started by observing that the late father of the Defendants was registered as owner in trust for the other brothers including their own father. The Plaintiffs brought suit therefore to recover their beneficial interests and not necessarily that of their father. This being the position, no letters of administration were required.

25. On the issue of sub-division, the Plaintiffs position is that the Defendants sub-divided the land sometime after their late father's died. No succession was ever done. Such transaction was therefore illegal and amounted to intermeddling with the estate of a deceased person, which is a violation of Section 45 of Law of Succession Act. The documents availed by the Defendants to demonstrate otherwise were all faulted as forged and/or fraudulent. Some were said to lack signatures of the relevant officials; others were said to be blank. And the whole exercise was said to be one done only on paper, with no actual sub-divisions on the ground. Position taken? It is the Defendants themselves, not their own late father, who caused the subdivisions.

26. The upshot, following the Plaintiffs arguments, is that they were left with nothing and the Court should intervene to give them their share.

27. The Defendants on the other hand submitted that the Plaintiff had no Locus to bring the suit, having not obtained letters of administration and yet claiming their share as beneficiaries or heirs of their late father. The 1st Defendant was also said to have been sued as administrator of the late Hannington Pamba yet nothing was availed to show she is such administrator.

28. On fraud, none was proved, the Defendants submitted. The Defendants were said to have availed the necessary documentation to show that all subdivisions were done by their late father. Further the Land Registrar should have been called to shed light on the issue of fraud. He was not called.

29. I have considered the pleadings, the evidence, and the rival submissions. The Plaintiffs claim in the

amended plaint, or even in the initial plaint, is clearly founded on the alleged fact of being children of Rusto Makaka – in case of 1st, 2nd and 3rd Plaintiffs – and Francis Opala – in case of 4th Plaintiff. Both Francis Opala and Rusto Makaka are dead. In the evidence too, it is clear that the claim derives from the fact that the Plaintiffs deceased parents were entitled to the land. And they were so entitled because the Defendants late father – Edward Pamba – was a brother to the Plaintiff’s fathers and was registered as owner in trust for the brothers. In other words, the Defendants late father was a constructive trustee for his brothers from whom the Plaintiffs are descended.

30. But the Plaintiffs made a serious blunder. They failed to pursue the succession process that they themselves accuse the Defendants of not pursuing. The trust they are pursuing did not first belong to them. It belonged to their fathers. The fathers are dead. The law is clear: You cannot pursue a deceased’s entitlement to claim it as your own without the requisite grant.

31. In the Plaintiffs submissions, they make a rather interesting and contradictory averment. And the averment was that the Plaintiffs were pursuing the claim as beneficiaries in their own right, not necessarily through their late father, and this therefore removes the need for the requisite grant. This averment contradicts both the evidence and the pleadings. Besides, if the Plaintiffs are claiming a constructive trust in their own right, they would be duty bound to show how such trust arises between them and the Defendants separate from the deceased parents.

32. To prove a constructive trust, the Plaintiffs were duty-bound to show that there was some bargain, undertaking, understanding or promise between themselves and the Defendants which the Court should construe as giving rise to constructive trust. And this is so because the Court would have to look at such bargain, undertaking, understating or promise and establish whether it would be unconscionable for the Defendants as owners to assert their beneficial interest and deny the beneficial interests of Defendants. Even if therefore it is accepted that there is a constructive trust between the parties separate from their deceased parents, the Plaintiffs would still be found to have failed to show the necessary bargain, undertaking, promise or understanding. Such trust would therefore fail.

33. But that is besides the point. The issue of a constructive trust arising between the parties *per se* was only raised in the submissions. And this was probably because the Defendants had pointed out the serious omission of lacking the necessary grant on the part of the Plaintiff before filing the suit. Without that grant, the Court cannot consider this kind of trust.

34. And the Defendants raised another crucial point: NOT only were the Plaintiffs duty bound to obtain the grant for the estate of their late fathers, they were also bound to show that the Defendants were the legal representatives of their late father Edward Pamba. In a more specific manner, the Plaintiff have sued the 1st Defendant as the administrator of the late Hannington Ouma Pamba. The 1st Defendant was not bound to prove that fact. The Plaintiffs were and they did not.

35. Several cases exist in our jurisprudence to show the fate of cases instituted without the requisite grant of letters of administration. In **NATHANIEL O. KHISA vs MARY KHISA NYANYI & 3 Others [2013] eKLR**, for instance, the suit was struck out because the Plaintiff had not obtained letters of administration.

36. On the issue therefore of lack of the requisite grant by the Plaintiffs to institute the suit or failing, again on the part of the Plaintiffs, to show that parties sued were legal representatives of the deceased persons they were purported to represent, this Court agrees with the Defendants.

37. There was then the issue of fraud. The Defendants were alleged to have been fraudulent and indeed the particulars of such fraud were given in the amended plaint. An allegation of fraud is taken seriously by our Courts and its standard of proof is normally higher than on a balance of probabilities. It was incumbent on the Defendants to prove it to this higher standard.

38. Fraud is essentially a knowing or intentional mis-representation of truth or peddling of falsehood by a party or parties with the aim that those to whom that is done will act on the mis-representation or

falsehood to their detriment or to the detriment of others. By its very nature its execution involves several actors. The fraud alleged in this case involved forging or falsification of documents eventually leading to unlawful registration of the Defendants as owners. The documentation availed by the Plaintiffs are copies of green cards showing the ownership of land shifting from Edward Pamba to the Defendants. According to the Plaintiffs fraud is shown because the change of ownership took place after Edward Pamba's death.

39. The Plaintiffs seemed not to appreciate that fraud normally is a process. It is rarely a single incident – like that of changing names in a green card. It is more often than not a process involving, in case of land matters, a paper trail. The green cards availed by the Plaintiffs, alone without more, cannot prove fraud. After all, the card merely shows that on a given date, ownership changed from Edward Pamba to the Defendants. It does not tell for instance when the process of that change of ownership started and/or the stages it underwent.

40. Moreover, the change effected took place at the lands office and that office was never called to give evidence or enjoined in the suit as a party. Question is: because fraud involves mis-representation or peddling of falsehood, to whom did the Plaintiffs do so?

41. The Plaintiffs seemed to fault the Defendants for not calling the Land Registrar to testify. With respect, the Defendants were not bound to call him. It was enough that they denied fraud. They were not bound to prove that they were not fraudulent. The Plaintiffs were bound to prove that they were. As the legal maxim goes: FACTUM NEGANTIS NULLA PROBATIA (No proof is incumbent on a person who denies a fact). This position is captured well in Sections 107, 108 and 109 of our Evidence Act (cap 80). The point? It was the Plaintiffs who were supposed to call the Land Registrar to shed light on the alleged fraud concerning entries made in that office. To the Defendants however, the green cards alone were enough to do so. They were wrong. The end result is that fraud was not proved. Infact, the Plaintiffs handling of the issue was such that it could not even be held to be proved even if the proof were to be on a balance of probabilities.

42. There are other issues manifest in the pleadings. For instance, the 5th, 7th, 8th and 9th Defendants denied the existence of 4th and 6th Defendants in their defence. I have looked at the records. I do not see the affidavit of service showing that the 4th and 6th Defendants were served. Since their existence was something denied, the Plaintiffs needed to show that they had not sued phantoms or ghosts. They did not show this. They did not even take issue with the fact that these two Defendants did not file defence. Question is: Do these two Defendants exist? This question remains un-answered.

43. Then there is the design of the case itself. Parcel No. 232 is said to be 45Ha in size. A mathematical calculation of what the Defendants are said to own as reflected in the Plaintiffs' own pleadings amounts to 38.79Ha. What this means is that there is some land - specifically 6.21Ha - that the Defendants apparently do not own. Who owns it? This question becomes relevant because the Plaintiff want action taken concerning the whole land. How then can such action be taken while those who own this parcel of land are not included in the suit? Is it justifiable to visit them with a court order arising from a suit in which they were not represented? The Plaintiff needed to take this into account.

44. More crucially however is this: the Plaintiffs want land parcel No. 232 to be shared out as follows: 20Ha to the family of their late father, 5Ha to the family of the 4th Plaintiff, and 20Ha to the family of the Defendants. From what appears on record however, there are other families living on the land. This is manifest not only from the Defendants side but from the Plaintiffs side as well. Infact, a scrutiny of the Court records shows statements by such people like WASHINGTON ABANGI OKWABA and HENRY ABANGI OLUMA filed by the Plaintiffs side itself claiming entitlement to the land. These people are not Pambas or Makakas. The proposed sharing seems to exclude them. It appears also clear that there are two primary schools and a church on the same land. The proposed sharing seems to exclude them also.

45. In my view, it was a serious omission on the part of the Plaintiff to exclude the evidence of these witnesses or even to enjoin them in the suit either as Plaintiffs or Defendants or more preferably as Interested Parties. For one is bound to ask why they are left out and whether justice can be said to be done when their interests are not catered for. They obviously need to be heard by the court on the issue of

sharing.

46. The end result is this: First, from a procedural perspective, the Plaintiff case is fundamentally and fatally flawed. Crucial mandatory procedural requirements were ignored and/or not adhered to. In particular, acquisition of letters of administration by the Plaintiffs and demonstration that the Defendants were the legal representatives of their late father's estate were all indispensable pre-requisites. Secondly, the foundational aspects of the case were wrong. Some people were left out of the case who were entitled to know what was happening. Such people deserved to have their input considered before any action concerning the land is taken. It was also a grave omission to leave out crucial evidence of some witnesses who had recorded statements on the Plaintiffs side.

47. Thirdly, the Plaintiffs set out to prove fraud and constructive trust. They failed to prove any because of their jumbled and lackadaisical approach to the issues. I have already pointed out elsewhere (see paragraphs 30, 31, 32, 33, 37, 38, 39 and 40) the shortcomings associated with their approach. That approach did not help matters. It is clear then that the Plaintiffs bungled their own case.

48. It is necessary now to look at the Defendants case. It has its serious flaws too. It is only the 3rd Defendant who testified. In the 3rd Defendant's statement, he talks of representing the 1st and 2nd Defendants also. The evidence he gave can only be deemed to represent himself and the two Defendants named in his sworn written statement. A question arises. Where does that leave 5th, 7th, 8th and 9th Defendants? Was it not necessary to call them as witnesses even if only to adopt their sworn written statements? This was a serious omission.

49. But there is more: When one looks at the Court record, one notices that the Defendants had initially approached their defence remarkably well. Bearing in mind that the Plaintiffs had alleged that the Defendants transferred the land fraudulently to themselves, some statements were put on record - see statements of MARY AKONGO and RAPHAEL OBONYO OKUTTA for instance - to show that it's the Defendants late father himself who initiated the process of subdivision and transfer. During hearing however, this crucial evidence was left out as only the 3rd Defendant testified.

50. In the same vein, and as a further observation, there was the written statement of one JULIUS ACHOKA. His statement seems to show the customary practices applicable in matters of subdivision. The Defendants had asserted the subdivisions are usually done according to portions cultivated by each wife in a polygamous set up. The evidence of Achoka was meant to lend credence to this assertion. If he had testified the Plaintiffs side would have had a chance to interrogate that evidence through cross-examination. The Defendants however did not see the need to call him. His statement counts for nothing.

51. I have pointed all this to show that the Plaintiffs case does not fail because of any effective rebuttal mounted by the defence but because of its own weaknesses and problems pointed out elsewhere in this judgement. The upshot is that I am bound to find, which I hereby do, that the Plaintiffs case is not proved on a balance of probabilities. I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 19th day of July, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

3rd Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

4th Defendant:

5th Defendant:

6th Defendant:

7th Defendant:

8th Defendant:

9th Defendant:

Namatsi & Co. Advocates for Plaintiffs:

Balongo & Co. Advocates for Defendants: