



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. CASE NO. 55 OF 2020**

**DR. KENNEDY NGUMBAU**

**(Suing on behalf of the Estate of PIYUSH MANUBHAI PATEL).....PLAINTIFF**

**VERSUS**

**PARESH KUMAR AMRUTLAL HARIYA.....1<sup>ST</sup> DEFENDANT**

**HARIA ASHOK KUMAR.....2<sup>ND</sup> DEFENDANT**

**HARIA MAYUR AMRITAL.....3<sup>RD</sup> DEFENDANT**

**ATUL KUMAR MOTICHAND SHAH.....4<sup>TH</sup> DEFENDANT**

**MUBARAK RAZIK SAID.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

Dr. Kennedy Ngumbau suing on behalf of Piyush Manubhai Patel hereinafter referred to as the plaintiff has come to the court by way of plaint claiming that he is the legal owner of all that piece of land known as Kisumu Municipality/Block 7/96 (hereinafter referred to as the "suit property"). He avers that he acquired proprietary rights over the suit property upon the demise of his uncle Chimanbhai Maganbhai Patel who died in 1978. The plaintiff states that on or about the year 1975, his uncle Chimanbhai Maganbhai Patel together with two brothers, Durga Dass Bouri and Ramesh Bouri, acquired a certificate of leasehold over the suit property for a period of 99 years from the year 1926, shred as follows:

<b>Durga Dass Bouri</b>	<b>¼ share</b>
<b>Ramesh Borui</b>	<b>¼ share</b>
<b>Chimanbhai Maganbhai Patel</b>	<b>½ share</b>

Later, Durga Dass Bouri and Ramesh Bouri left Kenya to go and live in India thus leaving Chimanbhai Maganbhai Patel as the sole proprietor over the suit property.

The plaintiff avers that in the year 1978, his uncle Chimanbhai Maganbhai Patel passed on, leaving the suit property to him as the next of kin. Upon acquiring the suit property, the Plaintiff began developing the same and afterward rented the property to a tenant who had been paying rent to the Plaintiff via Credit Bank Kisumu Account No. xxxxxxxxx.

The Plaintiff avers that in the year 2001, he left Kenya to live in the United States of America (USA) and appointed his cousin one Bhupendra S. Patel to take care of the suit property in his absence. The Plaintiff avers that in the year 2018, while still in the USA, he received a call from his friend one Vinod Pal informing him that there were buildings being erected on the suit property. Following the said call, the Plaintiff travelled back to Kenya on 18/8/2018 where he confronted the alleged owners of the buildings on the suit property, namely, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The Plaintiff states that upon confronting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, they claimed that they had legally acquired the suit property, having purchased the same from the 4<sup>th</sup> Defendant. Further, they had a sale agreement dated 23/08/2014 to back their claim together with a

certificate of lease dated 16/09/2014 indicating their names as the proprietors of the suit property.

The Plaintiff then approached the 4<sup>th</sup> Defendant who claimed to have acquired the suit property lawfully from the 5<sup>th</sup> Defendant. He also had a sale agreement dated 5<sup>th</sup> August 2013 together with a certificate of lease dated 23<sup>rd</sup> August 2013 indicating his name as the proprietor of the suit property.

For his part, the 5<sup>th</sup> Defendant claimed that he purchased the suit property from the three original proprietors, Chimanbhai Magnabhai Patel, Durga Das Bouri and Ramesh Bouri. A search at the registry in Kisumu indicates that the 5<sup>th</sup> Defendant acquired ownership of the suit property on 16<sup>th</sup> March 2003, during which the alleged sellers Chimanbhai Maganbhai Patel, the last registered proprietor of the suit property before it devolved to the Plaintiff, was long deceased.

The plaintiff therefore avers that the alleged transfer of the property from the three initial proprietors to the 5<sup>th</sup> Defendant was carried out fraudulently with the assistance of unidentified individuals working in the land registry at Kisumu.

The Plaintiff avers that the 4<sup>th</sup> Defendant, with the intention of defrauding the plaintiff of his proprietary rights over the suit property, knowingly undertook to purchase the suit property from the 5<sup>th</sup> Defendant knowing well the same had been acquired fraudulently.

Further, the plaintiff avers that the 4<sup>th</sup> Defendant, with the intention of defeating the plaintiff's claim over the suit property, conspired with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to transfer the suit property to themselves even though at the time, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were well aware that the same had been acquired by the 5<sup>th</sup> Defendant, and, subsequently, the 4<sup>th</sup> Defendant, unlawfully.

Despite numerous demands, the Defendants have refused, neglected and/or failed to vacate the suit property, render vacant possession and surrender an account of all rent collected from the said property since it came under their possession.

The Plaintiff prays for an **order permanently restraining the Defendants and/or agents/servants/employees from entering, trespassing, erecting building and/or in any way dealing with the land parcel Kisumu Municipality/Block 7/96. An order of eviction against the Defendants from the suit property. Costs of this suit.**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a statement of defence denying the plaintiff's allegations and averred that it is the children of the plaintiff's uncle that have immediate succession rights to the suit property and not the plaintiff. The Plaintiff lacks locus standi to bring the suit. No succession proceedings were undertaken by the plaintiff. The Defendants aver that they legally bought the property for Kshs. 22,500,000. The defendants aver that the death of one proprietor did not bar the other proprietors from selling the property. They claim to be innocent purchasers for value without notice of any wrong doing.

The 4<sup>th</sup> Defendant in defence states that the plaintiff lacks standing to bring the suit.

The 4<sup>th</sup> Defendant states that he lawfully sold the property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the proprietor. He further states that he acquired the suit property from the 5<sup>th</sup> Defendant at a purchase value of Kshs. 20,000,000.

The 5<sup>th</sup> Defendant was issued with a valid certificate of lease by the Land Registrar hence has a prima facie registered owner. The 4<sup>th</sup> Defendant was equally issued with a certificate of lease hence was proprietor of the suit land before he sold it to the 1<sup>st</sup> – 3<sup>rd</sup> Defendants. He prays that suit be dismissed.

When the matter came up for hearing ***DWI, Dr Kennedy Ngumbau*** relied on the witness statement filed on 13<sup>th</sup> June 2019 as his evidence in chief. He states that on 28/9/1975, Dayawanti Bouri, Ramesh Bouri (who were brothers) and, Chimanbhai Maganbhai Patel were registered as the proprietors of the suit property having purchased the same from Dajiben Khuslalbhai Patel. Later, Dayawanti Bouri and Ramesh Bouri left Kenya to go and live India thus leaving the suit property under the sole proprietorship of Chimanbhai Maganbhai Patel. All along, Chimanbhai had a nephew named Piyush Manubhai Patel. When Chimanbhai died in 1978, the suit property was develop the land until the year 2001, when he decided to relocate to the United States of America (USA). Piyush therefore left the suit property under the custody of his cousin, Bhupendra S. Patel. Meanwhile, Piyush had rented the suit property to a tenant who had been paying rent via Credit Bank Kisumu acc. No.xxxxxxxx.

In the year 2018, Piyush received a call from his friend Vinod Pal informing him that there were buildings erected upon his piece of Land belonging to one Paresh Kumar Hariyah. Followign the disturbing call, Piyush travelled back to Kenya on 18/8/2018 to establish the veracity of the information conveyed to him by his friend, Vinod. On arriving in Kenya, Piyush talked to Parsh, the alleged owner of the said buildings, who informed him that he had been bought the suit property on 16/09/2014 from one Atulkumar Motichard Shah. For his part, Atulkumar claimed that he bought the suit property form one Mubarak Razik Sayid, the then alleged registered proprietor.

Upon conducting his own investigations, Piyush came to learn of one Mubarak Razik Sayid who was claiming to have purchased the suit property form the three original owners; Daywanti Bouri, Ramesh Bouri and Chimanbhai Maganbhai Patel. The Green Card at the registry shown that Mubarak became the proprietor of the suit property on 16<sup>th</sup> March 2003. Further, there were rent clearance certificates at the registry indicating that Mubarak had been rates for the suit property. Interestingly, by the time the alleged transaction between Mubarak and the three original owners is said to have taken place (in 2003), Chimanbhai (the last known owner of the suit property before it devolved to Piyush) had long been dead. It was then that Piyush came to terms with the fact that some fraud must have occurred involving Mubarak and some individuals in the land registry at Kisumu.

In 2013, Mubarak, being the alleged registered proprietor sold the suit property to Atulkumar Motichad Shah for a value of Kenya Shillings

j(Kshs.) 20 million.

Subsequently, Atulkumar became the registered proprietor on 28/03/2013. Later on in the year 2014, in a sale agreement dated 23/8/2018, Atulkumar sold the suit property to Paresh Kuar Amrutlal Hariya, Hariya Ashok Kuamr and Haria Mayur Amrital for Kshs. 22.5 million. A search at the lands registry in Kisumu reveals that the three are now the registered proprietor of the suit property.

On cross examination by Mr Odongo, counsel for the 1<sup>st</sup> to 3<sup>rd</sup> defendant, the plaintiff stated that he did not have evidence that the property was given to Piyush Manumbhai Patel. Moreover, he stated that the documents obtained from the registrar of lands are thus the green card and certificates of lease were genuine documents. On cross examination by Mr Oloo counswel for the 4<sup>th</sup> defendant, the plaintiff states that he cannot confirm whether the persons named in the Power of Attorney are dead.

DW1, Mr Pareshkumar Amrutal Hariya testified that in the year 2014, with his two brothers namely Haria Ashok Kumar and Haria Mayur Amrital and after learning of Mr. Atulkumar Motichand Shah's intention of selling land parcel Kisumu Municipality/Block 7/96 measuring 0.0465 Ha belonging to him contacted him for negotiations. At the time the property had one old house constructed in it. They agreed with the said Mr. Shah to purchase the same at a price of Kshs. 22,500,000/- and a sale agreement was made and executed in the presence of an advocate on 23.08.2014. The process of conveyance was duly undertaken by their advocate. Eventually, the land was transferred to the defendants as agreed and they developed the property as it is now. The suit land therefore belongs to defendants as they bought it for value and by following the due procedure laid out by the law.

He therefore prayed that the plaintiff's case be dismissed with costs.

Atul Kumar Motichand Shah, the 4<sup>th</sup> defendant testified that vide a written agreement of sale dated 5<sup>th</sup> August, 2013, I purchased land title No. Kisumu Municipality/Block 7/96 (herein after referred to as the Suit parcel) from Mr. Mubarak Razik Said (the 5<sup>th</sup> Defendant herein) for value of Kenya Shillings Twenty Million (Kshs. 20,000,000.00).

That the 5<sup>th</sup> Defendant being the vendor presented him with a certificate of Lease from the Land Registrar duly signed by the Registrar showing him as the registered proprietor. He also presented a Rent clearance Certificate from the Commissioner for Land dated 19<sup>th</sup> February, 2013, an agreement for sale of land title no. Kisumu Municipality/Block 7/96 dated 4<sup>th</sup> March, 2003 between Dayawanti Boury, Ramesh Boury and Chimanbhai Maganbhai Patel (The vendors) and the 5<sup>th</sup> Defendant being the purchaser). He instructed his Advocates at the time L. G. Menezes to prepare the transfer documents and register the Certificate of Lease and the advocates carried out due diligence on the Suit parcel which included a search at the Land registry and the Search certificate indicated that the 5<sup>th</sup> Defendant was the Registered Proprietor of the suit parcel. That upon registration of the transfer of lease the Advocates procured the following documents; Letter of consent to transfer dated 14/08/2013. Transfer of Lease dated 19<sup>th</sup> August, 2013 and registered on 23/08/2013. Application for Registration of transfer of Lease dated 19/08/2013. Copy of official receipt for registration and issuance of Certificate of Lease dated 19/08/2013. Payment slip for Stamp Duty dated 19/08/2013. Copy of Bank slip for payment of Stamp Duty. (produced and annexed at pages 18-25 in the Defendant's list of documents are copies of letter of consent, transfer of lease, the official receipt for registration, payment slip for stamp duty and bank slips for payment of stamp duty)

That on 23/08/2013, he was issued with a certificate of lease over title No. Kisumu Municipality/Block 7/96. That the aforementioned advocates carried out further due diligence on the suit parcel after registration in his name which included a search at the Land registry and were issued with the Search Certificate dated 28/08/2013 indicated that the he was the Registered Proprietor of the suit parcel.

That he obtained a copy of a White card extracts of the suit parcel from the Kisumu District Lands Registry showing the history of the transfers undertaken with respect to the property up to entries no. 3 which as at 16<sup>th</sup> March, 2003 indicate the 5<sup>th</sup> Defendant as the Registered Proprietor as of 16.03.2003 and he had become the registered proprietor as of 23/08/2013.

On 2/09/2013, he placed a caution on the suit parcel to prevent any transactions on it. That final payment was made to the 5<sup>th</sup> Defendant by his Advocates on 6/09/2013 for the sum of Kshs. 5,500,000.00. Pursuant to finalizing payment he had details of the Suit parcel changed to his name. He took over all responsibilities towards the payment of rates in 2013. He continued to pay rent and rates for the Suit Parcel in 2014.

On 23/08/2014 he executed an agreement for sale of the Suit parcel between himself and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein as bona fide purchasers for value at a consideration of Kenya shillings Twenty-Two Million Five Hundred Thousand (22,500,000.00) only.

Prior to transfer of the lease to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants he conducted a search at the land registry and was issued with the Search Certificate dated 25/08/2014 indicated that he was the Registered Proprietor of the suit parcel. As a condition of the agreement for sale he had to obtain a rates clearance certificate which he did. The firm of Olel, Onyango, Ingutiah & Company advocates acting for the purchasers and himself proceeded to finalize the transactions. He undertook all that is legally and procedurally required of a purchaser of land and subsequently a vendor of land.

He neither had Notice of fraud concerning the suit parcel nor was I a party to any fraud before, after or at the time of the purchase and transfer of the Suit parcel to my name. He did not take part in any fraud at the time of the sale and Transfer of the suit parcel to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The gravamen of the plaintiff's submissions is that the defendants acquired the land in issue fraudulently. By the time the land was sold to the 5<sup>th</sup> Defendant, Mubarak Razik Said, Chimanbhai Maganbhai Patel was long dead in 1978. The plaintiff claims to have been the owner of the suit parcel of land after the demise of Chimanbhai Maganbhai Patel who died in 1978.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that there is no evidence that the plaintiff is related to the deceased Chimanbhai Maganbhai Patel. Moreover, there is no evidence that the plaintiff acquired the land by way of gift or transfer or trust. There is no instrument of transfer to the plaintiff. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submit that there is no evidence that Chinabhai Maganbhai Patel is deceased. They further contend that the plaintiff has no valid claim on the suit property.

The 1<sup>st</sup> to 3<sup>rd</sup> defendants further contend that the plaintiff has not proved the claim on fraud as required by law as no officer from the lands office was called. The Plaintiff did not enjoin the Land Registrar as a party to the suit. They finally submit that they hold a valid title.

The 4<sup>th</sup> Defendant submits that the plaintiff has not proved his case on a balance of probability as he has made general allegation of fraud and has failed to meet the burden of proof required to establish the offence of fraud. According to the 4<sup>th</sup> Defendant, he acquired good title as an innocent purchaser for value. He prays that the suit be dismissed with costs.

I have considered the pleadings, evidence on record and rival submissions and do find the following issues ripe for determination.

- 1. Whether the plaintiff has locus standi.**
- 2. Whether the plaintiff is the legal owner of the suit property.**
- 3. Whether the plaintiff has proved fraud.**
- 4. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hold a valid title.**
- 5. Whether the 4<sup>th</sup> Defendant acquired a valid title.**

On the 1<sup>st</sup> issue, as to whether the plaintiff has locus standi, I do find that Piyush Manubhai Patel describes himself as the legal owner of the suit property and acquired the property after the demise of his uncle Chimanbhai Maganbhai Patel who died in 1978. To begin with, there is no evidence that Chinabhai Maganbhai Patel died. The plaintiff has not produced a certificate to prove the said death. Moreover, no will or grant of letters of administration intestate has been produced by the plaintiff.

The history of the suit property is that on 28/9/1975 the register for Kisumu Municipality/Block 7/96 was opened in the name of the Government of Kenya as the lessor and Dalban Khusalabhai Patel as the lessee. On 21/7/1982, Dajawanti Boury Maresh Boury and Chimabhai Maganbhai Patel and a Land certificate issued on the same date. On the 16/3/2003, the property was transferred to Mubarak Razik Said and a lease certificate issued.

On 23/8/2013 the property was transferred to AAtulkumar Motichand Shah and a certificate of lease issued. The disposition was by way of transfer. On the 16/9/2014, the property was registered in the names of Pareshkumar Amrutalal Hariya (50%), Haria AAshok Kumar (25%) and a certificate of lease issued on the same date. The record at the lands office does not indicate that the plaintiff was ever registered as the proprietor of land through transmission. The record at the Lands Office is devoid of the plaintiff's name. I do find that the plaintiff lacks the standing to bring this suit. On the 2<sup>nd</sup> issue, I do find that the plaintiff has failed to demonstrate to be the legal owner of the suit property.

On the issue of fraud, I do find that the plaintiff has not enjoined the Land Registrar who is the custodian of the record and register of the suit parcel of land. Moreover, the plaintiff has failed to prove to the required standard how fraud was committed by the Defendants.

The 4<sup>th</sup> Defendant acquired title by way of transfer from the 5<sup>th</sup> defendant hence he had a valid title and passed the same to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I do find that the plaintiff has failed to prove his case on a balance of probabilities. The same is dismissed with costs. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>th</sup> DAY OF JANUARY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgment 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 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**