



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 421 OF 2015**

**JOSEPHINE NYAMBEKI NYAOGA .....PLAINTIFF**

**VERSUS**

**GEORGE WESLEY ONGAGA MAKWORO.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff instituted this suit against the Defendant by way of a Plaint dated the 16<sup>th</sup> day of September, 2015. In the said Plaint the Plaintiff claims that she sold the Defendant a parcel of land measuring 4 acres that was excised from land parcel number MWONGORI SETTLEMENT SCHEME/764. The Plaintiff alleges that she pointed out the portion that she intended to sell to the 1<sup>st</sup> Defendant, but the 1<sup>st</sup> Defendant disregarded the portion that had been pointed out to him and instead took a different portion which he fraudulently caused to be registered in his name. The Plaintiff therefore seeks the following orders:

- a) An order setting aside the transfer of the suit land namely, MWONGORI SETTLEMENT SCHEME /991 to the 1<sup>st</sup> Defendant as the registration was procured by fraud.
- b) A declaration that the Defendant holds L.R MWONGORI SETTLEMENT SCHEME/991 in trust for the Plaintiff.
- c) The 1<sup>st</sup> Defendant, his agents, servants and employees be restrained from entering into the suit land and/or disposing of it in any manner and/or use the same in a manner that is inconsistent with the Plaintiff's use and possession.
- d) Costs of this suit
- e) Any other relief that this court may deem fit and just to grant.

2. Upon being served with the Plaint and Summons to Enter Appearance, the 1<sup>st</sup> Defendant filed a Statement of Defence and Counterclaim dated the 15<sup>th</sup> day of October, 2015 denying the Plaintiff's claim. In the Counterclaim, he alleged that after he took possession of the parcel that the Plaintiff had pointed out to him, he realized that the said parcel fell on land parcel number MWONGORI SETTLEMENT SCHEME /765 which had been sold to one Simeon Ondieki Makworo.

3. The Plaintiff thereafter pointed out another portion of parcel number 764 which was subsequently subdivided into two portions giving rise to parcels number MWONGORI SETTLEMENT SCHEME/990 and 991. Land parcel number 991 was thereafter transferred to the 1<sup>st</sup> Defendant. He avers that after he took possession of parcel number 991, the Plaintiff through her agents trespassed thereon and have deprived him of the use thereof. He therefore seeks an order of eviction, a permanent injunction to restrain the Plaintiff from interfering with land parcel number MWONGORI SETTLEMENT SCHEME/991 and general damages for trespass.

4. The 2<sup>nd</sup> Defendant filed a Defence dated 30<sup>th</sup> June, 2016 denying the Plaintiff's allegations of fraud. The 2<sup>nd</sup> Defendant states that if the suit property was sub-divided, then the same was done legally with the Plaintiff's knowledge.

5. The suit was set down for hearing and the Plaintiff and 1<sup>st</sup> Defendant testified and called their witnesses.

**PLAINTIFF'S CASE**

6. Josephine Nyambeki Nyaoga, the Plaintiff herein testified as PW1. She relied on her witness statement dated 16<sup>th</sup> September, 2016. She stated that she entered into a land sale agreement with the 1<sup>st</sup> Defendant for the sale of a portion of land measuring 4 acres from land parcel number MWONGORI SETTLEMENT SCHEME /764 at an agreed price of Kshs. 870,000 per acre. It was her testimony that she showed the 1<sup>st</sup> Defendant the portion that she was selling to him and signed mutation forms for the subdivision of her land, so that she could transfer the 4 acres to the 1<sup>st</sup> Defendant.

7. She later learnt that even though she had shown the 1<sup>st</sup> Defendant the lower portion of her land, he had occupied the upper side where he constructed a semi- permanent house and toilet. The 1<sup>st</sup> Defendant also fenced the said portion. She also learnt that the 1<sup>st</sup> Defendant had obtained a title deed in respect of the portion that he was occupying. She denied having signed transfer forms in respect of the said transfer. She further stated that she did not attend the meeting of the Land Control Board and she was not asked to surrender the title for land parcel number 764 upon sub-division of the said parcel. The Plaintiff therefore told the court that the 1<sup>st</sup> Defendant was illegally occupying the upper portion of her land which he had fraudulently sub-divided. She said she had no problem if the 1<sup>st</sup> Defendant moved to the lower portion which she pointed out to him.

8. Upon cross-examination, she disclosed that she had sold the lower portion of her land to one Simon Ondieki Makworo, but they had agreed that she would refund his money. She told the court that the portion which she had sold to Simon Makworo measures 3 acres and it has a house which is occupied by Simon's brother. She said that he had been in occupation of the said parcel of land for about 10 years. The Plaintiff admitted that she executed the transfer form, mutation form as well as the application for Land Control Board consent. She insisted that she signed these forms in respect of the portion she had shown the 1<sup>st</sup> Defendant which was downstream.

9. The Plaintiff called her son Reagan Nyaoga Monyoncho as her only witness. He testified as PW2. He relied on his witness statement dated 16<sup>th</sup> September 2015. He told the court that his mother had sold land to Simon Makworo a parcel of land measuring 3 acres but she subsequently revoked the sale and she was supposed to refund Simon the purchase price. Later in 2014, she sold the same parcel of land to the 1<sup>st</sup> Defendant but he occupied a different portion and obtained a title deed thereof.

10. Upon cross-examination, PW2 stated that the 1<sup>st</sup> Defendant and his mother entered into a sale agreement in respect of 4 acres and he signed the sale agreement as a witness. He conceded that the sale agreement did not describe the portion that the Plaintiff was selling to the 1<sup>st</sup> Defendant. It was his testimony that the 1<sup>st</sup> Defendant knew that he was buying the same parcel that had been sold to Simon Makworo, but he occupied a different portion which he caused to be registered in his name. He denied that his mother had signed the mutation and transfer forms. He told the court that the 1<sup>st</sup> Defendant's land was supposed to be next to the river but the one he occupied is next to the road.

#### **1<sup>ST</sup> DEFENDANT'S CASE**

11. George Wesley Makworo, the 1<sup>st</sup> Defendant testified as DW1. He stated that he bought 4 acres out of land parcel no. MWONGORI SETTLEMENT SCHEME /764 from the Plaintiff. He stated that before he entered into the sale agreement with the Plaintiff, he conducted an official search to confirm that the land was registered in her name. He produced a copy of the Certificate of Official Search and copy of the Green card and sale agreement as Defendant's Exhibits 1, 2 and 3. He also produced funds transfer documents to show that he paid the purchase price of Kshs. 3,480,000 in full. He produced photos to show that the Plaintiff signed the mutation forms and he gave her a sufuria and blanket to signify that the sale had been concluded.

12. It was DW1's testimony that the Plaintiff later applied for consent of the Land Control Board after which land parcel 764 was sub-divided into parcels no. MWONGORI SETTLEMENT SCHEM 990 and 991. The Plaintiff then transferred parcel number 991 to him. He produced the mutation forms, application for consent, consent letter, transfer form, a copy of the Plaintiff's National ID, PIN Certificate and title deed for parcel number MWONGORI SETTLEMENT SCHEME /991 as his exhibits.

13. DW1 further testified that after he obtained the title in respect of parcel 991, he took possession thereof, fenced it and put up a house and toilet. However, the Plaintiff was not happy when he occupied the said portion as she wanted him to move to the lower portion near the river. He told the court that this was not possible as the said portion which is parcel no. 765 belongs to Simon Ondieki Makworo. He produced a copy of the title deed in respect of parcel number 765 as an exhibit.

14. He testified that when he realized that there was a dispute regarding the ground location of the land he had bought from the Plaintiff, he sought the intervention of the Chief who resolved that he should be given the 4 acres he had bought. However, the Plaintiff was not happy with the Chief's decision and she threatened to demolish his house, chased away his workers and destroyed his trees. He told the court that he reported the matter to the police and got the Forest Officer to assess the damage to the trees. He produced a copy of the extract of the Occurrence Book and Forest Officer's assessment report as his exhibits.

15. DW1 testified that the sale agreement did not specify the exact site of the parcel that he bought save that it was part of parcel number 764. He denied that he had occupied a different parcel from the one he bought as the one the Plaintiff wanted him to occupy was parcel number 765 which she had sold to Simon Makworo. He denied that he had fraudulently transferred parcel number 991 to himself as it was his evidence that the Plaintiff is the one who pointed out the land that he bought to the Surveyor.

16. Upon cross examination, DW1 stated that the dispute he had with the Plaintiff was about the ground location of the land he bought from her. He stated that she showed him parcel number 765 which she had sold to Simon Makworo. He told the court that the Plaintiff became hostile to him when he rejected parcel no. 765 upon realizing that it had been sold to Simon Makworo. He stated that he had to seek the intervention of the Chief, Land Surveyor and Land Registrar to assist him take possession of the parcel he had bought which was on the upper side of the Plaintiff's land. He testified that the Plaintiff initially showed him the upper portion of land but after he paid the full purchase price, he pointed out the lower portion which he had sold to Simon Makworo and when he rejected it, she became hostile to him. He stated that at some point he asked for a refund of his money but the Plaintiff was not willing to refund him and she kept taking him round in circles.

17. In re-examination, DW1 stated that the Plaintiff took him round her entire parcel of land and she pointed out the 4 acres which was on the upper side of the land. This is the portion that he fenced and occupied.

18. James Gichana Nyakundi testified and DW2. He stated that the Plaintiff who was his aunt requested him to get her a buyer as she wanted to sell 4 acres of her land. He approached the 1<sup>st</sup> Defendant and negotiated the price of the land which the Plaintiff agreed to sell at Khs. 870,000 per acre. He testified that the 1<sup>st</sup> Defendant entered into a written sale agreement with the Plaintiff and he signed the said agreement as a witness. Thereafter, DW1 paid the purchase price in full and the Plaintiff applied for consent of the Land Control Board after which DW1 gave her a Sufuria and Blanket to signify that the sale had been concluded.

19. It was his testimony that the 1<sup>st</sup> Defendant took possession of the suit property, fenced it and planted 9,000 trees. He also constructed a house and toilet thereon. He later learnt that the Plaintiff changed her mind about the parcel that he had sold to the 1<sup>st</sup> Defendant and wanted him to take a different parcel. He was categorical that land parcel no. MWONGORI SETTLEMENT SCHEME /991 belonged to the 1<sup>st</sup> Defendant as the Plaintiff had transferred the same to him and she had no valid claim over the same.

20. Upon cross-examination, he confirmed that he was the one who identified the land that the Plaintiff sold to the 1<sup>st</sup> Defendant and he was certain that it did not extend to the river. He stated that there was an access road between the 1<sup>st</sup> Defendant's land and the land on the lower side which belongs to Simon Makworo. He refuted the Plaintiff's claim that the 1<sup>st</sup> Defendant took the land by force.

21. In re-examination he clarified that the land that the 1<sup>st</sup> Defendant bought did not extend to the stream. He stated that the land that borders the stream belongs to Simon Makworo and both Simon and the 1<sup>st</sup> Defendant are in occupation of their respective parcels of land.

22. Simon Ondieki Makworo testified as DW3. He told the court that he had bought a parcel of land from the Plaintiff in 2010 and he was registered as the owner of parcel number MWONGORI SETTLEMENT SCHEME/765. He stated that his land was next to the river while the 1<sup>st</sup> Defendant's land was on the upper side. He said he has constructed a house and toilet on his land and his brother lives there and takes care of it.

23. During cross-examination he stated that he is in occupation of his land which measures 3 acres. He explained that the Plaintiff's land was originally known as parcel no. MWONGORI SETTLEMENT SCHEME/729. Upon sub-division the Plaintiff transferred to him parcel number 765 and remained with a parcel number 764. The 1<sup>st</sup> Defendant's parcel number 991 was excised from parcel number 764. He stated that the 1<sup>st</sup> Defendant's land does not extend to the river.

24. In re-examination he clarified that he owns parcel number 765 measuring 3 acres, while the 1<sup>st</sup> Defendant's land was parcel number 991 measuring 4 acres. He reiterated that his land extends to the river.

25. The 1<sup>st</sup> Defendant's last witness was David Ogega Nyambane who testified as DW4. He introduced himself as the Assistant Chief, Mwangori Sub-location and stated that both the Plaintiff and the 1<sup>st</sup> Defendant were his subjects. He testified that he had presided over a meeting between the Plaintiff and the 1<sup>st</sup> Defendant concerning the suit property. He stated that he had learnt that the Plaintiff had sold a parcel of land to the 1<sup>st</sup> Defendant, but she later changed her mind and wanted the 1<sup>st</sup> Defendant to take a different parcel which the Plaintiff had sold to one Simon Makworo. After listening to all parties it was resolved that the 1<sup>st</sup> Defendant be given the 4 acres he had bought.

26. He stated that after the meeting he held to resolve the dispute, the Plaintiff agreed to give the 1<sup>st</sup> Defendant a piece of land which was upstream and she guided the Surveyor on how it should be demarcated. He said that he was aware that the 1<sup>st</sup> Defendant's occupation was not peaceful although he helped him to get his parcel of land through arbitration.

27. After all the witnesses had testified, the parties were granted time to file their written submissions and they both complied.

## **ISSUES FOR DETERMINATION**

28. Having considered the pleadings, evidence on record and the rival submissions and to answer the points of controversy that emerge, the following issues fall for determination:

- i. Whether the Plaintiff obtained registration of L. R No. MWONGORI SETTLEMENT SCHEME/ 991 by way of fraud.
- ii. Whether the 1<sup>st</sup> Defendant holds the title to L. R No. MWONGORI SETTLEMENT SCHEME/ 991 in trust for the Plaintiff and if so, whether the trust ought to be determined.
- iii. Whether the Defendant is entitled to the reliefs sought in the Counterclaim.

## **ANALYSIS AND DETERMINATION**

29. It is trite law that fraud must be pleaded and proved. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

***“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.***

At paragraph 6 of the Complaint, the Plaintiff has pleaded fraud and set out the particulars of fraud against the Defendants.

30. It is not in dispute that 1<sup>st</sup> Defendant is the registered owner of land parcel MWONGORI SETTLEMENT SCHEME /991. The 1<sup>st</sup> Defendant testified that he purchased a parcel of land measuring 4 acres from the Plaintiff's parcel number MWONGORI SETTLEMENT SCHEME/764 vide a sale agreement dated 23<sup>rd</sup> February 2014. The Plaintiff admitted that she signed the necessary survey documents including the application for Land Control Board consent and mutation forms, copies of which she produced as her exhibits. Although in her evidence in chief the Plaintiff denied having signed the transfer forms, the 1<sup>st</sup> Defendant produced a copy of the Transfer form with the Plaintiff's passport photograph, ID number and Pin No. on it. The Plaintiff did not deny that the signature and other details on the form were hers and her allegation that her ID and other personal documents got lost was not at all convincing.

31. Upon cross-examination, she admitted that she signed the transfer form but for the portion downstream. According to the mutation form produced by the 1<sup>st</sup> Defendant, land parcel number 991 was created as a result of the subdivision of land parcel number MWONGORI SETTLEMENT SCHEME/764 which gave rise to parcels number 990 and 991. This is consistent with sale agreement which clearly states that the 1<sup>st</sup> Defendant bought a portion of parcel number 764.

32. The problem arose when it came to identifying the parcel that the 1<sup>st</sup> Defendant had bought on the ground. From the evidence on record, the Plaintiff showed the 1<sup>st</sup> Defendant the portion on the upper side of land then later changed her mind and wanted him to take the lower part near the river, which measures 3 acres and was already occupied by one Simon Ondieki Makworo. This is when the 1<sup>st</sup> Defendant realized that the Plaintiff was trying to shortchange him and involved government officials to assist him take possession of the land that he had bought. From the map attached to the mutation form, it is clear that the parcel registered in the name of Simon Makworo is parcel number MWONGORI SETTLEMENT SCHEME/765 and it is distinct from parcel number MWONGORI SETTLEMENT SCHEME/991. The Plaintiff's insistence that she sold the portion that is downstream is not consistent with the sale agreement and the map.

33. The 1<sup>st</sup> Defendant produced all the necessary documents to show that the sub-division and transfer of land parcel number 991 to the 1<sup>st</sup> Defendant was lawful and there is nothing to suggest that the said transfer of the suit property was fraudulent or unprocedural.

34. Turning to the second question, I have already held that it follows that if the 1<sup>st</sup> Defendant's title was not obtained fraudulently. It therefore follows that the said title is not held by the 1<sup>st</sup> Defendant in trust for the Plaintiff.

35. On the other hand, the 1<sup>st</sup> Defendant led evidence to show that the Plaintiff's agents trespassed on land parcel number MWONGORI SETTLEMENT SCHEME/991 and started cultivating the same, prompting the 1<sup>st</sup> Defendant to make a report to the Police and Chief. This evidence was not controverted by the Plaintiff. Having established that land parcel number 991 lawfully belongs to the 1<sup>st</sup> Defendant, he is entitled to protection thereof. In accordance with section 24 and 25 of the Land Registration Act, 2012 which provides that:

Section 24. *"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"*.

Section 25 (1) of the said Act further provides that; *"the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section"*.

36. In his Counterclaim, the 1<sup>st</sup> Defendant seeks an order of eviction and a permanent injunction restraining the Plaintiff from interfering with the suit property. He also seeks general damage for trespass.

37. From the 1<sup>st</sup> Defendant's evidence stated above, it is my finding that he is entitled to the reliefs sought as he has met the threshold for the grant of an injunction. Similarly, the 1<sup>st</sup> Defendant is entitled to an order of eviction against the Plaintiff and/or her agents.

38. The upshot is that the Plaintiff's case is dismissed with costs. Conversely, the 1<sup>st</sup> Defendant has proved his Counterclaim on a balance of probabilities. I therefore enter judgment for the 1<sup>st</sup> Defendant on the Counterclaim and make the following final orders:

a) The Plaintiff is hereby ordered to vacate L.R No. MWONGORI SETTLEMENT SCHEME/991 within 30 days from the date hereof failing which the Plaintiff may apply for an eviction order.

b) A permanent injunction is hereby issued restraining the Plaintiff either by herself, her agents, servants or anyone acting on her behalf from entering upon, trespassing onto, building on, cultivating, alienating, selling, transferring and/or otherwise interfering with L.R No. MWONGORI SETTLEMENT SCHEME/991.

c) The Plaintiff shall bear the costs of this suit and the Counterclaim.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF FEBRUARY, 2022.**

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**J.M ONYANGO**

**JUDGE**