



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 70 OF 2012

ODOYO OSODO PLAINTIFF

VERSUS

RAEL OBARA OJUOK1ST DEFENDANT

BENARD OPIYO OJUOK 2ND DEFENDANT

MOSES OCHIENG MATINDE OJUOK3RD DEFENDANT

ELLY MATINDE OJUOK4TH DEFENDANT

DICKENCE ONYANGO MATINDE5TH DEFENDANT

J U D G M E N T

1. The plaintiff commenced the instant suit by way of a plaint dated 23rd February 2012 filed on the same date. The plaintiff claims that he is the registered proprietor of land parcels **LR Nos. Rusinga/Wawere/1108, 1113, 1302 and 1552** (hereinafter referred to as “**the suit properties**”) by way of first registration following the process of land adjudication under the provisions of the **Land Adjudication Act, Cap 284** of the Laws of Kenya. The plaintiff further claims that he purchased the beneficial interests and rights of one, **John Matinde Ojuok** and **Henry Akeyo Matinde** (now both deceased) in the said parcels of land between the years 1989 - 1992 before the adjudication process was completed. The plaintiff avers that he purchased **LR Nos. Rusinga/Wawere/1108, 1113 and 1552** from the **late Henry Akeyo Matinde** who was a brother in law to the 1st defendant and an uncle to the 2nd defendant who was a son of the 1st defendant. The plaintiff further avers he purchased land parcel **LR No. Rusinga/ Wawere/1302** from the **late John Matinde Ojuok** who was the son of the 1st defendant and the father of the 3rd, 4th and 5th defendants.

2. The plaintiff further claims that the defendants jointly and severally during the month of January 2012 started laying a claim to the plaintiffs said parcels of land alleging the plaintiff had fraudulently caused the land to be registered in his name as owner of the suit properties. The plaintiff further states the defendants have invaded and trespassed onto portions of the suit properties with the objective of forcing the plaintiff out of his land. The plaintiff contends the defendants acts are unlawful and illegal and avers the defendants have despite demand to desist from the acts and being given notice of intention to sue, failed and/or refused to desist from their said illegal and unlawful acts.

3. The plaintiff by the plaint seeks inter alia:-

(i) A declaration that he is the lawful owner of the suit properties.

(ii) Permanent injunction against the defendants restraining them from trespassing and/or in any other manner interfering with the plaintiff's said properties.

(iii) An order that the defendants remove any fence and/or structures they may have erected on the suit properties.

(iv) An order for the eviction of the defendants.

(v) Costs of the suit.

4. defendants filed a joint statement of defence and counterclaim dated 28th March 2012. The defendants by their defence deny that there was any sale of the suit properties to the plaintiff as alleged by the plaintiff. The defendants dispute the alleged agreements between the plaintiff and the alleged vendors. The defendants deny the plaintiff has ever been in possession of the suit properties and aver that the plaintiff only attempted to enter into the land in 2012 when he knew the defendants had discovered the fraud he had perpetrated. The defendants deny their claim against the plaintiff is time barred.

5. By the counterclaim the defendants allege that the plaintiff fraudulently caused the suit properties to be registered in his name and have pleaded the particulars of the alleged fraud under paragraph 3 of the counterclaim. In consequence, the defendants pray for judgment in the counterclaim for:-

(a) Declaration that the plaintiff holds the suit properties in trust for the defendants.

(b) Rectification of the title registers to reflect the names of the original owners as before the commission of the fraud.

(c) Damages for fraud.

(d) Costs of the suit.

The suit was part heard before **Okong'o, J.** on 20th February 2013 and 8th December 2014 when the plaintiff and PW2 one, Gabriel Oneko Chek testified in support of the plaintiff's case and the plaintiff's case was closed.

6. The defence case was heard before me on 3rd March 2016 when Moses Ochieng Matinde who is the 3rd defendant testified as the sole witness for the defence and the defence case was closed. After the close of the defence case the parties filed their final closing submissions. The plaintiff filed his submissions on 5th May 2016 while the defendants filed their submissions on 19th May 2016.

7. The plaintiff's case;

The plaintiff testified that he purchased land parcel **Nos. 1152** in 1989, **1113** in 1990 and **1108** in 1991 all from **Henry Akeyo Matinde**. In 1992 the plaintiff purchased parcel **1302** from **John Matinde Ojwok**. The plaintiff produced copies of the respective agreements entered into with the vendors and the resultant titles registered in his name as **PEx.1(a)** and **(b)** to **4(a)** and **(b)** respectively. The plaintiff testified that at the time he was buying the properties **Rusinga/Wawere** had been declared an adjudication section and the process of land adjudication was ongoing and had not been completed such that the plots he purchased from the vendors had not as yet been demarcated and given parcel numbers. The plaintiff further testified that after he purchased the suit properties he immediately started using the same and was farming thereon. He stated that he has built a permanent house on land parcel **1108** which he has rented out to tenants. The plaintiff stated that he stopped using the suit properties in 2005 following threats from the defendants who were claiming the land belonged to their deceased father and they wanted to have the land back

8. The plaintiff stated that he reported the matter to the chief who referred him to the land registrar but even the land registrar could not offer any solution but advised that any aggrieved party should refer the matter to the court for determination. The plaintiff testified that during the adjudication process when all persons rights and interests are adjudicated, no person raised any objection to him being registered as the owner of the suit properties. He stated that the persons who sold the properties to him did not object since they had relinquished their rights and interest over the suit properties to him. The plaintiff maintained that he was properly registered as owner and his titles are now absolute and indefeasible.

9. PW2 one, Gabriel Oneko Chek testified that he was a retired chief and that the parties to the suit were from his area. He testified that the plaintiff purchased land parcels **1552, 1113** and **1302** from the late **Akeyo Matinde** and that the plaintiff further bought land parcel **1108** from the late **Akeyo Matinde** and the late **William Okeyo Ojuok**. The witness stated that at the time the sale transaction was taking place he was the Assistant Chief of Waware sublocation and that he was present and witnessed all the sale transactions between the plaintiff and the deceased vendors. The witness stated that at the time the sale transactions took place, the land had not been demarcated and that the parcel numbers indicated in the copies of the sale agreements were furnished after land adjudication and demarcation had been done. The witness affirmed that he witnessed the preparation of the agreements at the chief's office in his official capacity and he asserted that it was a case of willing buyer willing seller.

10. The defendants case;

The 3rd defendant, testified as DW1 on behalf of himself and his co-defendants. The witness adopted his recorded and filed witness statement dated 4th May 2012 as his evidence in chief. The witness testified that the chief of their area between 1985-1995 was one John Amolo Anditi and he did not execute the agreements of sale which are shown to have been witnessed by the chief. The witness however admitted PW2 was the assistant chief during the period the agreements were made. The witness denied the suit properties belonged to the plaintiff asserting that the plaintiff was fraudulently registered as the owner.

11. In cross examination the witness stated his father John Matinde Oduor died on 20th May 1994 and he was then 12 years old. He admitted that at the time the alleged sale transaction took place between 1989 and 1992 he was too young and could not have been a witness to the transactions. The witness stated that he came to learn that the plaintiff was the registered owner of the suit properties on 11th December 2012 when he visited the lands registry. The witness further stated that he became aware of the alleged agreements of sale between the plaintiff and his deceased father in March 2012 when he was served with the pleadings and documents in the present suit. The witness stated that when he scrutinized the agreements he formed the view that they were not genuine, notably because both sellers and all the witnesses who were shown to have witnessed the agreements on his father's side were all dead, who included his father's two brothers. The witness further explained the signature on his uncle's ID card (**William Okeyo**) appeared different to that he is alleged to have signed in the sale agreement.

12. The witness further stated that he had never lodged a complaint of fraud regarding the alleged agreements and neither had he obtained any experts report on the hand writing and signatures on the agreements to verify their genuineness or otherwise. The witness affirmed that they have never as a family petitioned for grant of letters of administration for the estate of their deceased father. Further, the witness affirmed that nobody in their family raised any objection regarding the suit properties during the process of land adjudication.

13. Analysis and determinations;

The parties filed their final submissions following the closure of the trial. The plaintiff's submissions were filed on 6th May 2016 while the defendants' submissions were filed on 19th May 2016. I have reviewed the pleadings, the evidence tendered by the parties and I have considered the submissions made by the parties. The following are the issues that arise for determination in the suit:-

1. Whether the plaintiff is the registered proprietor of land parcels LR

Rusinga/Waware/1108, 1113, 1302 and 1552.

2. Whether the registration of the plaintiff as the owner thereof was fraudulent.

3. Whether the plaintiff holds the suit parcels in trust for the defendant.

4. Whether the defendants have made out a case for the court to make an order for the rectification of the land registers of parcels Rusinga/ Waware/1108, 1113, 1302 and 1552.

5. Whether the defendants have trespassed onto the suit property.

6. What orders should the court make?

14. Whether the plaintiff is the registered proprietor;

The plaintiff tendered evidence that he was the registered owner of the suit properties. He produced copies of title deeds bearing his name as exhibits. Indeed DW1 in his evidence acknowledged that the plaintiff is the person registered as proprietor of land parcels **Rusinga/Waware/1108, 1113, 1302 and 1552** at the lands office save that DW1 contended that the plaintiff was fraudulently registered as proprietor. The plaintiff's evidence was that he purchased the subject parcels of land from the defendant's deceased father and uncle between the period 1989 and 1992. The plaintiff produced copies of agreements as exhibits in support of each sale transaction [copies of agreements and title deeds were produced as **PEx.1(a) and (b) to PEx.4 (a) and (b)**]. DW1 disputed the agreements of sale claiming they were not genuine. However, apart from observing that both vendors together with their witnesses were dead, the defendants did not offer any other evidence to show the agreements were not genuine. DW1 placed a lot of premium on the fact that the agreements had not been attested by the then area chief, one John Omolo Onditi (now deceased) but the plaintiff called PW2 who was the Assistant Chief who confirmed he was present when the agreements were made and he was a witness that the defendants father and uncle indeed sold their parcels of land to the plaintiff. PW2 who testified before me struck me as a truthful witness and I believed him. It is my finding thereof that the plaintiff purchased the parcels of land from the defendants father (deceased) and uncle (also deceased).

15. DW1 by his own evidence, was a minor and was hardly 10 years old when the last of the agreements is said to have been entered into in 1992. He therefore had no capacity to participate in the making of the agreements. The defendants have not tendered any evidence to show that the agreements were not signed and/or executed by the vendors. The defendants claims that the agreements were not genuine and/or were fraudulent were not backed by any evidence. The burden of proof that the plaintiff was fraudulently registered as proprietor of the suit properties lay with the defendants as the parties who were making the allegation and my view is that this burden was not discharged.

16. The plaintiff gave evidence that at the time he purchased the suit properties the land had not been demarcated and that during the process of land adjudication of land interests and rights in the area he was adjudicated as the owner of the suit properties and that no member of the defendants family made any objection against him being adjudicated as the owner of the parcels of land. Following the conclusion of the adjudication process, the plaintiff was registered as the owner of the suit properties and issued with title deeds. This constituted a first registration and conferred upon the registered owner absolute rights of ownership which were not liable to be defeated except if it is proved that the registration was obtained by fraud and it is shown the registered owner was party to such fraud.

17. Section 24 (a) of the Land Registration Act, 2012 provides:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the **Land Registration Act, 2012** further provides:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon transfer or transmission by a proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements and restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.

18. The plaintiff in his evidence which was supported by PW2 explained how he acquired the suit properties and how he got to be registered as the proprietor. Neither the vendors nor members of their families raised any objection during the adjudication process with the result that the plaintiff was registered as owner of the suit properties on the basis of the adjudication register issued under Section 27 of the **Land Adjudication Act**, Cap 284 Laws of Kenya. In the absence of any appeal to the Minister as provided under Section 29 of the **Act**, the registration of the plaintiff as the owner became final and he was entitled to enjoy all the rights and interest as an absolute owner of the suit properties.

19. Having reviewed the evidence and circumstances under which the plaintiff got registered as the owner of the suit properties, I am satisfied that the plaintiff was validly registered as owner of the properties following purchase and the process of land adjudication. As I observed earlier in this judgment, the defendants have not adduced any evidence to prove the alleged fraud against the plaintiff. DW1 in his evidence merely gave generalized statements that the agreements relied upon by the plaintiff were not genuine and that the plaintiff obtained the titles fraudulently. The defendants offered no evidence in proof of the allegations. The standard of proof in regard to allegations of fraud is on a higher pedestal than on a balance of probabilities as is the norm in civil cases. The Court of Appeal in the case of **Nyangate Guto alias Watson Mogere Mogoko –vs- Maxwell Okemwa Mmogoro & Another [2015] eKLR** restated this position when it observed:-

“...As the claim was based on fraud, the appellant, as the party making the allegation was required not only to plead it but also to prove the same. This is in line with the law as was stated in Rosemary Wanjiku Murithi –vs- George Maina Ndinwa [2014] eKLR (Civil Appeal No. 9 of 2014) where this court held that:- “Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.”

20. The court went on to observe that, the onus of proving fraud is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by the court in the case of **Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others [1996] eKLR [Civil Appeal No. 215 of 1996]** as being beyond that of a balance of probabilities. In the case the court stated:-

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

Quite clearly in the present case the defendants fell far short of proving any fraud against the plaintiff and I hold and find the defendants claims of fraud to be unfounded and baseless.

21. The defendants in their counterclaim apart from alleging fraud against the plaintiff seek a declaration that the plaintiff holds title of the suit properties in trust for the defendants. I have held and found that no evidence to prove fraud was tendered by the defendants. It is not clear or apparent in the defendants’ pleadings what the basis for the claim of trust is, as no particulars of trust have been pleaded. No evidence either has been led to give rise to a presumption of trust. The existence of or presumption of trust is a matter that requires proof by way of evidence. A trust cannot exist in a vacuum and neither can

a presumption of trust arise in abstract. For a trust to exist it has either to be express or implied and facts and circumstances have to exist to support the existence of a trust and/or to lead to a presumption of trust. In the instant case no evidence at all has been adduced by the defendants to support the existence of a trust and I therefore find and hold the plaintiff does not hold the titles to the suit properties in trust for the defendants.

22. Having held that the plaintiff was properly registered as the owner of land parcels **Rusinga/Waware/1108, 1113, 1302 and 1552** it follows that the defendants' occupation of the parcels of land and/or any portions thereof is unlawful. The plaintiff testified that he has put up a house in land parcel **1108** which he has rented out to tenants and further that he was farming in the suit properties until 2005 when the defendants started staking ownership claims over the parcels of land and have subsequently forcibly prevented him from utilizing his properties. My view of this matter is that the defendants have set out to reverse what their father voluntarily did when he opted to sell the parcels of land to the plaintiff. While the defendants may not like the fact that their father sold the land, they cannot be allowed to take the law into their own hands and forcibly prevent the plaintiff from enjoying the use of his land in respect of which he is the registered owner.

23. The defendants are trespassers onto the plaintiffs land and they ought to vacate and deliver vacant possession to the plaintiff. The plaintiff has in his submissions sought to be awarded damages for trespass. The plaintiff in his evidence did not lay a basis for an award of damages. By the plaint dated 23rd February 2012, the plaintiff has made no prayer for damages and I therefore find there is no basis upon which I could make an award for damages for trespass.

24. Having considered and evaluated the totality of all the evidence in this matter, I am satisfied the plaintiff has proved his suit on a balance of probabilities. I find the defendants counterclaim not proved and I order the same dismissed.

25. In the result, I enter judgment in favour of the plaintiff against the defendants jointly and severally in the following terms:-

(a) That the plaintiff be and is hereby declared to be the sole absolute proprietor of land parcels Rusinga/Waware/1108, 1113, 1302 and 1552.

(b) That the defendants be and are hereby ordered to vacate and deliver vacant possession of land parcels Rusinga/Waware/1108, 1113, 1302 and 1552 or any portions of the said parcels they may be in occupation of within sixty (60) days from the date of service of the decree herein upon them.

(c) That in default of vacating and delivering vacant possession of the suit properties as in (b) above an eviction order for their forcible removal to issue on application by the plaintiff.

(d) The costs of the suit and the costs of the counter claim are awarded to the plaintiff.

Judgment dated, signed and delivered at Kisii this 21st day of April, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Mireri for Otieno for the plaintiff

Mr. Moracha for Okoth for the 1st, 2nd, 3rd, 4th and 5th defendants

Milcent court assistant

J. M. MUTUNGI

JUDGE