



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL SUIT NO.60 OF 2014**

***(formerly HCC No.32 of 2009)***

**EDWARD SYATA OKELLO.....PLAINTIFF**

**VERSUS**

**VIVIAN WEST SYATA MAJALE.....1<sup>ST</sup> DEFENDANT**

**JOHN KARANJA GATHUU.....2<sup>ND</sup> DEFENDANT**

**ANNETTE PAMBA.....3<sup>RD</sup> DEFENDANT**

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

1. By a plaint initially dated 15/12/2009 and filed on the same date the plaintiff - **EDWARD SYATA OKELO** - complained that the 1<sup>st</sup> defendant – **VIVIAN WEST SYATA MAJALA** – had illegally and/or fraudulently transferred Land parcel No.**SOUTH TESO/ANGOROMO/852** to himself and thereafter subdivided it. The 1<sup>st</sup> defendant is then said to have transferred portions of the land to 2<sup>nd</sup> and 3<sup>rd</sup> defendants – **JOHN KARANJA GATHUU** and **ANNETE PAMBA**. The plaintiff pleaded he was the first registered owner of the land.

2. The plaint was amended later and re-filed on 7/5/2014. It was pleaded that the plaintiff became the registered owner of land parcel **No. SOUTH TESO/ANGOROMO/852** (“suit land” hereafter) on 7/11/1973. He then learnt on 27/11/2009 that some unknown people were working on his land. He decided to conduct a search at the Land’s office and discovered that the 1<sup>st</sup> defendant had transferred the land to himself and subsequently subdivided it into some 11 (eleven) parcels, two of which were transferred to 2<sup>nd</sup> defendant while the third one went to 3<sup>rd</sup> defendant.

3. The plaintiff saw fraud in the whole scheme. The fraud was largely attributed to 1<sup>st</sup> defendant who was, among other things, accused of forging transfer documents, pretending that the plaintiff had transferred the suit land to him, subdividing the land secretly without the defendant’s knowledge, and forging applications to Land Control Board.

4. According to the plaintiff, the transfer of the suit land to the plaintiff was void *abinitio* and the subsequent subdivisions and transfers were illegal and/or criminal, thus incapable of passing on title.

5. The plaintiff wants the Court to make findings that the transfer of the suit land to 1<sup>st</sup> defendant was illegal; that the 1<sup>st</sup> defendant lacked capacity and/or authority to transact with Land Control Board; that the suit land is still extant and intact in law; and that any and all transactions not done or authorized by the plaintiff could not confer title.

6. The plaintiff prayed that entries made in the land register on 30/11/1992 be cancelled or revoked. He desires that entries relating to registration of land parcels No.s.SOUTH TESO/ANGOROMO/7540 to **SOUTH TESO/ANGOROMO/7550** be cancelled and/or revoked. Also prayed for are costs of the suit.

7. The pleadings also referred to a pending case – PMCC No 586 of 2009 – which the plaintiff intended to consolidate with this one. The consolidation however never took place.

8. The defendant filed their defence on various dates. The 1<sup>st</sup> defendant’s amended defence was filed on 17/7/2014 while that of the 2<sup>nd</sup> defendant had come earlier on 12/5/2014. The 3<sup>rd</sup> defendant seemed to be contended with his defence filed on 27/5/2013. It is a defence that came before the filing of the amended plaint. In the 1<sup>st</sup> defendant’s defence, everything alleged by the plaintiff, including the particulars of fraud was denied. The 2<sup>nd</sup> defendant equally denied the plaintiff’s claim and averred that the claim is statute – barred. The 3<sup>rd</sup> defendant also

denied the claim and stated, *inter alia*, that she bought her own portion of land (parcel No.7550) for value without prior notice of fraud or illegality.

9. Hearing started on 5/2/2015 with taking of evidence of PW1, the County Land Registrar, Busia. This witness gave some history relating to transactions surrounding the suit land. According to him, the plaintiff had earlier offered the suit land as security for a loan he had borrowed from Industrial & Commercial Development Corporation (I.C.D.C.). There was also a time a prohibitory order had been placed on the title in relation to a court case in Nairobi. That order was removed on 30/11/1992 and on the same day the suit land was transferred to the 1<sup>st</sup> defendant. Then on 2/10/2009, the suit land was subdivided into 10 (ten) portions and from that point onwards, it ceased to exist as parcel No.852. And of the resultant parcels, two – Nos 7547 and 7549 – were transferred to 2<sup>nd</sup> defendant while one – No 7550 – was transferred to 3<sup>rd</sup> defendant.

10. The plaintiff himself testified as PW2. He said the suit land is his own, having become the registered owner way back in 1973. He confirmed he had used it as security for a loan. He was called by a neighbour, he said, sometimes in the year 2009 and was informed that some people were on the suit land. He then decided to conduct a search at the Lands office and discovered that the 1<sup>st</sup> defendant, who is his nephew, had transferred the suit land to himself. He also learnt that the land had been sub divided into several portions, some of which had been transferred to the other two defendants. All this, he said, happened without his authority.

11. Court records show that Counsel for 1<sup>st</sup> defendant, M/s Maloba, didn't show up during hearing despite an intimation earlier in the day that she would be present during hearing. The matter proceeded for hearing without her and the only cross-examination done was conducted by Omondi for 2<sup>nd</sup> defendant and Wanyama for 3<sup>rd</sup> defendant.

12. During cross-examination by Omondi for 2<sup>nd</sup> defendant, the plaintiff was heard to say that he only blamed the 2<sup>nd</sup> defendant for buying land from 1<sup>st</sup> defendant. And during cross-examination by Wanyama for 3<sup>rd</sup> defendant, the plaintiff said he couldn't tell whether 3<sup>rd</sup> defendant participated in the subdivision of the suit land by 1<sup>st</sup> defendant. He further said he could not tell how 3<sup>rd</sup> defendant acquired the portion transferred to her.

13. While the plaintiff's case was heard before my predecessor, Kibunja J, the defence case was conducted by myself after my predecessor changed station. The 1<sup>st</sup> defendant testified as DW1 on 19/9/2017. According to 1<sup>st</sup> defendant, he and the plaintiff swapped their lands. The plaintiff, as owner of parcel No.852, agreed to leave the suit land to defendant in exchange for ownership of 28 acres in Land parcel No.SAMIA/BUDONGO/1288. The plaintiff is said to have transferred the suit land to 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant then sold some portions to the other defendants. Both Counsel for 2<sup>nd</sup> and 3<sup>rd</sup> defendant questioned the 1<sup>st</sup> defendant as to the legitimacy and legality of the transactions of sale of land to the two defendants. The sale was legal, 1<sup>st</sup> defendant said, and the transactions were above board. And during cross-examination by Jumba for plaintiff, the 1<sup>st</sup> defendant said they agreed as relatives to exchange land and even when it came to the time of going to Land Control Board, it is the plaintiff, not himself, who went to the board.

14. The 2<sup>nd</sup> defendant testified as DW2. His evidence was brief. He bought the land, he testified, from 1<sup>st</sup> defendant and was not aware of any dispute or problem between 1<sup>st</sup> defendant and the plaintiff. This same position emerges from the evidence of 3<sup>rd</sup> defendant, who testified as DW3. She didn't know the plaintiff, she said, before she bought the land. She said she acquired the land lawfully, not fraudulently.

15. Hearing over, written submissions followed. The plaintiff's submissions were filed on 12/10/2017. They were followed by 2<sup>nd</sup> defendant's submissions on 1/12/2017. The 3<sup>rd</sup> defendant's submissions came last, specifically on 16/1/2018. I don't see the 1<sup>st</sup> defendant's submissions.

16. The plaintiff submitted, *inter alia*, that he never gifted the land to the 1<sup>st</sup> defendant as alleged or at all. The transfer to the 1<sup>st</sup> defendant was said to be illegal as the plaintiff never signed the necessary transfer forms. The defendant submitted further that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants should have exercised due diligence before purchasing the land.

17. The 2<sup>nd</sup> defendant observed in his submissions that the 1<sup>st</sup> defendant has already given back 8 portions of the suit land to the plaintiff. The only portions that the plaintiff does not have now are those sold to himself and 3<sup>rd</sup> defendant. This being the position he continued, the plaintiff's prayers for cancellation of entries creating parcels Nos 7540 – 7550 became untenable as the plaintiff himself now owns a majority of these parcels. According to 2<sup>nd</sup> defendant, the plaintiff made the prayers he is seeking incapable of being granted the moment he accepted back the parcels transferred to him.

18. It was the 2<sup>nd</sup> defendant further submission that the only issue remaining relate to the portions sold to himself and the 3<sup>rd</sup> defendant. He said he was an innocent purchaser for value without notice. The land should therefore remain his and the plaintiff should have recourse to the 1<sup>st</sup> defendant for compensation.

19. The 3<sup>rd</sup> defendant submitted that allegations of fraud against her were not proved. The allegations were said to be speculative. Further, the 1<sup>st</sup> defendant is said to have absolved her. She also said she was an innocent purchase for value without any prior notice of illegality and her title therefore needs to be preserved.

20. I have considered the pleadings, evidence, and rival submissions. It is clear that at this stage, the dispute essentially relates to three parcels – Nos 7547, 7549 and 7550. These are the parcels sold by the 1<sup>st</sup> defendant to the other two defendants. For all the other parcels, the 1<sup>st</sup> defendant transferred them back to the plaintiff. This came out clearly during cross-examination to the plaintiff by 3<sup>rd</sup> defendant's counsel. The plaintiff is shown saying: **“Vivian indeed transferred the eight plots that were remaining in his names to me. The eight plots Vivian has transferred to me are parcels Nos 7540, 7541, 7542, 7543, 7544, 7545, 7546 and 7548. Only parcel Nos 7547, 7549**

**and 7550 have not been transferred to me”.**

21. The 1<sup>st</sup> defendant alleged that the plaintiff himself transferred the land to him. According to him, the land became his own after exchanging it with the plaintiff for another land elsewhere. Transfer is a process and there is paper trail associated with it. One would have expected that the 1<sup>st</sup> defendant would show copies of such papers indicating clearly the plaintiff's signatures and details of his identity. No such thing was availed. Such papers and/or details would have vouched for plaintiff's participation in the process. When the plaintiff therefore says that he didn't transfer the land to the plaintiff, he sounds credible.

22. Further to this, it seems rather curious that when the plaintiff, complained that the 1<sup>st</sup> defendant had taken his land, the 1<sup>st</sup> defendant was quick to transfer all the portions he had not sold back to him. One would then ask: If the 1<sup>st</sup> defendant had really exchanged land with the plaintiff, why would he be so quick to transfer the land back to the plaintiff while the plaintiff himself is not showing reciprocal action to transfer back the land allegedly exchanged to 1<sup>st</sup> defendant? And is there any written agreement relating to such exchange? None was availed.

23. To me, failure by the 1<sup>st</sup> defendant to prove participation of the plaintiff in the transfer of the suit land to him and the subsequent quick transfer of the unsold portions of the suit land to the plaintiff when he complained are a confirmation that the 1<sup>st</sup> defendant's ownership of the suit land was not lawful. It was tainted with illegality. That would mean then that the 1<sup>st</sup> defendant never acquired a good title to the land. Infact if he did, I think he would have held on to the portions he transferred to the very end.

24. For the period that the 1<sup>st</sup> defendant held paper title to the suit land, he managed to sub-divide it. He then sold a total of three (3) portions to the defendant. The defendants say they are innocent purchasers for value without notice of defect of title. There is such defence in law. And it seems premised on the position that our title system largely embodies three principles, namely, the mirror principle of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with land, or search behind the title depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as a result of any inaccuracy.

25. But this seems to be somewhat tempered with both by the constitution – Article 40 (6) – and Land Registration Act – Section 26 (1) (b) – which is a statute meant to give effect to some constitutional provisions relating to land in the constitution. Article 40 in the constitution of Kenya, 2010, protects the right to own property in Kenya but qualifies that right in sub-article 6 by providing that such protection does not extend to property that is unlawfully acquired.

26. In almost a similar manner, Section 26 of Land Registration Act, 2012, also offers protection but qualifies that protection in two subsections viz: - Section 26 (1) (a) which removes protection where the title acquisition by the person acquiring it is found to be tainted by fraud or misrepresentation to which such person is a party; and – Section 26 (1) (b) which removes protection where the title is acquired illegally, unprocedurally, or through a corrupt scheme.

27. It appears to me, particularly under Section 26 (1) (b) of Land Registration Act, 2012 that a person who illegally acquires a title lacks legal competence or capacity to pass on a good title to someone else. In my view, this subsection erodes or detracts from the principle of innocent purchaser for value without notice of illegality or defect of title. In other words, it dilutes the principle.

28. When the 1<sup>st</sup> defendant sold portions of land to 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he did not, as we have seen, have a good title. His title had been illegally acquired. He therefore had no good title to pass on to anybody. This being the position then, I think the 2<sup>nd</sup> and 3<sup>rd</sup> defendants can not avail themselves of the defence of innocent purchase. The provisions of law just mentioned came much later than the principle of innocent purchaser. They must therefore be deemed to be modifying or amending it. I am therefore unable to agree with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in their defences, evidence and submissions.

29. The Plaintiff is entitled to the suit land exactly the way he initially owned it. One defendant submitted that the plaintiff can have recourse to the 1<sup>st</sup> defendant for compensation. I don't see it that way. It is the two defendants, not the plaintiff, who transacted with the 1<sup>st</sup> defendant. In my view, it is them, not the plaintiff who should have recourse to the 1<sup>st</sup> defendant for any compensation. Having taken this position, I need to point out that I agree with the plaintiff concerning his pleading at paragraph 11 (a) (b) (c) and (d) in the amended plaint dated 3/4/2014.

30. Bearing in mind that some parcels of land have been transferred back to the plaintiff, and in the interests of justice, I think it is necessary to modify the prayers sought to be granted. In this regard, let there be cancellation or revocation of entries made in the land register concerning land parcels Nos 7547, 7549 and 7550 and this should be followed by making of all the necessary entries to vest ownership of these parcels of land in the plaintiff. As regards costs, I order, again in the interests of justice, that the plaintiff is entitled to recover all his costs from 1<sup>st</sup> defendant, not from 2<sup>nd</sup> and 3<sup>rd</sup> defendants. And for 2<sup>nd</sup> and 3<sup>rd</sup> defendants, they are not entitled to recover their costs from the plaintiff but from 1<sup>st</sup> defendant.

**A.K. KANIARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 19<sup>TH</sup> DAY OF APRIL, 2018**

**IN THE PRESENCE OF:**

**PLAINTIFF.....**

**DEFENDANTS.....**

**COUNSELS .....**