



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 123 OF 2014

VINCENT OUMA KHAHUBI (as the administrator as litem of the estate of

KHAHUBI OCHWILA (DECEASED.....PLAINTIFF

= VERSUS =

HUMPHREY JUMA ONGARO (as the administrator of the estate of

JOSHUA ONGARO MILIMO(DECEASED.....DEFENDANT

JUDGMENT

1. The Plaintiff impleaded this suit against the Defendant vide a further amended Plaint dated 5th May, 2017 praying that judgement be entered in his favour on the following terms:

- a. An injunction restraining the Defendant from disposing or dealing in any manner with the said land and/or Certificate of Title;**
- b. Declaration that land parcel number SAMIA/BUDONGO/267 belongs to KHAHUBI OCHWILA;**
- c. An order to rectify the land register by removing the name of the Defendant's late father and two others and inserting the name of the deceased KHAHUBI OCHWILA; and**
- d. Costs of this suit and interest.**

2. The Plaintiff avers that he is the son of KHAHUBI OCHWILA (deceased) who was the owner of land parcel SAMIA/BUDONGO/267 and continued owning the said parcel of land together with his family till his demise on the 16th day of May, 1979 without any complaints from anybody. That the said parcel of land was fraudulently and/or due to misrepresentation acquired illegally or unprocedurally by JOSHUA ONGARO MIRIMO and two others. He listed the particulars of fraud as:

- a. Fraudulently altering the adjudication record of 1968;*
- b. Acquiring the certificate of title in contravention of the ruling by Court of the Funyula land area court;*
- c. Corruptly getting the land parcel registered in his name.*

3. The plaintiff pleaded further that the defendant had no valid title to which he could pass on to the persons claiming through him. The plaintiff's claim therefore is for an order of injunction restraining the defendant from using and or interfering with the land as well an order for rectification of the register. He added that the previous suits over the same parcel prosecuted in 1968 and 2008 were set aside by way of Judicial Review cases filed in the High Court.

4. The Defendant relied on his defence dated 23rd July, 2014 and filed on the 24th of July, 2014 where he denied all the allegations raised in the Plaint. He averred that that the issue of ownership of the suit parcel was determined bide Arbitration Board Land Case No. 9 of 1970 in favour of Joshua Ongaro Mirimo which ruling overturned the decision of the Funyula Land Area Court. That neither the Plaintiff nor his father has any right or interest whatsoever in the suit parcel and they have never owned or occupied the said land. He stated that the plaintiff is not entitled to the reliefs sought against the Defendant.

5. The hearing commenced on the 1st of July, 2021 with the Plaintiff, **VINCENT OUMA KHAHUBI** testifying as **PW1** and relying on his sole evidence. He adopted his witness statement dated 3rd June, 2014 together with the documents on his list dated 3rd June, 2014, 23rd July, 2019 and 22nd of December, 2020 which he produced as his exhibits. In his statement, PW1 stated that his father was the owner of land parcel SAMIA/BUDONGO/267 long before the land adjudication in 1968 and that the adjudication was made in favour of his father. He also stated that the Defendant's father did not object to the said adjudication as he did not appeal to the Minister. He asserted that they had a case in 1967 between his father and younger brother of the defendant called Samuel. But after the case Pw1's father was still registered as the owner of the land parcel SAMIA/BUDONGO/267 in 1971. He concluded by stating that he brought the case because after his father death they visited the lands office where they discovered that their father's name was cancelled and replaced with Ongaro Mirimo.
6. On cross-examination by Fwaya Advocate for the Defendant, **PW1** stated that he was born in the year 1966. That SAMIA-BUDONGO adjudication was carried out in 1971 although the green card indicates that the register was opened on the 27th of March, 1980. He continued to state that in the register it indicates that Ongaro Mirimo was registered as the first owner and nothing in the register indicates that he was registered as holding the land in trust for PW1's father/family
7. **PW1** stated further in cross-exam that his father was registered as the owner of L.R No. SAMIA/BUDONGO/316 in 1971 as he was staying on 371 but cultivating 267. That although he did not have the Adjudication records for the year 1968, he was in possession of the records for 1971 which adjudication record show that there were four names on the suit title. The other names were crossed to leave Ongaro Mirimo's name only as owner of the suit title. That the crossing on the record is signed on the 23rd of March, 1973 and refers to case No. 9 of 1970. That although he has no idea who did the crossing, the lands office advised him to investigate who did them.
8. When questioned about case no. 9 of 1970, the Plaintiff stated that he did not know the case but on looking at the defendant's witness statement he noted that the decision in the case gave land to Ongaro Mirimo. He was aware of the Land Disputes Tribunal Case awarding his father 5 acres out of the 25.6 acres of L.R No. 267 but was not sure whether the decision had been quashed through a judicial review case brought in the H. He confirmed that he is still using the 5 acres of the land awarded by a court order issued in 2008 which land he occupies with his 4 brothers. He denied selling any portion of the land and stated that everyone in occupation of the land is a family member. He concluded by stating that the Defendant and his brothers Josephat, Tom and Lawrence were not born on the suit land and only entered the said land in 1982, 1980, 2004 and 2007 respectively.
9. On re-examination, PW1 stated that in case no. 9 of 1970 Ongaro was the Plaintiff. That although the certificate of title states that the land in dispute has never been before the African Court, the said information is false as a dispute over the land was before court in the year 1968. He stated that both land parcel 267 and 316 belonged to his father as they were one parcel only separated by a road.
10. The defence called only one witness, **HUMPREY JUMA ONGARO** as **DW1**. He adopted his witness statement (initially filed as a replying affidavit sworn on the 23rd of July, 2014) as his evidence and the annexures attached thereon as his documents. He stated that his father was the one registered as owner of the suit land in 1980 since his father was living on the land with his wife Achoka. That his father got the land after winning the case between him and the Plaintiff's father and that there was no decision that varied the order made in case no. 9 of 1970. That the adjudication records relied upon by the plaintiff refer to an objection which was dismissed. The defendant added that he is using the land together with his brother one of whom was born on the land in the year 1947. He asserts that his grandfather, father and Josephat's mother were all buried on the said land. DW1 stated further that the Land Disputes Tribunal, Funyula gave the Plaintiff five (5) acres of the suit land which the plaintiff started cultivating by force and which made him return to court to have the decision quashed.
11. **DW1** continued in evidence that he did not change the adjudication records as the land was given to his father by the Court. That although he may not be aware of the decision made by the Land Disputes Tribunal, Funyula the decision made in 1970 remains to date. He concluded by stating that his father was not holding the land in trust for the Plaintiff's family.
12. Upon cross-examination by J.V. Juma Advocate, DW1 stated that he adopted his Replying Affidavit as his evidence and in paragraph 5 of the said affidavit he swore that the Plaintiff's family has never occupied or owned the suit land. That he does not know who made the cancellation in the adjudication records but after the cancellation, Ongaro Mirimo's name remained uncanceled. He did not know the year of death of the plaintiff's father. DW1 said Masiga's land was parcel no 331. On re-examination, **DW1** clarified that neither him nor his father had any part to do with the entries on the adjudication records. This marked the close of the defence case.
13. The Plaintiff filed his submissions on the 12th of August, 2021 submitting that his family cultivated the suit land while living on SAMIA/BUDONGO/316 and because it was inhabited, it attracted people. That the matter was first canvassed in the African Court Civil Case No. 7 of 1967 between Samuel Masiga vs. Khakubi Ochwila. That during the judgement delivered on the 15th of March, 1968, the Plaintiff in this case lost and did not appeal. That the Defendant's father filed objection no. 65 of 1971 after the land was registered in the names of KHAKUBI OCHWILA, ONGARO MIRIMO, MANGONGO OLUNGO and OJWANG MUGOLA. However, the objection was dismissed.
14. The Plaintiff submitted further that the Arbitration Board Land Case No. 9 of 1970 that the Defendant purports to rely on cannot be of much help because the Arbitration Board had no capacity or authority to decide on cases decided upon before the African Court and as such those proceedings are null and void. That the registration of Ongaro Mirimo as the sole owner of the land came through fraud. He concluded that he has proved his case on the required standards and that the cancellation of his father's name from the title was done fraudulently.
15. The Defendant filed his submissions on the 5th of August, 2021 and submitted on the following issues he framed for determination: whether the Defendant/or his late father got registered/held land LR Samia/Budongo/267 in trust for the Plaintiff or his late father(plaintiff's); whether cases of 1967/1968 of Funyula Area Land Court and Case NO. 9 OF 1970 of Arbitration Board Committee had any bearing on the ownership of the subject matter; whether the Defendant/and or his late father acquired the subject matter fraudulently, through misrepresentation or illegally; whether the plaintiff is entitled to the reliefs or any sought.
16. On the first issue, the Defendant submitted that the Plaintiff had failed to prove that the Defendant or his father held the land in trust for

the Plaintiff and/or his father at the time of first registration or subsequent thereto. On the second issue, the Defendant stated that the decision of 15.5.68 was a dismissal which did not confer any rights to the parties but instead returned them to the status quo before filing of the suit. He submitted further that the Arbitration case no. 9 of 1970 decision dishonoured the decision of the land committee and awarded the land to the Defendant's father.

17. With regards to the issue of fraud and/or misrepresentation, the Defendant submitted that his father acquired the land procedurally since he has been in occupation before and during adjudication. He submitted that the allegations of fraud have failed as the Plaintiff has failed to prove the particulars of the fraud alleged. The Defendant concluded by submitting that his father is the registered owner and holder of the title of the land and that he cannot be evicted as his rights to the land have not been overturned by any Court. He urged this Court to dismiss the Plaintiff's suit with costs.

18. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

- i. *Whether the Defendant's father obtained the Suit Property fraudulently;*
- ii. *Whether the current ownership of the suit property should be cancelled and the same revert to the Plaintiff; and*
- iii. *Who bears the costs of the suit?*

19. The Plaintiff's main contention is that the Defendants father fraudulently caused the registration of himself as the owner of L.R. SAMIA/BUDONGO/267.

He went further and listed the particulars of fraud in paragraphs 5 of the further amended plaint. It is trite law that allegations of fraud must be specifically pleaded and strictly proved. The Court of Appeal 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 in the case of held that the fraud cannot be inferred. The burden was on the plaintiff to discharge. In its attempt to discharge the alleged fraud of altering the records the Plaintiff relied on the proceedings of case no 7 of 1967 concluded in 1968 over the subject matter and other documents.

20. I will now consider the weight of those documents in proving the fraud *vis a vi* the defendants documents. The plaintiff said that the 1967 case was between his father and Samuel the brother to Defendant's father. By 1967, adjudication had not taken place so the said parcel had no number. The proceedings had attached a sketch map most likely drawn by the trial court during the site visit.

21. According to the sketch map, the land in dispute was between Khakubi Ochwila's land and Ongaro s/o Milimo's land. Samuel had sued three people with Khakubi Ochwila as Defendant no. I and Dadiaris Obonyo s/o Olango as Defendant no. III. The Plaintiff is relying on the dismissal of the suit to prove the land was given to them. This was an old matter and the proceedings may have been mixed up. However the evidence of Musungu Nambwamba who gave testified as DW1 corroborates the marks on the sketch drawn during the site visit, Mr. Musungu in part that the land in dispute was owned by Kamwamba who left it to his son Adieri. Adieri on his demise left it to Nambwamba. Nambwamba to Bala Olungo. Olungo left the land to Defendant no. II and III. According to this witness, Defendant no. II & III inherited the land from their great grandfather. The trial court stated they saw Bala's grave, his Ganjo. They also saw bananas which everyone on site belonged to Defendant no. II. I did not see any evidence which confirmed Khakubi Ochwila was also using the land.

21. As rightly submitted by Counsel for the Defendant (in this suit) the dismissal of Samuel's suit returned parties to their status prior to the filing of the suit. The final orders made in the judgment was silent on registration of the suit land (assuming it is the same land that is before this court). In order number 3, the court said Liguru's boundary confirmed and parties informed to plant sisal in order that it be seen clearly. None of the parties including the Plaintiff who relied on these proceedings did not tell the court what happened to the two Defendants who were sued by their father to now make Khakubi Ochwila as the sole owner of the land in this suit if the current land is the same as the one that was in dispute in case no. 7 of 1967.

22. The second document the Plaintiff's relied on to prove his case was the adjudication record of 18th February 1971. The records are for SAMIA/BUDONGO/267. On the face of it, the land was registered in 4 names. Three of the names have been cancelled only living the name of Ongoro Mirimo as the owner. The Plaintiff did not disclose the source of this document but if he received it from the adjudication office then he ought to have sued them or called them as a witness to elaborate on who did the crossings. The Plaintiff averred that it is the Defendant or his father who was represented to the adjudication office that led to their father's name being removed from the register. He was therefore under a duty to call evidence to support this fact and not expect the court to infer fraud.

23. In any event, the Defendant explained the reasons for these crossings being a result of what he call no. 9 of 1970. The said case is also mentioned in the document where next to the crossing these words are written " see A/Board case no. 9 of 1970". The signature/name of person who did the crossing is indicated and date of crossing given as 27.2.1973. Probably, the Plaintiff took issue with the Defendants father because his signature appears at paragraph 9 of the form as being satisfied with the contents of that form. Besides the signature of Ongaro Mirimo, which was witnessed by Nichola Khabinga, the form was also signed by Chairman on 8.2.1971 and Executive Officer on 20.1.1971.

24. On page 2 of the said form, at paragraph 14 refers to some decisions made by the adjudication Officer. The 1st commentary made on 27.2.1973 said he found the register of three people on one parcel without their consent carried by either a Liguru or Land Adjudication

Officer as unjust and he allowed the objection in part but ordered the Complainant Ongaro Mirimo to give a portion of the land 267 to Ojwang Mugola. The second comment made on 7.5.1973 dismissed the object submitted by Khakubi Ochwila who was advised to file a case against the owner of the land and not the present Respondent (in the objection). The document was not subjected to handwriting examination to ascertain that the persons who signed as chairman or Executive officer were not the one who made the writing thereon.

25. The last document is the proceedings taken before the Funyula LDT in case no 20 of 2008 between the Plaintiff and the Defendant and his brothers. The Plaintiff produced the proceedings but did not include the award. I will not comment much on the evidential value of these proceedings given the Defendant stated the proceedings and the award were quashed by the High Court in Judicial Review case.

26. The Plaintiff's other documents was the green card which showed the file for the suit land was opened on 27.3.1980. He therefore wondered how proceedings in a case conducted in 1970 could be registered on the title opened in 1980. In this instant, the Plaintiff failed to appreciate that the records from the adjudication office take process before the register is created under the RLA. That the two offices – adjudication section and the Registrar and issuance of titles are independent. His document for adjudication record showing cancelling refers to case conducted under the land adjudication Act. The findings are thus entered in the adjudication register and not the green card. I find no contradiction.

27. In light of the analysis of the Plaintiffs document produced and supported by his oral evidence, I find no iota of evidence adduced to support the particulars of fraud pleaded. The Plaintiff's claim was based wholly on fraud and having failed to prove it on balance of probability, it suffers the fate of being dismissed. The costs of the suit awarded to the defendant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF JANUARY, 2022.

A. OMOLLO

JUDGE