



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 130 OF 2014.

PETER OKAPEL MURUNGA.....PLAINTIFF

VERSUS

JONAM OMUDANG'A OMUNA.....DEFENDANT

JUDGMENT

1. The plaintiff herein - **PETER IKAPEL MURUNGA** claims that he is the rightful parcel NO. BUKHAYO/LUPIDA779 measuring 3.0 Ha (“suit land” hereafter).

The defendant – JONAM OMDANG OMUNA - is actually the registered owner of the same land.

2. According to the plaintiff, his father - **MURUNGA IKOMO ACHILU** – was the beneficial owner of the suit land before he died. The father died on 18th April, 1993. According to the plaint filed here on 20th May, 2008, the plaintiff's late father had put up his home on the suit land. The plaintiff pleaded that he and his family continue to live there.

3. Then a time came in year 2007 when the plaintiff wanted to subdivide the land. He conducted a search at the Lands Office and discovered that the defendant was the registered owner of the land, having been so registered on 25th November, 1986. Such registration, the plaintiff pleaded, was fraudulent. And it was so because there was no valid sale agreement between his deceased father and the defendant and there was also no evidence of payment of the purchase price. The plaintiff further said there was no consent from the Land Control Board. He also faulted any allege sale on the ground that the family of his late father was not consulted.

4. The plaintiff wants the defendant’s title cancelled. He also wants an eviction order to issue against the defendant. Also prayed for is reinstatement of the plaintiff’s late father as the sole owner of the land. Costs of the suit and other relief that court may wish to grant are further and other prayers from the plaintiff.

5. The defendant denied the plaintiffs entire claim vide a defence filed on 14th June, 2008. In the defence, the defendant said inter alia, that he obtained the property legally for valuable consideration and obtained his title way back in 1977. He also said the plaintiff lacks LOCUS STANDI to sue on behalf of his late father and averred further that the suit was filed out of time.

6. During hearing, the plaintiff testified as PW 1. He called the Land Registrar – TOM CHEPKWESI – who testified as PW 2. While testifying, the plaintiff said that his father occupied parcel NO. 909. The father earlier owned parcel NO. 910 also but he sold it at the time of his death. The suit land is said to have been part of parcel NO. 909. During cross-examination by the defendants counsel the plaintiff

agreed that the records of ownership do not show that his late father was ever registered as owner of parcel NO. 779.

7. The plaintiffs only witness – PW 2 – availed records showing the defendant became owner of land parcel NO. 779 through succession. And defendant became such owner in 1977. The ownership itself did not vest in the defendant from the plaintiffs late father but from one MORRIS HOBA. On the issue of fraud, PW 2 said the records in his possession did not show fraud. In fact PW 2 asserted in cross-examination that such records showed that the defendant became owner of the suit land lawfully and/or legally.

8. The defendant gave his evidence as DW 1. He said he bought the suit land from one Morris Hoba in 1974. He had occasion to change his names on the land certificate. That happened in 1986. The defendant further said he has been using the suit land and the plaintiff has never used or cultivated it.

9. After hearing, parties filed written submissions. The plaintiffs submissions were filed on 16/7/2015. In the submissions, the plaintiff reiterated that the suit land belonged to his late father and was part of his estate. The succession process through which the defendant is said to have acquired ownership was faulted, with the plaintiff averring that the certificate shown does not show the court file number. The certificate was said to be incomplete and therefore for rejection by the court. According to the plaintiff, the case is well proved on a balance of probability as it is well shown that the defendant has no legitimate claim over the suit property.

10. The defendants submissions were filed on 17/9/2015. It was pointed out that the plaintiff's late father has never been the registered owner of the suit property. Documents of ownership were said to show only two owners: one MORRIS HOBA and the defendant.

11. The defendant further submitted that the claim is time- barred. The argument here is that section 7 of Limitation of Actions Act (cap 22) enjoins that a claim to recover land be brought before a period of 12 years. The defendant is said to have become owner 30 years before the plaintiff decided to sue him. According to the defendant, that period is too long that some documents got missing or misplaced. And the plaintiff was trying to take advantage of that by demanding production of the same documents.

12. On the issue of succession that the plaintiff faulted, the defendant said the seal of the court is not disputed. The signature of the magistrate presiding is on the document also and the plaintiff did not doubt it.

13. I have considered the case as filed, the evidence availed, and the rival submissions. It appears to me that as filed and prosecuted, the plaintiffs case has shortcomings. It is necessary to point out some of the shortcomings.

14. First, the plaintiff pleaded that his father was beneficiary of the suit land. A beneficial owner in a court of law must be shown as such both as a matter of law and fact. The necessary nexus between the plaintiffs late father and the suit land needed to be demonstrated. In particular, it needed to be shown that the suit land was part of his estate. Documentary proof is vital to demonstrate this. The plaintiff did not show it.

15. Second, the pleadings talk of parcel NO. 779 only. It is that land that the plaintiff said was owned by his late father. During hearing however, the position of the plaintiff seem to be somewhat different. The Plaintiffs evidence showed that his late father owned parcels NO. 909 and 910. He however sold parcel NO. 910 and remained with 909. The suit land – parcel NO. 779 – was said to be part of parcel NO. 909.

16. Some questions however arise: where is proof that the plaintiffs late father owned parcel NO. 909 even 910? Where is documentary evidence to show that land parcel NO. 779 was derived or excised from parcel NO. 909? The plaintiffs availed nothing to address these concerns.

17. Third, the plaintiffs pleadings seemed to stand on the premise that the defendant acquired the suit land

through fraud. And the fraud was alleged to be through a sale that was not valid and failure to obtain the consent of Land Control Board. Fraud was therefore central to plaintiff's case. But look at the evidence of PW2, a witness called by the plaintiff himself. According to this witness, there was no fraud. The land was acquired legally by the defendant.

18. When it turned out later that succession was an issue, the plaintiff faulted the document availed to prove it. But the issue raised was only with the case number. Other vital contents stood unchallenged. In particular, there was the seal of the court and the signature of the presiding magistrate. There was also the fact that the same document was acted upon by the relevant land office and the process in which it was used still stood. This case itself cannot be said to be a challenge as that office is not party to these proceedings.

19. The defence raised a serious point namely: The defendant dealt with one Morris Hoba not the plaintiff's late father. I note that the premise of the plaintiff's case is that the defendant dealt with his late father or at least perpetrated fraud on him. But when the scenario emerged differently in the course of proceedings, it is clear the plaintiff had no ready answer to give. In fact, it emerged that the plaintiff did not know such a person. He had instead dealt with one Morris Hoba. The court itself cannot turn a blind eye to the fact that this is the person the defendant dealt with in order to acquire the suit land.

20. When all this is considered, it is clear that the plaintiff's case is materially and fundamentally flawed. It rests on quicksand. The defence availed successfully tore onto it. It crumbles because it fails to address vital issues. I therefore hold that the case is not proved on a balance of probabilities. I dismiss it with costs.

A.K KANIRU,

JUDGE.

DATED AND DELIVERED ON 29TH FEBRUARY, 2016.

IN THE PRESENCE OF;

PLAINTIFF.....

DEFENDANT.....

COUNSEL.....

JUDGE.