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Court:	High Court at Busia
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Judge:	Anne Omollo
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Advocates:	-
Case Summary:	-
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County:	Busia
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Advocates Against:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC CASE NO. 15 OF 2020**

**SIRIEKESI MORRIS WANJALA.....PLAINTIFF**

**= VERSUS =**

**BONFACE BRUNO WANJALA.....DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff vide a plaint filed 13<sup>th</sup> May, 2020 impleaded the Defendant in this suit and pray for judgement against the Defendant for:

**a) An order for the cancellation of the Defendant's name and registration on land parcel number BUKHAYO/MATAYOS/3450 and the same be reverted back to the original title LR No. BUKHAYO/MATAYOS/430 for the appropriate action of the succession and equitable distribution;**

**b) Costs of the suit; and**

**c) Any other relief that this Honourable Court deems fit and just to grant.**

2. The Plaintiff pleaded that his father BLASIO BRUNO WANZALA (deceased) and LAWRENCE WANZALA were jointly registered owners of a parcel of land known as **LR No. BUKHAYO/MATAYOS/430**. It is the plaintiff's contention that the said Lawrence Wanzala caused himself to be registered on this land with the intention of grabbing it which action caused the plaintiff to register a caution on the title number 439 belonging to the said Lawrence as well as sue him before the Nambale Land Disputes Tribunal.

3. That the Defendant without the Plaintiff's consent and without following the laid down succession procedures colluded with LAWRENCE WANZALA and caused subdivisions of the original parcel of land into two portions **LR No. BUKHAYO/MATAYOS/3450** (measuring approximately 3.0Ha) registered in the Defendant's name and **LR No. BUKHAYO/MATAYOS/3449** (measuring approximately 5.6Ha) registered in the names of **Blasio Wanzala Bruno** and **Lawrence Wanjala** (both deceased).

4. The Plaintiff further pleaded that the entire process was made out of malice and fraud with the sole intention of frustrating the Plaintiff and denying him the inheritance in his father's estate. The particulars of fraud alleged on the Defendant's part were listed as:

*a) Not following the procedure and proper laid down processes of the succession before subdivision of the suit parcel;*

*b) Not involving all the relevant beneficiaries at the stage of subdivision of the suit parcel;*

*c) Not following the due and diligent laid down procedures of the transfer processes and failing to obtain consent of the close family members and the consent of the Land Control Board at the time of the subdivision of the suit parcel;*

*d) Failing to produce evidence of land sale agreement and proper documentation to ascertain the authenticity of the exchange of the suit parcel herein between the Defendant and the alleged deceased transferor; and*

*e) Failing to disclose the nature which the Defendant acquired parcel number LR No. BUKHAYO/MATAYOS/3450 hereof whether by sale, gift or lease.*

5. The Defendant filed his statement of defence on the 25<sup>th</sup> of September, 2020 stating that Lawrence Wanjala (deceased) partitioned and sold to him a portion of the suit land causing the creation of Bukhayo/Matayos/3449 and Bukhayo/Matayos/3450 with parcel no. 3450 being registered in his name. That he did not grab the land as alleged and denied all the allegations of fraud levelled against him. The defendant stated that the parcel No. 3450 was transferred to him while Lawrence was still alive.

6. During the hearing, the Plaintiff relied on his sole testimony. He stated that the Defendant is his last-born brother and their father died in 1974 when the Defendant was 3 years old. That in 2007 the Defendant returned home and colluded with their uncle and the uncle proceeded to subdivide the land by planting boundary marks on the ground. He testified further that he proceeded to register a caution on the land parcel number 439 until Lawrence deregisters himself from their parcel number 430. That in a case SRMCC No. 189 of 1993, Lawrence was ordered to remove his name from the land but he declined to do so. That a similar order was made by the Land Disputes Tribunal.

7. **PW1** continued in evidence that the Defendant subdivided the land without his consent and even ploughed and planted on the land and when the matter was reported to the Chief, the Defendant stated that he had papers despite the fact that succession was yet to be done. He concluded by producing his documents as exhibits and urged this Court to grant the orders in the Plaintiff.

8. Upon cross-examination by the learned counsel for the Defendant, **PW1** stated that the Defendant's statements recorded in Busia Criminal Case No. E271 of 2021 when he complained against the Defendant over land dispute in Bukhayo/Matayos/430 belonging to their father. That the green card indicates that Blasio and Lawrence were holding ½ a share each. **PW1** stated that he is not aware why the Defendant was registered as the owner of the land and neither is he aware that Lawrence gave the Defendant his share of the land. He continued to state that the Lawrence never informed them that he had transferred his share to the Defendant. He concluded by stating that the Tribunal case ended in the year 2000 and that the judgement in case No. 186 of 1993 was to remove the caution in parcel No. 439.

9. The Defendant, also relied on his sole witness and adopted his statement dated 22<sup>nd</sup> of September, 2020 as his evidence in chief and produced the documents in his list of documents and defence exhibits. In his statement, **DW1** stated that he is the sole registered owner of land Bukhayo/Matayos/3450 transferred to him by Lawrence Wanzala during the lifetime of the said Lawrence. The Defendant contends that L.R. 3450 comprised Lawrence share in L.R. 430. It is his defence that the plaintiff has no cause of action against him.

10. **DW1** was put on cross-examination by the Plaintiff, where he stated that he was Blasio's child and that LR No/ 430 belonged to the late Blasio and Lawrence. That he is not aware that the Plaintiff sued Lawrence to have the latter's name removed from the suit parcel and that if the land reverts to 430 it will still be in the two names. He further explained that Lawrence gave him his share in the land because he was taking care of it and he (defendant) still has a share in 3449. He concluded that he was not aware one must do succession in respect of a deceased registered owner and he was not present when Lawrence did the processes of transferring the title 3450 to his name.

11. Parties were directed to file submission within two weeks each but only the Defendant filed his submissions on the 13<sup>th</sup> of July, 2020. He submitted that the Plaintiff did not include a 2<sup>nd</sup> Defendant in his claim who was an important party as the Defendant did not participate in the subdivision. He submitted that since Blasio and Lawrence were joint tenants, Lawrence was within his rights to subdivide the parcel of land. He concluded by stating that the Plaintiff had no right to bring the present suit in his own capacity unless he brought it as the personal representative of the estate of Blasio Wanjala and as such the suit should be dismissed.

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

*a) Whether the Plaintiff has the capacity to bring this suit on behalf of his late father, BLASIO WANZALA;*

*b) Whether the Defendant acquired a part of the Suit land fraudulently;*

*c) Whether the Defendant's title to the Suit Land should be cancelled and the same reverted to the deceased's estate; and*

*d) Who bears the costs of this suit"*

13. With regards to the **first issue**, the Defendant has alluded to the fact the Plaintiff lacks capacity to represent the estate of Blasio Wanzala in this case. The Court in **Daykio Plantations vs. National Bank of Kenya Limited & 2 Others (2019) eKLR** held that:

**"It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to."**

14. Locus is extremely important and before this court canvasses the issues at hand, I have to establish that the Plaintiff has proper standing to bring the present suit. That being said, both PW1 and DW1 have confirmed that they are the children of the BLASIO WANZALA (deceased). The suit land was in the name of the deceased as co-owners with one LAWRENCE WANJALA (also deceased). In his bundle of documents, the Plaintiff produced a Limited Grant Ad Litem from CMCC Cause No. 12 of 2020 as PEx9 giving him the authority to sue on behalf of the estate of BLASIO WANZALA. This is sufficient proof that he has locus standi to institute proceedings on behalf of the estate of BLASIO WANZALA (deceased).

15. With regards to the second issue on whether the Defendant acquired the subdivided parcel of land fraudulently, it is trite law that an allegation of fraud has to be substantially proved beyond a balance of probabilities. The onus of proof is on the Plaintiff to present to this Court evidence that will aid him in proving the allegation of fraud. The Black's Law Dictionary, 10<sup>th</sup> edition defines fraud as:

**"As knowing misrepresentation or know concealment of a material fact made to induce another to act to his/her detriment."**

16. The Court of Appeal inferred in the case of **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR**, that fraud is a question of evidence. All the necessary documentations have to be provided to substantiate the allegation of fraud. Fraud is an allegation that has to be proved as held in the **Paul Muira & Another vs. Jane Kendi Ikinyua & 2 others (2014) eKLR** where the court cited with approval the Court of Appeal case of **Musonga vs. Nyati (1984) KLR 425** and in **Koinange and 13 Others (1986) eKLR 23** where it was observed:

**"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."**

17. PW1 testified that the Defendant together with Lawrence Wanzala effected a transfer on the suit parcel before succession had been done. DW1 stated that he was not aware that succession had to be done before the property was transferred to him. The Plaintiff in support of his claim provided a certificate of death in respect of their father which confirmed that the late Blasio died in 1974. The date of death is not disputed by the defendant nor is it disputed that parcel no Bukhayo/Matayos/430 was jointly registered in the names of Blasio-deceased and Lawrence-deceased. The plaintiff went further to produce court proceedings where he challenged the registration of Lawrence as a co-owner of parcel no 430. Although the defendant stated that he was unaware of these proceedings, but Lawrence who according to the defendant undertook the subdivision process was aware of the existing court orders.

18. The plaintiff pleaded that the defendant colluded with the late Lawrence to subdivide the land parcel 430 before undertaking succession proceedings of the estate of the late Blasio Wanzala. In my opinion and I so hold, the plaintiff discharged the burden of proving fraud by availing certificate of death that showed the co-owner was deceased at the time the subdivision was undertaken in the year 2008. In any event, if the surviving co-owner did the subdivision rightly as submitted and per section 94(2) of the Land Registration Act, the resulting titles would bear both names. This has been shown by a copy of the search for L.R. no 3449 (Pex1). How then did the ownership change in respect of title for 3450 from the names of the joint owners to the defendant (Pex2)" The defendant produced a copy of the register for Bukhayo/Matayos/430 showing the title was closed on subdivision on 6<sup>th</sup> June 2008 but the register doesn't indicate who did the subdivision. Since the defendant is a beneficiary of one of the resulting titles, he could only exonerate himself from the fraud by presenting transfer documents from Lawrence to his name.

19. The defendant instead stated that everything was done by Lawrence since he was working in Nairobi. He is waving the title deed shouting the land is mine without laying a basis for how he acquired it yet the case has been brought to challenge that title. The law has changed to require a party to do much more than just dangling the title as provided in section 26 of the Land Registration Act thus;

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

**(a) on the ground of fraud or misrepresentation to which the person is proved to be partly; or**

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

**2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.**

20. Having found above that there is no evidence supporting how the defendant’s averment that he procedurally and legally acquired his title, my answer to the third question posed is positive that his title no 3450 should be cancelled and the land reverts to the original number Bukhayo/Matayos/430 in the joint names of Blasio Wanzala-deceased and Lawrence Wanzala-deceased.

21. Given the above analysis and observations, I am satisfied that the Plaintiff has proved his case on the balance of probabilities and the prayers sought are granted that;

**a) An order be and is hereby issued for the cancellation of the Defendant’s name and registration on land parcel number BUKHAYO/MATAYOS/3450 and the register be rectified reverting the land to the original title LR No. BUKHAYO/MATAYOS/430 for the appropriate action of the succession and equitable distribution.**

**b) Costs of the suit to the plaintiff**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.**

**A. OMOLLO**

**JUDGE**



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