



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NO. 2 OF 2014**

**JACKTONE ATIENO INGOTSE.....PLAINTIFF**

**VERSUS**

**JEI.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit on 9<sup>th</sup> January, 2014 impleading the Defendant that he is the owner of land parcel No. N. TESO/KAMURIAI/xxx which the Defendant has registered in his name. The Plaintiff pleaded that the suit land was duly transferred to him on 20<sup>th</sup> January 1977 which land the Defendant registered in his name after the demise of his father. The Plaintiff prays for judgment in the following terms;

***a. An order to revoke the title deed/current status of the Defendant as the registered owner of L.P No. N. Teso/Kamuria/xxx.***

***b. Costs of these proceedings***

***c. Any other relief this Hon. Court deems just and fit to grant.***

2. On receipt of Summons to enter appearance, the Defendant filed his statement of defence on 29<sup>th</sup> May, 2014 denying the claim. The Defendant pleaded that no consent of the Land Control Board was never applied for or obtained on 20.7.1977 and the purported consent obtained bore fundamental alterations without the consent of the maker of that document. The Defendant denied he was in breach of any agreement. He added that he had been allocated the suit land and chose lawful steps of taking out letters of administration to register the property in his name. He urged the court to dismiss the suit with costs.

3. After pleadings closed, parties presented their viva voce evidence. The Plaintiff called three witnesses with his testimony as PW1 on 30<sup>th</sup> November, 2016. PW1 testified that he bought the suit property from the Defendant's father Francis Etyang Enagei – deceased on 2<sup>nd</sup> June, 1977 which sale was reduced into writing and he produced a copy of the agreement as Pex. 1. The Plaintiff stated that the agreement was drawn in the house of Gabriel who was then the area Liguru and witnessed by Isaiah Miheso and Alex Ekakolo. PW1 continued that they applied for and obtained consent to transfer on 20.7.1977 (Pex 2 & 4). That he presented the documents of transfer for registration but the person in charge of receiving payments was away. He visited the lands office 5 times at which point his father died and he also became sick thus he did not get a title deed registered in his name.

4. The Plaintiff stated further that the Defendant was a small child of approximately 2 years when he bought this land. That he (Plaintiff) started using the sold land as Francis Etyang relocated to a different land he purchased from the proceeds of their transaction. In cross examination PW1 said he did not see the difference in handwriting in the letter of consent and denied that it was a forgery. That he only had one transfer form dated 20.7.1977. He also denied filing a citation cause no. 184 of 2009 against the Defendant. The Plaintiff denied taking the Defendant's land falsely.

5. Consolata Barasa gave her evidence as PW2. She introduced herself as the wife to Gabriel Isilo. Her testimony was to the effect that she saw the sale agreement between the Plaintiff and the Defendant's father being drawn. She also confirmed the presence of Isaiah and Alex during that meeting. In cross examination, PW1 confirmed she saw kshs. 3000 being paid. She also confirms that the Plaintiff utilizes the suit land since 1977. That the Plaintiff has a house on the suit land.

6. Isaac Muruka Emojong who is the area chief for where the land is situated testified as PW3. He confirmed that PW2 was the wife to Gabriel Isilo. During cross-examination, the witness said Gabriel's home now falls under Osasame sub-location which was curved from Kamuriai Sub-location. This marked the close of the Plaintiff's case.

7. The Defendant gave his testimony as DW1 on 7<sup>th</sup> April, 2021. He adopted his written witness statement filed in court as his evidence in chief. He stated that he is the legal representative and beneficiary of his father's estate. DW1 continued that the suit land was family ancestral land registered in the name of his late father Francis Otieng as shown in the copy of register and title deed annexed as JE 4 & 5. DW1 avers that the Plaintiff failed to disclose particulars of the alleged breach and fraud DW1 had committed. That his title deed cannot be revoked since he obtained registration through transfer by transmission and that the suit as drawn is defective since the revocation of his registration will still leave the land registered in his father's name.

8. The Defendant contends it is the Plaintiff who is in breach of the sale agreement since no evidence was shown that he paid the balance of the price thus he is not entitled to equitable orders. DW1 also states that the attempt to enforce the 1977 agreement in 2014 is barred by the Statute of Limitation. The Defendant contend that no meeting of the Land Control Board scheduled for 20.7.1977 took place and the letter of consent produced was never signed by Kimau Kanu who was the then District Officer in charge of signing letters of consent (annex JE 11,12,& 13).

9. The Defendant wonders why after obtaining a transfer and Land Control Board letter of consent, the Plaintiff never registered himself as the owner of the land yet the proprietor died in 1995 – 18 years after the sale. He argues further that the current suit was filed out of time without leave of the court. He urged the court to dismiss the case.

10. During cross-examination, DW1 said he learnt through this case that someone tried to sell the suit land. That in 1977 he was two (2) years old thus could not be involved in land matter nor be informed of the Land Control Board transaction. That his Dex shows the transfer of land form was executed on 8.7.1977. He knew Gabriel Isilo whose name appears on Dex 7 as a Liguru. He refused to believe that PW2 was present during the preparation of the sale agreement as it's only the Plaintiff's signature appearing on the sale agreement. His father died when he was 22 years old and was buried on L.R. No. 555. In re- examination, DW1 maintained that both his father and Gabriel did not sign the sale agreement. That his father never used to sign as recorded in the application for Land Control Board consent.

11. Cornel Imagai Okunam adopted his written statement as DW2. He was a brother to Francis Otieng who owned LR N. Teso/Kamuria/555 which he bought and L.R. xxx. According to DW2, the suit land was not in use after the deceased moved out and it is only in the year 2008 when some strangers trespassed on it and started planting seasonal crops. That in 2009, another stranger entered the land and began constructing a temporary structure. DW2 denied that the Plaintiff resides on the suit land. That the house built in 2009 has never been occupied.

12. On cross examination DW2 said there was no agreement because he witnessed none. He confirmed that Gabriel was their liguru. That his brother bought land using cows paid in dowry. That the house built on the suit land was built at night. He knew the Plaintiff is called "Aliero" but he does not know if he owns the suit land.

13. Maximus Ikamar Baraza testified as DW3. He works in the office of the Assistant County Commissioner of Amagoro as a divisional clerk. That he had worked at the L.C.B department since 2009. He confirmed that the letter dated 26.11.2020 originated from their office and produced it as Dex 12 (b). In cross examination he asserted that they do not have records of any meeting of Land Control Board for 1977. Shown Dex 12 (a) which listed dates of when Land Control Board meeting were to be held for 1977, the witness denied knowledge of such a letter and infact disowned it. According to DW3, they had records dating from 1989 only. That by 1977 he was not in service so he could not verify anything. In re- examination. DW3 said he had no minutes of Land Control Board meeting held on 20.7.1977. This marked the close of the defence case.

#### ISSUES FOR DETERMINATION

***i. Whether the Plaintiff's suit is time barred.***

***ii. Whether the Plaintiff's suit is in competent as drawn.***

***iii. Whether or not the Plaintiff has proved a case to entitle him to the orders sought.***

14. The Defendant pleaded and submitted that the Plaintiff brought this suit after more than 18 years from the date of the alleged purchase. The Plaintiff in his pleadings, oral & documentary evidence and submissions have raised issues with the Defendant registering the suit property in his name. The Plaintiff said he had no issues with the Defendant's father who had put him in possession and executed all the requisite transfer documents. Therefore my understanding of the Plaintiff's claim is that the cause of action arose when the Defendant transferred the land to himself. The registration of the Defendant took place on 20<sup>th</sup> May, 2010 which is four years to the time this suit was filed. The ground of objection on the suit being statute barred is without merit.

15. The second issue raised by the defence was that the suit as drawn was incompetent. The reasons proffered includes the argument that if the court grants the orders as prayed, the Plaintiff will still need to return to court for an order to have the property registered in his name. This is more about the merit of the Plaintiff's suit. My determination on it will be included in part 3 of the issues.

16. The Plaintiff seeks orders against the Defendant for revocation of his title deed and or cancellation of the registration of the Defendant as the owner of N. TESO/KAMURIAI/xxx. The Plaintiff supported his case by producing a sale agreement dated 2.6.1977 to confirm that he had bought the land. His evidence was corroborated by the evidence of PW2 who stated that the agreement was prepared in her house in the presence of her husband who was then the area Liguru. The Plaintiff went further to produce an application for Land Control Board consent signed by the Defendant's father and a letter of consent issued to him by the Amagoro Land Control Board. The Plaintiff also had a duly executed transfer of land form. Although the Defendant took issues with the authenticity of these 3 documents, he did not give evidence that would make the court doubt them. For instance, DW3 who is the divisional clerk and working at the office of the Land Control Board said they started keeping records of Land Control Board meetings from 1989. He also said he was not in service in 1977 so he could not verify the authenticity or otherwise of any document issued in that year.

17. DW3's office had been served with summons to come and give evidence concerning the documents issued in 1977. Being the person standing in the shoes of the Assistant County Commissioner (previously called the District Officer) he should have dug information sufficient to authenticate or discredit the impugned documents. He did not and therefore there is no basis for this court to determine the documents of consent was a forgery. In regard to the sale agreement, the same was drawn when the Defendant admittedly was toddler. DW2 was absent in the transaction so both of them are questioning the document based on their opinions. On the face of the agreement, is written the name of the seller and on the application for Land Control Board and transfer the signature part of the seller is in the form of name writing. Probably he signed by writing his name and the Defendant did not provide an expert report to ascertain that the name was not written in the hand of his father. It is misleading for the Defendant to submit that there was no signature to be submitted for examination when there were writings. On the part requiring his father's signature.

18. Given the finding that the documents of purchase presented by the Plaintiff are genuine, does this evidence entitle him to the orders sought? The Plaintiff admits that his documents were never registered. He has given the explanation why they were never registered. The question which comes to my mind is whether or not the suit property still formed part of the estate at the time the Defendant took out letters of grant to administer it. I am alive to the fact that the letter of grant was already issued and while I am not sitting on appeal on a decision of a court of con-current jurisdiction, the law does not bar me from making a finding on what rights the grant bestowed on the Defendant based on the circumstances of this case. The green card produced in evidence showed that the Defendant acquired title by way of transmission (RL. 7 & RL 19 forms). He is thus standing in the shoes of his late father.

19. The Defendant's case is that the land was fallow (DW 2's evidence) until 2008 when some stranger came and planted seasonal crops and in 2009 another stranger came and put up a temporary building. PW1 and PW2 gave evidence that the Plaintiff has always used the suit land. The Plaintiff added that he did not sue the Defendant's father because he had completed his part of the transaction. Thus if the defendant stepped into the shoes of his father as the legal representative, then he must carry on the obligations imposed by the law upon his father. His registration as owner of the suit land can only be in trust for the benefit of the Plaintiff and not the absolute owner as he pleaded in his statement of defence and gave evidence in support thereof.

20. The Plaintiff relied in the case of Munyu Maina Vs. Hiram Gathima Maina (2013) eKLR where the Court of Appeal observed that;

***"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."***

21. I am in agreement with the Court of Appeal's observation which is also in line with the provisions of Section 26 of the Land Registration Act that a title of a registered owner can be challenged where the registration was obtained by way of misrepresentation or fraud to which the party is proved as a party to. The misrepresentation here is by virtue that the Defendant is claiming that his registration was as the beneficiary of the suit land yet the land had already been sold. There is no problem with the Defendant administering the estate of his father in respect of the suit property for purposes of facilitating the transfer of the land to the Plaintiff.

22. In the case of Wily Kimutai Kitilit Vs. Michael Kibet (2018) eKLR, the Court of Appeal considered the import of the provisions of Section 6 and 7 of the Land Control Act cap 302 (repealed) and the rights of a purchaser who had not complied with Section 6 (2) of cap 302. The Court of Appeal at paragraph 18 of their judgment thus;

*The doctrines of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. Sections 3(3) of the Law of Contract Act and Section 38 (2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in Yaxley v. Gotts [2000] Ch. 162 (Yaxley's case) on which the Court in Macharia Mwangi Maina Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.*

23. The Court of Appeal at paragraph 27 of the judgment held thus;

***[27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.***

***As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular, the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.***

24. I will not make an order for cancellation as prayed for by the Plaintiff on account of the fact that the Defendants registration is pursuant to the letters of administration issued to him which grant has not been revoked. However, I make a finding under prayer (c) of the plaint that his registration is in trust for the Plaintiff therefore the Defendant is not entitled to dispose of the land and or undertake any activity that would breach the Plaintiff's rights. Guided by the decision in the Wily Kitilit case *Supra*, this court finds that the Plaintiff has demonstrated

that a constructive trust accrued in his favour.

25. In short, I hold that the Plaintiff has proved his case on a balance of probabilities and enter judgement in his favor that

*a). That the Defendant is holding land title No. N. TESO/KAMURAI/xxx in trust for the Plaintiff.*

*b). Each party to meet their respective costs of the suit.*

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 27TH DAY OF JAN, 2022.**

**A. OMOLLO**

**JUDGE**