



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 232 OF 2013

JACOB NYAKWA OJWANG.....PLAINTIFF

VERSUS

NATHWALAL NARISHIDAS GHELANI.....1ST DEFENDANT

JOSHUA OMARI T/A SEDIME AGENCIES.....2ND DEFENDANT

SAMWEL OGWENO OKECH.....3RD DEFENDANT

MATHEWS OWINYO ODERA.....4TH DEFENDANT

JOSHUA ONGWENO WAGUDE.....5TH DEFENDANT

THE DISTRICT LAND REGISTRAR – KISUMU.....6TH DEFENDANT

JUDGEMENT

Jacob Nyakwa Ojwang (**hereinafter referred to as Plaintiff**) has sued Nathwalal Narishidas Ghelani and Joshua Omar t/a Sedime Agencies, Samwel Ogweno Okech, Mathews Owinyo Odera, Joshua Ongweno Wagude and The District Land Registrar – Kisumu (**hereinafter referred to as the defendants**) claiming that at all material times to this suit, land parcel No. Kisumu/Kanyakwar ‘B’/396 was owned by the late Augustinus Ojwang Okut also known as Ojwang Okut (deceased) who was the biological father of the plaintiff. By an agreement dated 13th February, 1979 the Plaintiff’s father sold eight (8) acres of land parcel No. Kisumu/Kanyakwar ‘B’/396 to the 1st Defendant through his agent one Dr. Oluoch Okeyo at a price and consideration of Kenya shillings Fifty-Two Thousand (Kshs. 52,000/=) which was paid in full at the time of execution of the said agreement. At the time of entering into the sale agreement the area had not been demarcated by the land adjudication under the Land Adjudications Act Cap 284 of 1968 and as such it was still under adjudication section and unsurveyed. It was not until 26th February, 1981 when the adjudication process for the area started and the land demarcated. The plaintiff states that during the demarcation process the aforesaid land parcel No. Kisumu/Kanyakwar ‘B’/396 was adjudicated in the names of Nathwalal Narshidas Ghelani the 1st defendant herein as the original land owner. Subsequent upon adjudication process the said land parcel No. Kisumu/Kanyakwar ‘B’/396 was registered into the names of the 1st Defendant under a first registration on 23rd February 1983. It was after the adjudication and subsequent registration of the suit land that the actual acreage of the said land was determined as twelve (12) acres.

On 26th November, 2002, the 1st defendant proceeded to obtain title deed for whole of the suit land comprising twelve (12) acres as opposed to eight (8) acres sold to him. A certificate of official search dated 25th May, 2010 indicates that the suit land was registered in the names of Sedime Agencies the 2nd defendant on 21st January, 1999 and the land certificate issued to them. A further certificate of official search dated 23rd September 2011 shows that the suit land was registered into the names of Samwel Ogweno Oketch and Mathews Owinyo Odera the 3rd and 4th defendants herein as trustees of Afya Co-operative Kisumu Branch members and title deed issued to them on 23rd March 2011.

The plaintiff alleges that the 5th defendant herein fraudulently, unlawfully, maliciously and without any colour of right purportedly sold the whole of the suit land to the 2nd defendant who subsequently sold the same to the 3rd and 4th defendants herein. That on 18th August, 2012 when the plaintiff applied for a certified copy of the register (Green Card) his application was turned away with remarks "Custody Check" and on subsequent dates he was told there was "no card" for the suit land.

At one particular instance he was informed, and he was able to have a glimpse of the certified copy of the register (Green card) bearing the names of the 5th Defendant but when he asked the 6th defendant for a certified copy of the same he was denied.

The 1st defendant's action to register the whole of the twelve (12) acres instead of the eight (8) acres sold to him into his names was wrong, illegal, and fraudulent and has effectively denied the plaintiff his rightful share of four (4) acres legally belonging to him as the next of kin and beneficiary of the estate of his late father.

The actions by the 2nd, 3rd, 4th and 5th defendants in collusion and in collaboration with the 6th defendant to change ownership of the suit land, tamper with records and make it impossible for the plaintiff to get good information at the land registry pertaining the suit land is fraudulent, illegal, criminal and intended to deny the plaintiff as well as the 1st defendant the rightful share and ownership of the suit land and to deprive them of the enjoyment of the same and has effectively delayed the plaintiff's quest to seek justice.

The plaintiff prays for Judgment against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants jointly and severally for a declaration that the defendant is only entitled to eight acres out of land parcel No. KISUMU/KANYAKWAR 'B'/396. The plaintiff further prays for an order that the suit land parcel No. KISUMU/KANYAKWAR 'B'/396 be surveyed, subdivided and a portion measuring eight (8) acres be registered into the names of the 1st defendant while the remaining four (4) acres to be registered into the names of the plaintiff. Lastly, he prays for a declaration that any dealings, transactions, entries and records made by and in the names of the 2nd, 3rd, 4th and 5th defendants regarding the suit land were fraudulent and void should be cancelled and Costs of this suit plus interest thereon.

The 1st Defendant filed a statement of admission denying fraud. The 1st Defendant further states that when he bought the suit parcel of land the whole of it was shown to him as measuring (8) acres and therefore he had no ill intentions when he obtained title deed or the whole parcel of land. However, he has no objection to the plaintiff acquiring his share of four (4) acres and leaving to him his other share of eight (8) acres. He further avers that the suit land was demarcated and registered into his names as a first registration and has no knowledge of anybody raising any objections or claiming ownership of the same. The 1st Defendant further avers that since buying the suit land and obtaining title deed of the same he has not sold the same to anybody or group of people and therefore he does not know the 2nd, 3rd, 4th and 5th defendants.

The 5th Defendant also filed a statement of admission admitting paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. He states that he was not party to the registration of the suit land into the names of the 2nd, 3rd and 4th Defendants. He denies any dealing with the 1st, 2nd, 3rd and 4th and 6th Defendants in relation to the suit land or at all. He denies any sale agreement with the 2nd, 3rd, or 4th Defendants for the sale of the suit land or at all and does not therefore know the said 2nd, 3rd or 4th Defendants. The 5th Defendant further avers that he had migrated to Tanzania in the year 1975 and only came back in the year 1985 well after the adjudication and demarcation process in Kanyakwar area had been completed and therefore could not have participated in the demarcation process. The 5th Defendant further avers that he again migrated to Suba District in 1987 until 2007 when he came back and therefore the allegation that the suit land might at one time been in his names was made in his absence, fraudulent, criminal and also made without his knowledge, consent nor approval. That he never at any time or at all has he either signed any papers nor attended any land control board for transfer to anybody in relation to the suit land and if such documents are there then they are a forgery and a misrepresentation.

The 3rd, 4th Defendants filed a statement of defence denying the contents of paragraph 4 of the plaint. In particular, the Defendants deny that No. KISUMU/KANYAKWAR 'B'/396 belonged to and was hitherto owned by one Augustinus Ojwang Okut now deceased. Besides, the defendants also deny that the plaintiff herein is a biological son of the said Augustinus Ojwang Okut. The 3rd, 4th Defendants further state that the suit property herein was adjudicated and demarcated in favour of one Petro Omeri Okoth, prior to the transfer of same to and/or in favour of the 1st Defendant herein. In this regard, the allegations that the suit property hitherto belonged to Augustinus Ojwang Okut, is a Mirage. In particular, the said Augustinus Ojwang Okut, now Deceased, could not purport to have sold and/or entered into any valid land sale agreement with Dr. Oluoch Okeyo, allegedly on behalf of the 1st Defendant, without having been the adjudicated owner and/or proprietor of the suit property. The Defendants aver that the suit property herein, which was adjudicated in favour of Petro Omeri Okoth was entirely transferred to the 1st Defendant, without regard to the acreage and/or otherwise. Consequently, the 1st Defendant became the legitimate owner of the entire property and not 8 Acres as the plaintiff

would want the honourable court to believe. The Defendants herein aver that the suit property was never adjudicated in favour of the 1st Defendant, save that the 1st Defendant acquired ownership when the adjudication and demarcation process was still on going. However, the suit property was adjudicated and demarcated in favour of Petro Omeri Okoth who thereafter transferred same to the 1st Defendant.

The defendants admit the contents of paragraph 9 of the plaint and re-affirm that the registration of the suit property in favour of the 1st Defendant, followed and was pursuant to a first registration. For clarity, the acreage of all parcels of land under the Adjudication and Demarcation process, the suit property not excepted, are ordinarily determined at the time of the Adjudication process and not after. In this regard, the contents of paragraph 10 are informed by ignorance of the obtained adjudication and Demarcation process. The Defendants aver that the 1st Defendant, acquired the entire of the suit property from the previous adjudicated owner, who was separate and distinct from the Plaintiff's alleged father, now deceased. The Defendants aver that the suit property appears to have been lawfully transferred to and/or in favour of the 2nd Defendant, who acquired lawful title thereto. The Defendants aver that they were deputized by Afya Sacco co-operative Society Limited, Kisumu Branch, to procure and obtain a suitable property for and on behalf of the members thereof and in this regard, the Defendants identified and thereafter acquired the suit property. Consequently, the Defendants are Bona-fide purchasers for value without any defects on the Title, whatsoever. The Defendants deny the allegations of fraud.

The Defendants deny having colluded with the 2nd, 5th and 6th Defendants, towards and/or in respect of the acquisition of the suit property. For clarity, the suit property was lawfully acquired by the Defendants, pursuant to a lawful sale/purchase agreement, following exercise of the requisite due diligence. Owing to the fact that the suit property was lawfully purchased and therefore acquired by the Defendants, the Defendants deny that the plaintiff has any lawful rights over and in respect of the suit property (which has since been sub-divided into various portions and hence non-existent) or any portion thereof, whatsoever.

The Defendants contend that the instant suit as drawn and filed is misconceived, bad in law and otherwise legally untenable. Consequently, the Defendants reserve the right to raise and canvass preliminary objections on points of law, as hereunder;

i. The plaintiff's claim is statutorily time barred pursuant to and/or by dint of Section 4 of the Limitation of actions act Chapter 22, Laws of Kenya.

ii. The suit against the 1st Defendant who is long dead is void ab initio.

iii. The plaintiff is Devoid of the requisite locus standi to mount and/or maintain the instant suit. In this regard, the plaintiff is a Busybody.

iv. The entire proceedings herein are a nullity and hence void ab initio.

v. The suit herein is pre-mature, misconceived and bad in law.

vi. The plaint herein does not disclose any reasonable cause of action against the defendants.

vii. The instant suit amounts to and/or constitutes an abuse of the due process of court.

viii. The plaintiff is non-suited.

The 3rd and 4th Defendants pray that the suit be dismissed with costs.

When the matter came up for hearing, Jacob Nyakwa Ojwang of Dago sub-location testified that he is the legal representative of the estate of his father known as Augustine Ojwang Okut having obtained a grant of letters of administration intestate. The 1st Defendant was sold land measuring 8 acres by his father in 1979 leaving 4 acres as the whole land was 12 acres. When his father sold eight acres to 1st Defendant in 1979 the land had not been adjudicated and registered. When the land was later adjudicated the whole 12 acres were registered in the 1st Defendant's name. The plaintiff produced the sale agreement between Dr. Oluoch Okeyo a representative of 1st Defendant and his late father. The plaintiff further produced the adjudication record showing the land was registered in 1st Defendants name. The plaintiff further produced the certificate of official search showing the land was registered in 1st Defendant's name.

After discovering that 1st Defendant had been registered with the whole land, the plaintiff's contention was that the 1st Defendant took four (4) acres more than he bought and the plaintiff wanted four (4) acres returned to the estate of his father. He later did a search in 2009 and 2010 on the land and found the 2nd and 3rd Defendant had been registered as the proprietors. He was not involved in the transfers of the land to 1st Defendant or from the 1st Defendant to the other Defendants. He knows that the land has since been sub-divided into almost fifty parcels and his prayer is that all those parcels be cancelled to enable him get four acres and the other eight acres be left with 1st Defendant. He also prays for costs.

On cross examination by Mr. Ogutu, counsel for the 3rd and 4th defendants, he states that land parcel Kisumu/Kanyakwar B/396 is not in the schedule of the certificate of confirmation in the estate to be distributed because the land was in the name of 1st Defendant then. He does not have any documentary evidence to show that his late father had been registered with the suit land. After adjudication the land was registered with 1st Defendant but the adjudication record has the name of Petro Omeri Okoth above that of 1st Defendant but the former was entered and cancelled.

That Petro Omeri Okoth was a family or clan member. His family had not lodged a complaint on the adjudication result over the land. His father did not need to be registered with the land after adjudication as he had sold it to 1st Defendant. The sale agreement over the land was signed by Dr. Oluoch for the 1st Defendant. The sale agreement did not disclose the parcel number. The sale agreement does not show that Dr. Oluoch was signing as an agent for the 1st Defendant or that he was buying the land on behalf of 1st Defendant or anybody else. In 2007, he discovered that the 1st Defendant had been registered with all 12 acres instead of 8 acres. He does not know how the 3rd and 4th Defendants got registered with the suit land. He has not seen the documents filed by 3rd and 4th Defendants that show that they got the land from the 2nd Defendant but if that is confirmed as the case, he would not be surprised because he found in the 2010 search that 2nd Defendant had been registered with the whole land.

PW2-, Thomas Okumu Obongo a resident of Kanyakwar. States that the plaintiff is a first cousin and that his father and plaintiff's father had sold land to the 1st Defendant. He does not know the parcel number but is at Kanyakwar. The whole land was 12 acres and when plaintiff followed up he established only eight acres had been sold to 1st Defendant but had been registered with the whole parcel. He does not know how the 2nd to 5th Defendants got registered with the suit land. On Cross examination by Mr. Ogutu, he states that he does not know whether there exists a sale agreement signed by his late father and the Plaintiff's father selling the land to 1st Defendant as he was then young. He cannot remember the parcel reference of the land in dispute.

PW3, Samwel Oduke Ojwang of Dago Sub location, states that the Plaintiff is his blood brother. He knows the case before the court as his father Augustinos Ojwang sold the land to an Asian called Ghelani. He does not recall the parcel number. The land that was sold to Ghelani was eight acres and the remaining acres were to remain for the family. He does not know how Joshua Omari TA Sedline Agencies got involved in the land. He also does not know how Samuel Gweno Oketch, Mathews Owinyo Odera and Joshua Ogweno Wagude got involved with the land.

On being Cross examined by M/s Winnie Ochola, he states that his father Augustinos Ojwang Okutu was the owner of the land and sold eight acres to the Asian called Ghelani. The land is Kisumu/Kanyakwar B/396. He does not have any documentary evidence to show that the land was registered with his late father but the plaintiff has the details. His statement indicated that he was a witness in the sale agreement between his late father and Ghelani. He is not aware that the sale agreement did not give the parcel number. He does not know how to read but signed the agreement after his father asked him to do so. He cannot recall the year the adjudication of the land was done. He is not aware that the suit land was first adjudicated in the name of Petro Omeri Okoth and not his father. He is not aware that Ghelani was to get the whole parcel of 4.8. hectares as the portion sold was eight (8) acres.

PW4, Peter Adhola Ojwang of Kanyakwar Dago Sub-location used to work at Kiboswa slaughter house. The Plaintiff is his youngest brother from the same parents whereas he is the oldest and PW3 is in between. He states that the land in dispute is up the hill. His father sold only eight (8) acres leaving four (4) acres for the three. They have not sold any portion of the four acres to anybody. He does not know any other buyer of the land except the Asian called Ghelani. He does not know how 2nd to 5th Defendant acquired registration of the suit land. On Cross examination by M/s Ochola- He states that he does not know where the Asian called Ghelani who had bought the eight acres of the land in 1979 resides. He did not sign the sale agreement. He was not there when adjudication of the land took place. The sale was before adjudication. He is not aware that after adjudication the land was first registered with Petro Omari Okoth. He does not agree with the suggestion that his father did not own the land as it belonged to his grandfather.

The 3rd and 4th Defendants on their part called Mathews Owino Odera an employee of Jaramogi Oginga Odinga Referral Hospital as a medical laboratory technologist. He knows Afya SACCO Co- Operative Ltd because he was the branch chairman at

the material time and he is aware that the suit revolves on land parcel No. Kisumu/Kanyakwar 'B'/396. He testified that the suit property does not exist. The land was subdivided and new titles issued. That the land was registered in the names of Afya Sacco, that the names of the 4th and 3rd Defendants as trustees. They were not aware of the plaintiff's claim as the Adjudication record shows that the registered owner was Petro Omeri Okoth and the second name on the adjudication register is Nathanael Narshlas Ghelani. He refers to case number 55 of 1981 without elaborating on the parties and the particular details. He states that it is not true that the land belonged to the plaintiff's father. The sale agreement between Ojwang Okoth and Okeyo was made on 13/2/1970 but it does not have the parcel number. On cross examination by Nadhifo, counsel for the plaintiff, DWI states that the 1st registered owner was Petro. Omeri Okoth. That the name of Ghelani does not appear on the green card. The names on the green card were Adegū |Sungu Wagude and Josphad Ongweno Wagudae. That the name Ghelani does not appear on the green card. He states that when they did search on 13/12/2007, the land was registered in the names of 1st Defendant. On 4/07/2011, the land was registered in the names of Samuel Okech Ogweno. That they did due diligence.

On re- examination by Ogotu, DWI states that he had never met Nathalal Ghelani. That the land was not sold by the 1st Defendant. He avers that he had not been shown any document showing that the land belonged to the Plaintiff's father. That the land did not initially belong to the 1st Defendant as the first owner was Petro Omeri Okoth. There is no connection between the plaintiff and parcel no. 396.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submits that the evidence on record demonstrates that his deceased father owned the suit parcel of land and sold the same to the 1st Defendant and that he adjudication record produced by the Plaintiff and the 3rd and 4th Defendants bears a note that the name of the said Peter Omeri was cancelled based on a case no. 55 of 1981. The plaintiff relies upon the admission filed by the 1st Defendant in arguing that it is more probable than not that indeed the suit parcel of land belonged to the deceased Augustinus Ojwang prior to demarcation and as such the plaintiff herein indeed has the locus to bring this suit as the administrator of the estate of his late father.

According to the plaintiff, the adjudicating record shows that the parcel of land was registered in the name of the 1st Defendant, who went on to obtain a title in his name on 26.11.2002 as per the title deed produced, the certificate of official search dated 13.12.2007 shows that indeed the land was registered in the name of the 1st Defendant. The green card indicates that the first registered owner was one Adegū Sunga Wagude and later Joshua Ongwen Wagude the 5th Defendant herein who denied having any knowledge of the suit parcel of land as per the statement of admission filed. The land allegedly came from the said Joshua Ongwen Wagude to the name of Sedime Agencies the 2nd Defendant who sold to the 3rd and 4th Defendants. It is clear that the name of the 1st Defendant whom the 3rd and 4th Defendants admit owned the land from the date of adjudication does not appear on the green card at all. It is clear that the 2nd Defendant fraudulently obtained the title and as such could not pass good title to the 3rd and 4th Defendants. Had the 3rd and 4th Defendants conducted a historical search or even simply done due diligence by visiting the land physically and inquiring from the neighbors, they would have known the true status.

The plaintiff relies on the case of Esther Ndegi Niir & Another vs Leonard Gatei (2014) eKLR where Mutungi J held that;

'...the rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners involving title to land to carry out due diligence that goes beyond merely obtaining certificate of official search... Section 26 (1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as 'grabbed lands' it is essential to endeavor to ascertain the history and/or root to the Title.'

The plaintiff submits that from the facts presented in trial and the evidence adduced in form of documentary evidence, it is clear that the 2nd Defendant fraudulently and unlawfully acquired the title to the suit parcel of land and as such could not have passed good title to the 3rd and 4th Defendants and as such the title held by the latter is not indefeasible.

This whole case smacks of fraud, corruption and illegality which they pray the defendants are not allowed to get away with. The 2nd Defendant could not have passed good title to the 3rd and 4th Defendants. The plaintiff relies on the case of Esther Ndegi Njiru & Another v. Leonard Gatei (2014) eKLR where it was stated: -

"...Whereas the law respects and upholds sanctity of title the law also provided for situations when title shall not be absolute and indefeasible.... Article 40 (6) of the Constitution removes protection of title to property that is found to have been

unlawfully acquired...”The 1st and 5th Defendants herein both filed statements of admissions in response to the suit herein.

The plaintiff submits that the 1st Defendant at paragraph 5 admits that he bought and was shown only eight acres (8 acres) of the land and that he had no ill intention when he obtained the title deed for 12 acres. He goes ahead at paragraph 6 of the statement to state that he has no objection whatsoever to the Plaintiff acquiring his share of the four (4) acres of land as prayed. The 1st Defendant at paragraph 8 states that he has never sold the suit parcel of land to anyone or any group of people and as such does not know the 2nd – 5th Defendants. He joins issue with the plaintiff in praying for judgment against the 2nd to 5th Defendants. The 5th Defendant similarly filed a statement of admission stating that he did not participate in the process of adjudication as at the time he was away in Tanzania and that he never attended any land control board or signed any papers transferring the suit parcel of land to anybody and prayed for judgment against the other Defendants as prayed by the plaintiff. Now, the 3rd and 4th Defendants have submitted that the signatures contained on the statements of admission are forgeries that had been made by the same person due to the similarity in print of the plaintiff and the statements of admission but the 3rd and 4th Defendants herein have not brought anything before court to prove that the signatures on these statements of admission are a forgery and who the perpetrator is. This honorable court as being tasked to compare signatures in accordance with section 76 of the Evidence Act whose language is permissive and not mandatory in nature.

It is not in dispute that the suit is based on fraud which is a tort which is limited to three years within which an action can be brought. However, it is trite that in matters of fraud, the time starts to run from the time when the discovery was made. From the plaint, it appears that the Plaintiff discovered the fraud in 2012 and filed the suit in 2013 thereby defeating the time limit set by Limitation of Action Act, Cap 22, laws of Kenya.

The plaintiff relies on the case of JAVED GABAL RAHIM & another VS BENARD ALFRED WEKESA SAMBU & Another. CA NO. 11 of 2001 LLR 6088 (CAK) the court is said to have held as follows;

“In a claim for land on the basis that registration was done by way of fraud, the time starts to run when the said registration is discovered and the limitation is a period of three years.”

THE DEFENDANTS’ SUBMISSIONS

The 3rd and 4th defendants submit that from the evidence tendered before the Honourable court, both oral and Documentary, it is common ground that the suit property, was first Adjudicated and demarcated to and/or in favour of one Petro Omeri Okoth, whose name was entered on the Adjudication Record at the very onset of the process.

On the other hand, it is also worth to note that upon the demarcation of the suit property to and/or in favour of the said Petro Omeri Okoth, there was an objection, which was lodged by the 1st Defendant herein vide Case No. 55 of 1981, which appears to have succeeded and the suit property was thereafter transferred and registered in the name of the 1st Defendant. The contention by and/or on behalf of the plaintiff, that the suit property hitherto belonged to and was Adjudicated in favour of Austinus Ojwang Okut, now Deceased, is not supported by any evidence and in this regard, it is explicit that the allegations pertaining to such ownership, was therefore not proven and/or otherwise established. Where a party alleges, the Burden of proof lies on the shoulders of the party making the allegations and therefore in respect of the case, the burden of proving that the suit property belonged to and was adjudicated in favour of Agustinus Ojwang Okut, now deceased, laid on the plaintiff.

In support of the foregoing submissions, the 3rd and 4th defendants invoke and rely in the decision in the case of Pinnacle Tours and Travel Limited & 3 Others V Pauline Ngigi T/A Safari Market Tours [2019] Eklr. It is trite law that he who alleges must prove. In the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M’warabua [2015] eKLR the court held as follows with regard to the burden of proof:

“.....,in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant... The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that he respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt beign claimed herein.”

From the foregoing decision, the 3rd and 4th defendants argue that it was the plaintiff who had made the allegations that the suit property herein, was hitherto adjudicated and/or demarcated in the name of Agustinus Ojwang Okut, now deceased. Consequently, the plaintiff was obliged to prove that allegation, but unfortunately the allegation under reference was not proved.

It is the 3rd and 4th Defendants' humble submissions that to the extent that the suit property was never Adjudicated nor demarcated in favour of Austinus Ojwang Okut, now deceased, the said property thus did not form and/or comprise of the Estate of the said Deceased and to the to the extent that the said property did not comprise of the Estate of the Deceased, the plaintiff herein, whether as the legal Administrator of the deceased or otherwise, cannot now purport and/or pretend that the suit property was fraudulently acquired from the Deceased or by extension that the estate of the deceased, was defrauded of the suit property.

The 3rd and 4th defendants argue that it is settled law that no one can be defrauded of a property over and in respect of which the person in question, did not have any lawful and/or legitimate rights over, during his lifetime or at all.

The defendants invoke the Doctrine of *Nemo dat Quod non habet*, and rely on the decision in the case of DIAMOND TRUST BANK KENYA LTD V SAID HAMAD SHAMISI & 2 OTHERS [2015] eKLR

Firstly, Section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet).

These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in BISHOPSGATE MOTOR FINANCE CORPORATION LTD V TRANSPORT BRAKES LTD (1949) 1 KB 322, AT PP. 336 when he stated:

"In the development of our law, two principles have striven for mastery, the first is for the protecting of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

The 3rd and 4th defendants argue that the import and tenor of the Doctrine of *Nemo dat quod non habet*, was further amplified and/or otherwise deliberated upon in the decision in the case of KATANA KALUME & ANOTHER V MUNICIPAL COUNCIL FO MOMBASA & ANOTHER [2019] eKLR.

"Nemo Dat quod Non Habet" (No one can give that which one does not have) equally applies to the purported allocation of the suit property herein to the 2nd defendant.

A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case, No person can ever pass a better title than the one he has. They relied on the decision of the court of Appeal in diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others [2015] eKLR.

Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet).

These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in Bishopsgate Motor Finance Corporation Ltd vs transport Brakes Ltd (1949) 1 KB 322, at pp. 336 – 337 when he stated.

From the foregoing decision, it is the 3rd and 4th Defendants' submissions that to the extent that the suit property, did not vest in the name of Austinus Ojwang Okut, now deceased and hence same did not comprise of the estate, there is no way the Plaintiff herein can seek to acquire and/or propagate the issue pertaining to the title. In the premises, it is the 3rd and 4th Defendants' humble submissions that the plaintiff herein, just as the Estate of the Deceased that he purports to represent, does not have any legitimate suit herein, ought to fail. According to the 3rd and 4th defendants, having made the very positive allegations, including the existence

of a land agreement, it was incumbent upon the plaintiff herein to tender and/or to produce before the Honourable court evidence of Sale agreement, if any, that the Deceased entered into and/or executed with the 1st Defendant pertaining to and/or concerning the suit property. The plaintiff herein produced and/or adduced before the Honourable court a copy of a land sale agreement. However, the land sale agreement which was produced by the plaintiff herein was between Ojwang Okut and Dr. Oluoch Okeyo Asango, the latter who is not a party to this suit.

The sale agreement which was produced herein, does not stipulate and/or state the parcel of land in respect of which same relates to. Nevertheless, even assuming that the sale agreement, which does not relate to the suit property, was meant to affect the suit property, one would have expected the said Dr. Oluoch Okeyo Asango, who was the purchaser, in terms of the land sale agreement, to be registered as the 1st Adjudicated owner of the suit property.

From the evidence tendered by the plaintiff, it is worthy to note that the Plaintiff himself has stated at paragraph 9 of the plaint that the 1st Defendant herein, was registered and thereby became the registered owner on the 23rd day of February 1983, following the completion and/or conclusion of the Adjudication and demarcation process.

On the other hand, the plaintiff also adduced before the Honourable court evidence to show that one Agustinus Ojwang Okut, now deceased, died and/or passed on the 9th day of October 1990. For clarity, it is then evident that Agustinus Ojwang Okut, now deceased, who is purported to have been defrauded survived and/or lived for a period of more than 11 years, from the purported date of the sale agreement, without laying a claim to the portion of the suit property.

According to the defendants, the plaintiff herein seems to have been aware of the various transactions, touching on and/or affecting the suit property. The 3rd and 4th defendants rely on the contents of paragraph 12 of the plaint, which is reproduced as hereunder”

“12..By a certificate of official search dated the 25th day of May 2010, it indicates that the suit land was registered in the names of SEDIME AGENCIES, THE 2ND Defendant on the 21st day of January 1999 and the land certificate issued to him”.

From the said paragraph according to the defendants, it is imperative to note that at the latest, if at all, the plaintiff herein discovered the alleged fraud on the 25th day of May 2010, when he procured and obtained a Certificate of Official Search.

Having ascertained and authenticated the Fraud, pertaining to and/or concerning the suit property, the plaintiff was thus obligated to file and/or commence the subject proceedings, which are anchored on Fraud, within 3 years from the date of discovery of the fraud.

In support of the foregoing submissions, the 3rd and 4th Defendant rely in the provisions of Section 4 (2) of the Limitation of Actions Act chapter 22 Laws of Kenya, which provide as hereunder:

(1)The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

From the plaint filed by and/or on behalf of the plaintiff herein, it is evident and/or notable that the plaintiff's claim is founded and/or based on illegality and Fraud. In this regard, it is settled law that the plaintiff was obliged not only to plead illegality and Fraud, but to proceed and particularize the particulars of Fraud. See Order 2 Rule 10 of the Civil Procedure Rules, 2010 which provide as hereunder:

2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

(a)particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and

The defendants submit that the mandatory nature in which claims anchored on fraud must be pleaded, has been the subject of numerous decisions, whereby it has been stipulated that unless Fraud is pleaded and particularized, the plaintiff cannot purport to adduce and/or tender any evidence of Fraud. In support of the foregoing submissions, the 3rd and 4th Defendants invoke and rely in the decision in the case of KURIA KIARIE AND 2 OTHERS VS SAMMY MAGERA (2018) eKLR.

“The next and only other issue is fraud. The law is clear and we take it from 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 hat 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.” The same procedure goes for allegations of misrepresentation and illegality.

26. As regards the standard of proof, this court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. "See Ndolo vs Ndolo (2008) 1 KLR (G & F). 742 wherein the Court stated that; “...we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely in him Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but that burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal case....” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

The defendants argue that the certificates of official search which were produced by the plaintiff herein predate the filling of the suit. However, it is important to note that he 4th Defendant herein testified and informed the Honourable court that upon purchasing the suit property, same was transferred and registered in the names of the 3rd and 4th Defendants, albeit as Trustees of Afya Sacco Co-operative society Limited. It was the further testimony of the 4th Defendant that upon the transfer and registration of the suit property in their respective names, the suit property was subjected to sub-division and was thus sub-divided into numerous numbers in terms of the Mutation.

The 3rd and 4th Defendants, placed before the Honourable court evidence in terms of Certificate of official search which were procured and/or obtained by the Advocate who was engaged to pursue due diligence. For clarity, the totality of the certificate of search which were placed before the Honourable court, showed that when the 3rd and 4th Defendants, dealt with the suit property, same was registered in the names of the 2nd Defendant.

On the other hand, the 3rd and 4th Defendants have also placed before the honourable court a copy of the land sale agreement, which was prepared and/or executed between the vendor and themselves, which paved way for the sale, transfer and ultimate registration of the suit property in favour of the 3rd and 4th Defendants.

In view of the foregoing, it is the 3rd and 4th Defendants humble submissions that given the nature of the dealings and the documentation that underlines the transactions, the 3rd and 4th Defendants were Bona fide purchasers for value without notice of any defect in the Title. Consequently, the 3rd and 4th Defendants contend that by virtue of being Bona fide purchaser for value, their Title

which was lawfully registered, is not open to defeat and/or nullification by and/or at the instance of the plaintiff herein, who in any event, does not hold any legitimate interest, over and in respect of the suit property.

In support of the foregoing submissions, the 3rd and 4th Defendants, invoke and rely in the decision in the case of **WESTON GITONGA & 10 OTHERS V PETER RUGU GIKANGA & ANOTHER [2017] EKLR**

23. *Black's law Dictionary 8th Edition defines "bona fide purchaser" as:*

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

24. *In the Ugandan case of Katende v. Haridar & Company Limited [2008] 2 E.A 173 it was held:-*

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

a.he hold a certificate of title;

b.he purchased the property in good faith;

c.he had no knowledge of the fraud;

d.he purchased for valuable consideration;

e.the vendors had a parent valid title;

f.he purchased without notice of any fraud;

g.he was not party to any fraud.

Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

DETERMINATION AND ANALYSIS

I have considered the evidence on record and do find that the first issue for determination is whether or not the suit parcel of land comprised the estate of the deceased Augustinus Ojwang Okut and if so, whether or not the plaintiff has the locus to bring this suit. The adjudication panel allocated the suit property to Petro Omeri Okoth, whose name was entered on adjudication record at the very onset of the process. It is also clear that the 1st defendant lodged an objection through case number 55 of 1981 that succeeded and the suit property was registered in his name. Upon registration of the suit property in the name of the 1st Defendant, Mr. Petro Omeri Okoth and Augustinus Ojwang Okut lost any interest in the suit property and therefore the plaintiff has no locus to claim any interest in the property. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

107 "(1) 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 that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

I do find that the Plaintiff has failed to prove that his father had any interest in the suit property. It is trite law that whoever alleges in any case has the burden of proof. The Plaintiff has failed to prove that there was any agreement between himself, his father on one side and the 1st Defendant on the other side. He has also failed to prove that the land in dispute belonged to his father Augustinus Ojwang Okut. The alleged agreement of sale was not signed by the 1st Defendant and the plaintiff's father. I do find that the plaintiff has failed to prove that the property in dispute is comprised within the estate of the deceased Augustinus Ojwang Okut who was never registered as the proprietor of the suit land.

In the case of **Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR** where the court held as follows with regard to the burden of proof:

“...As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

The treatise, **The Halsbury's Laws of England, 4th Edition, Volume 17**, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

The second issue is whether the suit is time barred, I do find that the plaintiff has sued on behalf of the estate of the deceased Augustus Ojwang Okut who died on 9/10/1990. The deceased died 10 years after the alleged sale to the 1st Defendant. He never sued the 1st Defendant in his life time and never occupied the suit property. Infact he never claimed the suit property. His son has come to court after 33 years from the date of registration of the 1st defendant.

Section 4 (2) provides:

“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

The deceased plaintiff's father never bothered to sue the 1st Defendant for the suit property and therefore lost the right to sue after the expiry of 3 years after the 1st defendant was adjudicated as the owner of the suit-land and after Adeganga Sunga Wagude was registered as the proprietor. The plaintiff herein discovered the alleged fraud on 25/5/2010 and was supposed to sue by the 25/5/2013 but came to court on 17/9/2013 more than 3 years after discovering the fraud. I do find the suit to be time bared.

The 4th issue is whether fraud was properly particularized and proved. Under **Order 2 rule 4** of the **Civil Procedure Rules** it was incumbent upon the plaintiff to plead fraud specifically. The order succinctly provides as follows: -

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or Defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2)

In the case of *Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR* at page 23 Justice Amin citing the case of *Ratilal Patel Makanji (1957) EA 314* observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

Furthermore, in *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)* 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

It is clear that the plaintiff did not give particulars of fraud and therefore ambushed the defendants at the hearing of the case.

Moreover, the plaintiff failed to prove the allegations of fraud. Ultimately, I do find that the pleadings on fraud are insufficient and the evidence did not depict any fraud.

The third issue is whether the 3rd and 4th defendants were bonafide purchasers for value without notice of any fraud I rely on section 80 of the Land Registration Act no 12 of 2012 that provides as follows: -

“80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake

(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

This court further finds that the 3rd and 4th Defendants were bonafide purchasers for value without notice of any fraud and in fact the plaintiff did not prove fraud against the defendants. The 3rd and 4th defendants did a search and found that the property was registered in the names of the 2nd Defendant and the 2nd Defendant held a title in respect of the suit property. The 3rd and 4th Defendants executed an agreement and paid Kshs. 16,800,000 to James Odhiambo Ojolo T/A Sadine agencies. Upon payment, they subdivided the parcel of land and distributed to members who are now in possession. I do find that the 3rd and 4th defendants were innocent purchasers for value without notice of any wrong doing. The upshot of the above is that the plaintiff has failed to prove his claims on a balance of probabilities and the suit is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE



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