



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC APPEAL NO. E004 OF 2021

AFRICANUS OSAKAISE EPRONG.....1ST APPELLANT

ROBERT SABALA.....2ND APPELLANT

VERSUS

JOHN ORONI IKAPASA.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment made in Busia CMC ELC No. 76 of 2019 of Chief Magistrate's Court by Hon. P. Y. KULECHO SRM delivered on 8th March 2021 in this suit. The appellant who was the Plaintiff in the Lower Court raised the following grounds in their Memorandum of Appeal dated 17th March 2021;

- a. The Learned Trial Magistrate erred in law and fact by misapprehending the claim, pleading and exhibits thereby omitting at erroneous finding.**
- b. The Learned Trial Magistrate erred in land and fact by finding the plaintiff did not prove his case on a balance of probabilities.**
- c. The Learned Trial Magistrate failed to appreciate the fact that the Respondent did not defend his impugned ownership as envisaged by law and procedure.**
- d. The Learned Trial Magistrate downplayed the Appellant evidence and overhyped the Respondent evidence.**

2. He prayed that the judgment delivered on 8th March 2021 be set aside and judgment be entered as per the plaint dated 17th June 2019 in Busia CMELC NO. 76 of 2019.

3. The parties agreed to dispense with the hearing of the appeal by way of written submissions. The Appellants filed their submissions on 14th September 2021 and submitted that the impugned entries were made on the strength of change of name. The name of **OBONYO IKAESE** changed to **ALEXANDER OBONYO EMOIT**, that of **IKABISA OSOKAESI** changed to **IKABISA EKADA OSOKAESI**, lastly the name of **GREGORY IKABISA** changed to **JOHN ORONI IKABISA**. They submitted that it was the last name change which was a fraudulent entry as the deceased was his father and at no time was his name changed to **JOHN ORONI IKABISA**. Lastly, they submitted that the last entry resulted in the Respondent becoming a beneficiary and as an administrator of his father's estate, he had to disapprove the entry was not fraudulent.

4. The Respondent filed his submissions on 23rd September 2021 and stated that the appeal lacks merit and the same should be dismissed with costs. He relied on the provisions of section 107 of the Evidence Act adding that it is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities as was held by the High Court in **Gichinga Kibutha v Caroline Nduku (2018) eKLR**. It was his humble submission that the Appellants did not prove a single instance of fraud against the Respondent so as to defeat his title and warrant the cancellation of title. They relied on the decisions in **Wallingford v Mutual Society (1880)** and **Dr. Joseph Arap Ngok v Justice Moijo ole Keiwua & 5 others Civil Appeal No. Nai. 60 of 1997**.

5. The background of the appeal is that the Appellants brought a suit against the Respondent alleging fraud and misrepresentation on the part of the Respondent. They sought to have the entries made on LR. SOUTH TESO/ASINGE/261 on 6th November 1989 and any subsequent entries be revoked. During trial the 1st Appellant said that in 1972, the land was registered in the joint names of Obonyo Osokaise, Gregory Ikabisa (1st Appellant's father) and Ikobisa Osokaese (Respondent's father). In 1989, ownership changed and the names of Alexander

Obonyo Eموit (2nd Appellant's father) was added to the title alongside the name of Ikabisa Ekada Osokaise and John Oroni Ikabisa. His father's name was omitted and in his place John Oroni Ikabisa's name inserted. He prayed that their father's inheritance be given to them.

6. On the Respondent's part, he denied ever doing succession over the estate of the deceased hence he was not an administrator of the Estate of **IKASIBA EKADA OSOKAISE** and denied his part in any acts of fraud that led to the entries of 3rd July 1972 and 6th November 1989 on the register to land parcel no. **SOUTH TESO/ASINGE/261**. He placed the blame on **OBONYO IKABISA** who is deceased and stated that the Appellants had not established a cause of action against him.

7. The trial court found that the Appellants failed to prove their case on a balance of probabilities by failure to show that the Respondent participated in the alleged fraud. She found that the Appellants failed to prove fraud by failing to produce the documents to show how the transfer was done or how the estate of the deceased, **IKABISA OSOKAISE** was involved as a party to the proceedings.

8. I have considered the findings of the Lower Court, the submissions of counsel and the numerous authorities cited before me. Guided by various authorities, I am aware that this being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. In the Court of Appeal case of **Selle v Associated Motor Boat Co. [1968] EA 123**, it was put thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

9. After a careful consideration of the grounds of appeal, evidence, proceedings before the lower court, the impugned judgment and submissions, the issues I raise for determination in this appeal are;

a. Whether the Respondent obtained the transfer to **L.R. SOUTH TESO/ASINGE/261** through fraud;

b. Whether the Respondent was party to the fraud?

c. Whether the Appellant proved their case on a balance of probabilities.

10. It is well settled in law that fraud is a serious accusation which procedurally has to be pleaded and proved to the standard above a balance of probabilities but not beyond reasonable doubt. This was buttressed in the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where **Tunoi, JA.** (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

11. The Appellants outlined the particulars of fraud and misrepresentation in paragraph 8 of their plaint dated 17th June 2019. In their submissions at the lower court and in this court, the Appellants inferred that it was upon the Respondent to defend his inclusion as the co-owner of the land as his title had been called out for being fraudulent. The Respondent on the other part, relied on Section 107 of the Evidence Act which provides that;

‘Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.’

12. The onus of proof was upon the Appellants as they have alleged that the entry of the Respondent's name on the register for the suit property was fraudulent and that it was either the Respondent or his father who orchestrated the entry which directly benefited him. The Appellants relied on the green card of **L.R. NO. SOUTH TESO/ASINGE/261** which was produced as PEXH 2 and it shows that the first entries made in 1972 ownership was conferred upon Obonyo Ikabisa, Ikabisa Osokaes and Gregory Ikabisa. The subsequent entry made in 1989 and which forms the gist of this dispute is indicated to have been made pursuant to change of name. The names now read Alexander Obonyo Eموit, Ikabisa Ekada Osokaes and John Oroni Ikabisa.

13. The Appellants argue that the Respondent's name John Oroni was added as third name and their father's name Gregory Ikabisa removed. It is their contention that their father's name was never changed from Gregory Ikasiba to John Oroni Ikabisa. That subsequent to the addition of the Respondent's name on the title, they have been disinherited. The 1st Appellant brought this suit as the legal representative of Gregory Okabisa while the 2nd Appellant is the legal representative of Alex Obonyo Eموit. Gregory is indicated to have died in November 2000 while Alex died in 1994 with both dates of death happening after the impugned entry of 1989. According to the Appellants, the Respondent was the administrator of the estate of his father Ikabisa Ekada Osokaese who perpetrated the fraudulent entry of 1989.

14. In paragraph 3 of the plaint, the Respondent was described as a male adult of sound mind and the administrator of the estate of Ikabisa Ekada Osokaese. The Respondent in his written witness statement said he had not taken letters of administration in respect of his father's estate. He also denied being party to any acts of fraud complained of. The Appellants produced a copy of grant issued to the Respondent in CMC Succession Case no. 315 of 2018 as PEXH 4. In cause, the Respondent was appointed as the administrator of the Estate of Alex

Obonyo Emoit and Ikabisa Ekada Osokaese. This answers the question of capacity of the Respondent in the suit.

15. The Respondent denied taking part in the fraudulent entry complained of. The suit property was jointly owned by the three parties registered in 1972 in equal shares. The Appellants who administers the estate of Alex Obonyo-deceased and Gregory Ikabisa by their pleadings makes a point that the deceased were not party to the entry of name change made in 1989. They have accused Ikabisa Ekada-deceased of undertaking these acts which resulted in removing the name of Gregory Ikabisa-deceased from the ownership and instead giving Gregory's share to the Respondent. The trial court in analysing the evidence presented before her at paragraph 20 *observed that although the acts complained of were done by Ikabisa Osokaese-deceased, yet his estate was not included in the proceedings.* This was a misdirection because the Respondent had been sued as the administrator of his deceased father Osokaese.

16. The trial court observed further that the Land Registrar ought to have been called by the Appellants to shed light on how the changes in the suit title were effected as that was the only way the court could have determined whether the same was irregular. The honourable magistrate failed to analyse the evidence adduced vis-avi the legal provisions. The Appellants as co-owners of the suit land said they were not part of the transaction that resulted in the impugned entry of 1989. The legal position is that no transaction can be undertaken in land that is jointly owned without the consent of the co-owners.

17. Section 91 of the Land Registration Act provides thus;

5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld

18. It is recorded in the proceedings in cross-exam of the Respondent where he stated that Obonyo and Ikabisa made him a co-owner. That he signed one of the forms which is not before the court then again states that he never signed any forms to effect the changes. The Respondent in re-exam admitted that his father subdivided the land and gave him a portion. In my opinion, all these were admissions pointing a finger at the Respondent's father's involvement in the changes complained of. As the administrator of the estate and a beneficiary of the suit land, the burden shifted on him to show that when his father was giving him a portion of this land or effecting changes that included his name in the register, the consent of the two co-registered owners were sought and obtained. This kind of evidence did not have to be adduced by the Land Registrar.

19. Section 26 of the Land Registration Act provides that certificate of title is held as conclusive evidence but subject to be challenged on the ground of misrepresentation or fraud to which the person is proved to be a party to. The Respondent cited the holding in the case of **Dr. Joseph Arap Ngok vs Justice Moiwo Ole Kewua & 5 Others (1997)eKLR** where the Court of Appeal stated thus;

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title. Otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

20. Further, on whether the Respondent was party to the fraud, the Respondent submitted thus, *the 1st Plaintiff (read Appellant) confirmed the following facts during cross-exam;*

i)...

ii) *the act complained of was done by Ikabisa Osokaese*

and not the defendant (read Respondent).

iii) *the plaintiffs have not personally blamed the*

defendant for the acts of fraud.

iv) *Alexander Obonyo and Gregory Emoit never raised*

any complaint regarding the entry during their lifetime.

21. It can be deduced from the Respondent's submission that he admitted the acts of fraud complained of were done by his deceased father. What he forgot that he had been sued as an administrator. He did not lead any evidence to demonstrate that Alex and Gregory knew about

this entry before their demise. In any event, their representatives are before this court challenging the entry made in November of 1989.

22. I have said enough that showed the Appellants established their case before the trial magistrate on a balance of probabilities and therefore deserved to receive the orders of rectification of the register. The result is my finding that the appeal is merited and in conclusion, I make the following orders;

a) The appeal is allowed and the judgement entered on 8th March 2021 dismissing the Appellants suit be and is hereby set aside.

b) The Appellants claim as contained in the plaint dated 17th June 2019 is granted thus; an order be and is issued for rectification of the register for L.R S.Teso/Asinge/261 by revoking entry number 2 made on 6.11.1989 and all subsequent entries.

c) Cost of this appeal and the costs of the suit in the subordinate court awarded to the Appellants.

Dated, signed & delivered at BUSIA this 24th day of Feb., 2022

A. OMOLLO

JUDGE