



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL SUIT NO. 74 OF 2007.**

**GRACE N. KUTIMA.....PLAINTIFF**

**VERSUS.**

**GEOFFREY WAFULA MUMWANI.....DEFENDANT**

**JUDGMENT.**

[1]. Grace N. Kutima suing as the administrator of the estate of John Kutima Mukenya filed this suit against the defendants. Vide her amended plaint dated 29<sup>th</sup> September 2015 claims that her husband John Kutima Mukenya was the absolute registered proprietor of land parcel Ndivisi/Ndivisi/2117. That on or about the 14<sup>th</sup> day of September 2005 the 1<sup>st</sup> defendant fraudulently and corruptly caused land parcel Ndivisi/Ndivisi/2117 to be registered in his names when John Kutima was already dead. She set out particulars of fraud arising out of that alleged fraudulent registration. Which included registering the same without land Control Consent not obtaining land control consent, and presenting forged transfer documents and using corrupt means to obtain land control consent among others.

[2]. The plaintiff alleges that she has used the suit land as her matrimonial home and that she has the right to occupy the same. She alleged that the 1<sup>st</sup> defendant in cahoots with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants without notice to the plaintiff and/or due process did remove a caution on the suit property which removal was unlawful, unprocedural and amounted to a violation of the plaintiffs rights to her matrimonial home and was geared to granting the 1<sup>st</sup> defendant title unlawfully. She prayed for a declaration that the registration of the 1<sup>st</sup> defendant as absolute proprietor of land parcel number Ndivisi/Ndivisi/2117 is null and void and for a cancellation of the same and that the same do revert to the names of the plaintiff as the personal representative of John Kutima Mukenya.

[3]. The plaintiff gave evidence in court and said that she has lived on the land since 1965 when she got married and that she lives there with the family. She alleged that this land was previously clan land. She stated that she lodged a caution on the land that on 2/9/2005. The caution was removed without her being consulted. She alleged that she did not give the land registrar power to do so. She averred that Geoffrey Wafula Mubwani was registered as an owner on 14/9/2005 and that this was after her husband died. She denied knowing one Margret Arisa and that she was not her co-wife. On the agreement for sale produced, she contended that those signatures on the agreements do not resemble her husbands signatures. She said that her husband did not tell her that he had sold the land and that was strange since she was the only wife. She admitted that there was a time the 1<sup>st</sup> respondent had destroyed her house, toilet and her bananas and that he was charged in the Webuye Criminal Case 1865 of 2009.

[4]. The 1<sup>st</sup> defendant filed an amended defence on 14/10/2015. She stated that the proprietary interests of John Mukenya Kutima was transferred to the 1<sup>st</sup> defendant by way of sale and hence at the time of filing this suit neither the deceased nor the plaintiff herein had any ascertainable interests known into law in respect of the said parcel of land. The first defendant denied having fraudulently and/or corruptly causing the suit land to be registered in his name as alleged.

[5]. The first defendant alleged that there was a sale agreement entered on 9/8/2005 with John Kutima Mukenya for valuable consideration of parcel Ndivisi/Ndivisi/2117 to the first defendant. He produced the minutes of the Webuye land control board of 18<sup>th</sup> September 2005 and the consent of the same date and a transfer dated 9<sup>th</sup> September 2005 signed before Dan Omukunda an Advocate and Officer of this Court. The first defendant avers that the aforesaid signature were obtained when the said John Mukenya Kutima was in good health and that he executed all necessary documents and consents to rest the title in the names of the 1<sup>st</sup> defendant. The first defendant states that the suit was not brought in good faith and that this suit should be dismissed.

[6]. Margaret Anyisa gave evidence for the first defendant. She relied and adopted her statement filed in this case on 4/6/2013. She stated that she was the 2<sup>nd</sup> widow of John Kutima Mukenya (deceased). She stated that before her husband died, he entered into a land sale agreement for the sale of land parcel Ndivisi/Ndivisi/2117 with Geoffrey Wafula Mubwani on 1<sup>st</sup> July 2005. That she was present and she witnessed the seller and vendor execute the agreement. She stated that she was also aware that the consent of the land Control Board was obtained for that sale and the subsequent transfer were executed and that the said Geoffrey Wafula Mumbwani was Subsequently issued with the title of the suit land. She averred that the plaintiffs suit is brought in bad faith and should be dismissed.

She added in court that the land sold was initially 1.2 acres for Kshs.80,000/= and that the second agreement of 9/8/2005 the piece sold was of four (4) acres and it was sold for Kshs.320,000/= and that she witnessed the agreement. She said that she has five children with the deceased John Kutima Mukenya four daughters and one son. She gave evidence that she did not get along with her co-wife Grace. That they kept on fighting and Grace was beating up her children. That her deceased husband called the clansmen who decided that the suit land be sold and when the land was sold her late husband bought for her two acres at Matete in Kakamega County. She said that everyone knows her husband had two wives and the chief wrote a letter to that effect. She said that she knew her husband had another piece of land Ndivisi/Ndivisi/2121.

[7]. The issue for determination is whether the plaintiff is entitled to the orders sought in her plaint.

[8]. Was the sale of the suit land fraudulent?

In *Patel Vs. Lalji Makanji (1958) EA 314* it was stated that allegation of fraud must be strictly proved. Something more than a mere balance of probabilities.

The plaintiff in this case makes just mere allegations on the agreement of sale, land control consent and the transfer. My perusal of the sale agreement shows the agreement of sale was drawn by Omukunda & Co. Advocates of Webuye. The same was witnessed by Dan Omukunda advocate. Mr. Omukunda frequently appears before me. It cannot be said that it would have been difficult to obtain his presence to throw some light on the agreement herein. He also witnessed the transfer documents. The defendants annexed to their documents the minutes of the Webuye Land Control Board of its meeting held on 8<sup>th</sup> September 2005 at the District Officers Office. The transaction relating to Ndivisi/Ndivisi/2117 L.C.R. 542/05. The minutes show members presenting all locations that are served by that Land Control Board. The consent of 8/9/2005 is annexed. These are the documents the land registrar used to register the land into the name of the defendant. There is no evidence that a report was even made to the police that either of these documents was forged or is fake.

[9]. One of the witnesses that gave evidence for the 1<sup>st</sup> defendant states that she was herself a co-wife of the plaintiff. That she has five children with the plaintiff's husband. That the wives were quarrelling, children were being beaten and their husband called the clan elders who decided that the suit land be sold and land be purchased elsewhere for the second wife while the first wife moves to the other land of the plaintiff. Consequently the land was sold for Kshs.400,000/= and another land of two (2) acres was purchased at Kakamega where the 2<sup>nd</sup> wife moved into while the plaintiff refused to vacate from the suit land. There was no challenge to the assertion that Margaret Anyisa is a co-wife to the plaintiff. Her statement to that effect was filed in Court on 4/1/2013 and it was not been challenged.

[10]. The suit land was equally the matrimonial home of Margaret Anyisa the 2<sup>nd</sup> wife of John Mukenya. The plaintiff claims that the said suit land was ancestral land. Consequently, neither her nor her co-wife Beatrice Anyisa contributed to the acquiring of the land. At any rate, no contribution of the said land was proved to court by the plaintiff. The claim that the plaintiff is therefore entitled to the same as her matrimonial home is without merit.

[11]. The plaintiff raised an issue of the caution she had imposed on the suit land and that it was removed without any notice to her. The question that begs an answer is, she alleged that she was an only wife of the deceased. Why was she putting a caution on her husband's land during his lifetime? What were those interests that she was protecting? Could it be that she had wind that her husband and co-wife were selling the same through advice of the clan?

[12]. Under the now repealed Registered land Act, the land Registrar was empowered to remove a caution upon giving 30 days notice to the cautioner. If the same was wrongly removed there was recourse to the Chief Land Registrar or to the court. No documents challenging the alleged illegal removal of caution were produced in court.

[13]. Having heard all the evidence and having perused all the documents and authorities produced, I have come to a conclusion that the Plaintiff has not proved her claims. This suit must fail and it is dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

Judgment read in open Court in the presence of Counsels.

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Joy: Court Assistant

Mr. Murunga: For the defendant

Mr. Amani for M/s. Mumalasi for the Petitioner