



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

E.L.C. CASE NO. 13 OF 2017

JULIUS OTIENO OPIYO.....PLAINTIFF

VERSUS

DAUDI TADO NYAPOLA.....1ST DEFENDANT

RAPHAEL ODHIAMBO OYONGA.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff filed a suit against the defendants via a plaint dated 26th January 2017 praying for judgment against the defendants for;

a) The land registrar at Busia be directed by way of court order to rectify and revert all records at land Registry to PETER AYONGA OTIENO which were fraudulently changed after his demise in 1989.

b) Costs of this suit.

c) Any other relief this Honourable Court may deem fit to grant.

2. The plaintiff impleaded that the 2nd defendant who is entitled to a share arising from land parcel no. BUKHAYO/EBUSIBWABO/20 colluded with the 1st defendant and other people not known to the entire family members to subdivide, distribute and share the whole original land parcel BUKHAYO/EBUSIBWABO/20. The plaintiff stated that they realised all the anomalies when they visited the land registry and found the new numbers had been created being Bukhayo/Ebusibwabo/1905, 1906, 1907 and 2058. The plaintiff's claim against the defendants is for an order from this Honourable Court to cancel or strike all the title deeds issued to the defendants and any other persons from the original number BUKHAYO/EBUSIBWABO/20 as per records shown in the land registry after the death of PETER AYONGA OTIENO.

3. The 2nd defendant entered appearance and filed their defence on 24th February 2017 where he pleaded that he is the second last born to the late PETER AYONGA OTIENO and a paternal uncle to the plaintiff. He denied having colluded with the 1st defendant and other people not known to the entire family members of the deceased or anybody to subdivide, distribute and share the whole original parcel no. BUKHAYO/EBUSIBWABO/20. According to the 2nd defendant, he owns land parcel no. BUKHAYO/EBUSIBWABO/2057 jointly with the plaintiff and one PATRICK OKONO YONGA and he denied having any dealings on parcel no. BUKHAYO/EBUSIBWABO/20 and put the plaintiff to strict proof. He prayed that the suit be dismissed with costs to the defendants.

4. The 1st defendant entered appearance and filed his defence on 6th March 2017 which was later amended and filed in court on 9th March 2018. The 1st defendant denied colluding with the 2nd defendant or with anybody else to subdivide the original L.R. BUKHAYO/EBUSIBWABO/20 and put the plaintiff to strict proof. He stated that the plaintiff has not taken out letters of administration in respect of the estate of his late father therefore he lacks capacity to institute this suit. He averred further that he has been in possession of the suit land without permission of the registered owner continuously and peacefully without interruption before and after the death of the plaintiff's father for a period of over 12 years thus the suit is barred by Limitation of Actions Act. He prayed for the suit to be dismissed with costs.

5. The matter was set down for hearing on 10/11/2020 with the plaintiff JUSTUS OTIENO OPIYO testifying as PW1. He testified that he sued the defendants because they got title deeds without taking out letters of administration and the land in dispute is Bukhayo/Ebusibwabo/20. He pointed out that the plot No. 20 was registered in the name of Peter Yonga Otieno who was his grandfather and who passed on in 1989. He stated that the 1st defendant is a purchaser from Peter Yonga who is different from Peter Ayonga Otieno. He stated that his claim is to know how they got title when the estate of Peter Ayonga Otieno had not been distributed.

6. The plaintiff prayed that his claim be allowed as prayed and he relied on the documents filed in court to support his case. The documents include;

- *Peter Yonga's ID Card No. xxxxxxxx*
- *Emmanuel Obiero Ayonga ID Card No. xxxxxxxx – note that the Peter Yonga and Emmanuel Obiero Ayonga is the same person who had two different identity cards.*
- *Copy of the Identity Card for the late Peter Ayonga Otieno owner of the land parcel No. Bukhayo/Ebusibwabo/20.*
- *Copy of green card showing on how title deeds were issued.*
- *Copy of title deed No. Bukhayo/Ebusibwabo/2017.*
- *Copy of title deed No. Bukhayo/Ebusibwabo/1961.*

7. During his cross-examination by Mr. Jumba, learned counsel for the first defendant, PW1 stated that Peter Yonga is his uncle and that his biological father's name is Lucas Opiyo Yonga. He claimed that he inherited the land from his father and that Gabriel Onyango Oduru was a purchaser, but he didn't know who he was. He admitted to knowing Roseline Atieno Obiero as Peter Yonga's wife and that she was the registered owner of L.R. No. 2057, the land on which the witness lives. In further cross-examination, PW1 stated that Peter Yonga was registered as the owner of L.R. No. 1961, but he had not sued them. He admitted that the suit, L.R. 20, had been closed on subdivision. He conceded that he obtained letters of administration of Peter Ayonga Otieno's estate without the consent of the second defendant, despite the fact that he is Peter Ayonga Otieno's son.

8. During cross-examination by the second defendant, the plaintiff said that he is entitled to a piece of the suit land because nine brothers were left out. He admitted that his grandfather divided the land long before the second defendant was born and that each person continues to live on their part according to the division. He indicated that he sued the second defendant because he sold his half of the land and that he was curious as to how he gained his title without first obtaining letters of administration.

9. DANIEL OTIENO testified as **PW2** stating that he lives in Ebusibwabo and the plaintiff is his brother. He stated that the 2nd defendant is a younger brother to their father and he denied knowing the 1st defendant. **PW2** testified that Emmanuel Obiero Yonga changed his name to Peter Yonga in 1993 and then he was arrested and charged in court. In his opinion, he stated that he must have used the change of name to register the land in his name before he passed on in 1997. In 2006-2007, he decided to buy a plot because there was already ongoing dispute and the 2nd defendant showed him land to buy comprised in L.R. No.20. When he went to the 2nd defendant for a title, he discovered that Emmanuel had put his name on the title as Peter Yonga. He told the court that they decided to contribute money to do succession. The 1st defendant was registered as owner of 2057 and 1907 and they did not know how he got his title before succession. He admitted that the wife of Peter Yonga Otieno was still alive.

10. During cross-examination by Mr. Jumba learned counsel for the 1st defendant, PW2 stated that his grandmother is old and he did not have evidence that Emmanuel Obiero was charged in court. He admitted that Ebusibwabo/20 had been subdivided and they did not know all the owners of the subdivisions and they had not joined them to these proceedings. That his share in the land accrues through his father called Patrick Opondo and a portion he purchased though he did not produce evidence that he bought land from his grandmother. On further cross-examination by the 2nd defendant, PW2 stated that his father is still alive and his father is older than the 2nd defendant. He stated that he had nothing for permission to claim land from him.

11. SILVANUS WABWIRE WANYAMA testified as **PW3** said he knew the plaintiff. He stated that he had bought land from Ouda Opondo in June 1984 and he was introduced to the sons of Oudo Opondo. He told the court that they lived peacefully until the 1st defendant sent people to come and tell them that he had bought the portion he had bought. Upon cross-examination, **PW3** stated he is a witness because his portion had been grabbed. He wanted the land registered in Ouda's name so that he can get his title. He stated that he lives on the suit portion and he had an agreement but it was not filed in court by the plaintiff.

12. RAPHAEL ODHIAMBO YONGA gave evidence as **DW1** stating that he comes from Musoma and he is a farmer. He adopted his witness statement dated 29/9/2017 as his evidence in chief. He stated that he is the son of the late Peter Yonga Otieno and he is the 2nd last born. He stated that it was the late EMMANUEL OBIERO AYONGA who secretly subdivided the land parcel no. BUKHAYO/EBUSIBWABO/20 without consulting other family members. He told the court that he never participated in subdividing the land parcel no. BUKHAYO/EBUSIBWABO/20 as alleged by the plaintiff in this case and he should not be liable for the wrongful act of the late EMMANUEL OBIERO AYONGA. He testified that on 2nd May 1997 through his brother PATRICK OKONO they complained to the Divisional Criminal Investigation office at Busia about the late EMMANUEL OBIERO AYONGA who had fraudulently duplicated the National ID of their late father PETER AYONGA OTIENO and used the same to subdivide their family land BUKHAYO/EBUSIBWABO/20 purporting to be their late father who had actually passed on by then.

13. He informed the court that the entire family of the late PETER AYONGA OTIENO agreed and appointed him as to be the administrator of the deceased's estate to enable the family file a succession cause and inherit the estate land. He stated that following the appointment as the administrator of the estate of the late PETER AYONGA OTIENO, the family through him sold one acre of land out of land parcel No. BUKHAYO/EBUSIBWABO/1961 to finance the succession process. He told the court that he had worked hand in hand with the plaintiff and the fact that the plaintiff changed his mind and sued him for wrongful acts of the late EMMANUEL OBIERO AYONGA knowing very well that he is not the said person and he never participated in the wrongful acts of the late EMMANUEL OBIERO AYONGA does not hold water. He wanted the court to send a representative to confirm that each person was occupying their shares as allocated by their late father. He produced the documents in his list of documents as exhibits. Upon cross-examination by the plaintiff, DW1 stated that he did not have a

title deed and the land was registered in the name of Peter Yonga Otieno.

14. The 1st defendant did not attend the hearing of his suit despite the date being taken in the presence of his advocate and therefore their case was closed without adduction of evidence. Thereafter, the parties agreed to file written submissions. The plaintiff filed his written submissions on 18th August 2021 and submitted that the subdivision of the suit land happened without filing of a succession cause and the new numbers were illegally created and as such should be nullified.

15. The court has considered the pleadings, the evidence adduced by the parties, the submissions on record and the law applicable. The issues up for determination before this court are;

- a) *Whether the subdivision of BUKHAYO/EBUSIBWABO/20 and creation of the subtitles was done illegally.*
- b) *Whether titles to the subdivisions should be cancelled and the land reverted to the original status for distribution.*
- c) *Who should pay costs?*

16. On the first point, it is undisputed that land parcel no. BUKHAYO/EBUSIBWABO/20 was registered in the name of PETER AYONGA OTIENO, who died in 1989. According to PW1 and his witnesses, the second defendant caused the subdivision of BUKHAYO/EBUSIBWABO/20 and sold it to many third parties, including the first defendant in this case. They contended that the subdivision occurred in the absence of a succession to the late Peter Ayonga Otieno's estate. The second defendant has refuted such charges, claiming that Emmanuel Obiero Yonga, also known as Peter Yonga, was the one who falsely duplicated their father's national identification card, resulting in the subdivisions.

17. However, the second defendant admits selling one acre from Bukhayo/Ebusibwabo/1961 to a third party in order to finance the succession procedure. The plaintiff asserts that the newly produced parcels from the original Bukhayo/Ebusibwabo/20 are Bukhayo/Ebusibwabo/1905, 1906, 1907, and 2058. The defendants asserted that the plaintiff lacked capacity to file this action since no letters of administrator for the late Peter Ayonga Otieno's estate had been obtained. On 9th October 2018, the plaintiff filed a replying affidavit in response to a preliminary objection, attaching grant ad litem awarded to him on 16th January 2017 prior to the commencement of this matter. Thus, the plaintiff possessed ability to commence and prosecute this action regardless of whether the consent of the second defendant was obtained.

18. According to the green card for Bukhayo/Ebusibwabo/1907, Peter Yonga (also known as Emmanuel Obiero Yonga) became the registered owner on 23/3/1994, following the death of Peter Ayonga Otieno, the registered owner of Bukhayo/Ebusibwabo/20. The green card for this parcel indicates it was a subdivision from plot no Ebusibwabo/20. The said parcel number 1907 was transferred to Gabriel Onyango Oduru who unfortunately was not joined to these proceedings. The 2nd defendant admitted that the deceased Peter Yonga alias Emanuel Obiero Yonga had irregularly subdivided their father's land without first taking out letters of administration. That they had took up this matter jointly with the plaintiff and he was surprised for the turnaround of being blamed for the actions of someone else.

19. The plaintiff has demonstrated that indeed the original title Bukhayo/Ebusibwabo/20 was subdivided without first undertaking succession process of the deceased registered owner. However, he failed to provide evidence that the new parcels created from Bukhayo/Ebusibwabo/20 are registered in the names of the 1st and 2nd defendants. Secondly there is no evidence linking these two defendants that they fraudulently and illegally caused the subdivision of Bukhayo/Ebusibwabo/20. PW1 relied on documents which include the copy of title deed to Bukhayo/Ebusibwabo/2057 bearing the name of Roseline Atieno Obiero and 1961 bearing Peter Yonga who inspite of this knowledge the plaintiff chose not to join to this suit.

20. It would not be right or equitable to annul the titles of the current registered owners of the parcels of land created from L.R. Bukhayo/Ebusibwabo/20 without first giving them an opportunity to be heard and the issue resolved on the merits. The plaintiff brought this action against the first and second defendants in error because none of the papers on which he relied in evidence established that the first and second defendants were parties to the fraudulent subdivisions of L.R. 20. Due to the non-joinder of parties, I am hesitant to revoke the titles to the new parcels until they are heard in accordance with the rules of natural justice.

21. On the third issue, the plaintiff shall pay costs to the defendants since they failed to prove their case against them and they incurred costs to defend the suit.

22. The upshot is that the plaintiff's suit be and is hereby struck out with costs to the defendants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF NOVEMBER 2021.

A. OMOLLO

JUDGE