



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 260 OF 2011

PETER OUMA ODUOGO PLAINTIFF

VERSUS

OTIENO JAOKO JAGERO 1ST INTERESTED PARTY

SHADRACK OWINO 2ND INTERESTED PARTY

JAPHETH OGADA EZEKIEL 3RD INTERESTED PARTY

JANET ATIENO 4TH INTERESTED PARTY

WILKISTA ACHIENG MIRUKA 5TH INTERESTED PARTY

LADISLAUS ADUWO 6TH INTERESTED PARTY

JACOB MUCHUMBWA 7TH INTERESTED PARTY

GEORGE O. WIGNA 8TH INTERESTED PARTY

MONICA AUMA OKEYO 9TH INTERESTED PARTY

VERSUS

NELLIE OKWIRI 1ST DEFENDANT

THE LAND REGISTRAR – MIGORI/RONGO DISTRICT 2ND DEFENDANT

HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiff's father one Oduogo Anduru (deceased) was the registered owner of land parcel **Suna East/Wasweta I/37** which he subdivided before his death into two portions **land parcel No. Suna East/Wasweta I/747** and **748**. The late Oduogo Anduru (deceased) sold land parcel **Suna East/Wasweta I/748** on 18th March 1977 to one Mohamed Shariff who subsequently sold the parcel of land to one Stephen Eve Okwiri in May 1977.
2. The plaintiff is one of the sons of the late **Oduogo Onduru** (deceased) and the administrator of

- his deceased father's estate and together with Joseph Odhiambo also the administrators of his brother's estate the said Daniel Ogalo Oduogo (deceased). Before his death, Daniel Ogalo Oduogo (deceased) and the plaintiff were the administrators of their late father's estate whose assets included land parcel **Suna East/Wasweta I/747**.
3. The plaintiff by the plaint filed in court on 10th November 2011 states that following the death of their father, land parcel **Suna East/Wasweta I/747** was divided amongst the sons of Oduogo Anduru (deceased) who thereafter before the succession process was formalized sold various portions of their land entitlements to various buyers. The plaintiff avers that he and his brother Daniel Ogalo Oduogo initiated succession proceedings in respect of their late father's estate but unfortunately the said Daniel Ogalo Oduogo passed away on 6th February 1997 before they had completed the process.
 4. The sons of Oduogo Onduru, Daniel Ogalo Oduogo and Peter Ouma Oduogo following succession Cause Nairobi NO. 1119 of 1995 were jointly registered as owners of portions of 4.53hectares and 5.53hectares respectively of land parcel **Suna East/Wasweta I/747**. The said sons sold varying portions of the land to various buyers before the title was partitioned and some of these buyers are the persons who have been enjoined as interested parties in this suit. Daniel Ogalo Oduogo died on 7th February 1997 before the land parcel **Suna East/Wasweta I/747** had been subdivided to sever his portion and his brother with whom they had been registered as co-owners. The plaintiff together with one Joseph Odhiambo on 7th February 2006 obtained confirmed grant of letters of administration to the estate of Daniel Ogalo Oduogo allowing them to be registered as trustees in respect of the deceased interest in land parcel **Suna East/Wasweta I/747** to hold the interest in equal shares for the deceased children Jane Okoth and Lucy Atieno.
 5. The plaintiff claims that during time unknown to them the 1st defendant fraudulently caused the plaintiffs' land parcel **747** to be annexed to other land particularly **parcel No. 748** which had been sold and transferred to the 1st defendant's husband by the person to whom Onduru Oduogo (deceased) had sold to. The plaintiff contends that the subdivisions procured by the 1st defendant out of land parcel **Suna East/Wasweta I/747** being land parcels **Suna East/Wasweta I/1165, 1166 and 1167** were fraudulently and unlawfully obtained as the interest of the plaintiff in land parcel **Suna East/Wasweta I/747** was totally ignored and the plaintiffs rights and interest over the land were totally disregarded.
 6. The 1st defendant filed a defence on 14th December 2011 and denies the averments contained in the plaint. The 1st defendant avers that she is the lawful owner of land parcel **Suna East/Wasweta I/1304** which she states was originally known as land parcel **Suna East/Wasweta I/37**. The 1st defendant avers that land parcel **Suna East/Wasweta I/37** was subdivided to create parcel numbers **1165, 1166 and 1167** on 12th March, 1992. The 1st defendant asserts that land parcel 1165 was transferred to the 1st defendant's husband on 12th March 1992 by the then registered owner Oduogo Anduru (deceased). The 1st defendant states her late husband Stephen Okwiri purchased parcel nos. **1166 and 1167** thereby completing the purchase of what was **parcel No. 37**. The 1st defendant states that after her husband's death she on 20th August 2001 amalgamated the parcels **1165, 1166 and 1167** to form parcel number **Suna East/Wasweta I/13156** which she later subdivided to create parcels **13303, 13304 and 13305**. The 1st defendant avers that parcels **Suna East/Wasweta I/747 and 748** do not exist as the mother title **Suna East/Wasweta I/37** was closed upon subdivision of the same into parcels **1165, 1166 and 1167** and could not have been available for creation of parcels **747 and 748** as claimed by the plaintiff.
 7. The 2nd and 3rd defendants filed a statement of defence dated 28th November 2012 on 10th December 2012. The 2nd and 3rd defendants deny land parcel **Suna East/Wasweta I/747** was subdivided into 3 parcels and further aver that land parcel **Suna East/Wasweta I/37** having already been subdivided into parcels 747 and 748 could not have been subdivided again to subsequent parcel numbers. The 2nd and 3rd defendants while denying the particulars of fraud ascribed to them by the plaintiff shifts the blame wholly against the 1st defendant for perpetrating the fraud. The 2nd and 3rd defendants give the particulars of fraud of 1st defendant under paragraph 10 thus:-

- i. **Misrepresenting to the 2nd defendant that she was the owner of LR No. Suna East/Wasweta I/748 and LR No. Suna East/Wasweta K/747.**
- ii. **Colluding with fraudsters to register LR No. Suna East/Wasweta I/747 in her name and causing the same to be subdivided into parcel Nos. 13303, 13304 and 13305 in total disregard of the interested parties and the plaintiff.**
- iii. **Causing the plaintiff to be evicted from their parcels of land using fraudulent registration.**

The 2nd and 3rd defendants pray for an order nullifying titles for parcels Nos. **1165, 1166, 1167, 13156, 13303, 133304 and 13305.**

8. The 1st defendant was served with a hearing notice for the suit by way of substituted service but did not attend court on 24th February 2016 when the court rescheduled the hearing on 12th April 2016 and dispensed with service on the 1st defendant. The matter was listed for hearing before me on 12th April, 2016 when the plaintiff testified in the presence of the defendants. Dr. Ladislaus Aduwo (PW1) one of the interested parties testified on behalf of the plaintiff and the interested parties. The plaintiff had donated a power of attorney to the witness which gave the witness authority to represent him in the suit. The power of attorney is included in the plaintiff's bundle of documents.
9. The witness reiterated the contents of the plaint notably that land parcel **Suna East/Wasweta I/37** was registered in the name of Oduogo Onduru (deceased) who was the plaintiff's father. Land parcel **number 37** had been subdivided to create parcels **747** and **748**. The plaintiff's father had sold **parcel 748** during his lifetime and that the plaintiff and his brother, Daniel Ogaro Oduogo were registered as owners of **parcel 747** after their father's death following a succession case. The plaintiff and his brother sold portions of the land to various buyers but Daniel Ogallo Oduogo died before the land was subdivided and buyers given their portions. When the plaintiff obtained letters of administration for his late brother's estate and wanted to formalize the subdivision and sale transaction on parcel **747** he was notified at the land registry that parcel **747** did not exist and in its place there was a new **parcel 13304** that was in the 1st defendant's name. Attempts by the plaintiff to obtain a search certificate in respect of **parcel 747** or **13304** proved futile as the land registrar was unco-operative. After change of personnel at the land registry the plaintiff stated a search certificate was issued to the plaintiff on 24th September 2009 in respect of parcel 747 which still showed the plaintiff and his brother were the registered owners.
10. The witness stated that after the 1st defendant had caused the unlawful subdivision of **parcel 747** and had obtained fake titles she used these fake documents to forcibly evict both the plaintiff and the buyers like the witness some of whom had built permanent homes where they were residing. The witness further testified that after obtaining the search that showed the plaintiffs were still the registered owners they complained to the land registrar who caused an investigation to be undertaken. The investigations by the land registrar affirmed that the actions and titles held by the 1st defendant were indeed fraudulent. The letters written by the land registrar Migori dated 25th October 2011 to the Attorney Generals Chambers and Permanent Secretary Ministry of Lands and 7th December 2012 to the state counsel, AG's office Kisumu which are both included in the plaintiff's bundle of documents both affirm the 1st defendant's activities and the titles held by her were fraudulent. The plaintiff placed reliance on the witness statement he made in this matter on 10th November 2011 and produced the plaintiff's bundle of documents as listed in the list of documents dated 10th November 2011 as plaintiff Ex1-39.
11. I have considered and reviewed the evidence and documents tendered in support of the evidence by the plaintiff and I am satisfied that the plaintiff and the interested parties have proved their case on a balance of probabilities. I am satisfied that the 1st defendant hatched a scheme to wrestle the property parcel **number 747** from the plaintiff's grasp and employed a scheme of carrying out dubious subdivisions and amalgamations to blur the history of the land parcels. Luckily some of the documents escaped her machinations. The abstract of title for **parcel 37** issued on 8th October 2009 shows that this parcel was registered in the name of Oduogo Anduru the deceased father of the plaintiff and that it was subdivided on 15th July 1973 into parcel Nos. **747** and **748** whereof the

parcel was closed. Oduogo Anduru was registered owner of parcel 747 on 18th March 1977 while he transferred parcel 748 to one Mohamed Shariff on 18th March 1977. The said Mohamed Shariff as per the title abstract of parcel 748 transferred the parcel to Stephen Eve Okwiri (husband to 1st defendant) on 26th May 1977 and there is a land board consent dated 26th May 1977 in respect of this transaction. The 1st defendant's series of transactions resulting in the various subdivisions and amalgamation are not supported and I am in agreement with the plaintiff and the 2nd and 3rd defendants that they were work of fraud.

12. The plaintiff in the plaint has claimed that they suffered special damages and prays for an award of special damages. In the body of the plaint no special damages are pleaded. It is trite law that special damages must not only be specifically pleaded but must also be specifically proved. My view is that no special damages were specifically pleaded and none have been specifically proved. On the claim for general damages there can be no denying that the plaintiff and the interested parties were ejected from their lawful places of abode and/were denied the use of the same. The 1st defendant's acts were malicious, calculated and uncalled for. The 1st defendant knew what she was doing and she must have known it was not right and would cause inconvenience and misery to the plaintiffs and the interested parties.
13. The plaintiffs stated that their houses were, damaged crops destroyed and trees indiscriminately felled. A report from the Kenya Forest Services dated 11th October 2011 is included in the plaintiff's bundle of documents and outlines the various types of trees cut down and/or damaged. The plaintiffs have also included a bundle of photographs which show some of the damaged buildings and cut trees strewn all over. The damage no doubt was extensive. The plaintiff and the interested parties as the owners of the suit land were entitled to have their properties protected. The 1st defendant had no justifiable cause to invade the plaintiff's property as she did. An award of general damages would be appropriate in the circumstances of this case. I would award a sum of kshs. 500,000/= against the 1st defendant.
14. In the result I enter judgment in favour of the plaintiff in the following terms:
 - a. **That title number Suna East/Wasweta I/747 is owned by Daniel Ogalo Oduogo and Peter Ouma Oduogo.**
 - b. **That titles for parcels Nos. Suna East/Wasweta I/1165, 1166, 1167, 13156, 13303, 13304 and 13305 if they exist are fraudulent, null and void, and the land registrar, Migori is directed to nullify and cancel the same forthwith.**
 - c. **The plaintiffs and interested parties are awarded general damages of kshs. 500,000/= as against the 1st defendant with interest at court rates from the date of this judgment.**
 - d. **Costs of the suit are awarded to the plaintiff and the 2nd and 3rd defendant to be paid by the 1st defendant.**

Judgment dated, signed and delivered at Kisii this 23rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

Ms. Gogi for Oduogo for the plaintiff

Ms. Gogi for Oduogo for the interested parties

N/A for the 1st defendant

M/s Kariuki for Ochwal for the 2nd and 3rd defendants

Ngare Court Assistant

J. M MUTUNGI

JUDGE