



**REPUBLIC OF KENYA.**

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

**ELC. NO. 108 OF 2013 (Formerly HCC.67/2013)**

**HEZEKIAH OMONDI ..... PLAINTIFF**

**=VERSUS=**

**VINCENT OGUTU ONYANGO..... DEFENDANT.**

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

**HEZEKIAH OMONDI**, hereinafter referred to as the Plaintiff, filed this suit against Vincent Ogutu Onyango, hereinafter referred to as the Defendant, through M/S. Namatsi & company Advocates for;

“ (a) Cancellation of the Defendant’s name from land parcel number South Teso/Angoromo/2834.

(b) The costs of this suit.”

The Plaintiff claim is based on allegations of fraud attributed to the Defendant, whom he had given the title deed as security for a Kshs.53,000/= debt his son owed in 2007, after which the Defendant had the land transferred to his names.

The defendant denied the claim and filed a defence. Defendant denied the allegations of fraud and avers that the Plaintiff and his son voluntarily transferred the land to him as payment for the Kshs.100,000/= the Plaintiff’s son owed him. He prays for the plaintiff’s case to be dismissed with costs. The defence was filed through M/S. Bogonko, Otanga & co. advocates.

In reply to the defence , the Plaintiff denied voluntarily transferring the land to the Defendant.

The Plaintiff testified as PW 1 and had also filed an affidavit sworn on 19<sup>th</sup> August, 2013 summarizing his evidence. He called Joseph Joshua Mwanza, who testified as PW 2 and who had also filed evidence affidavit sworn also on 19<sup>th</sup> August, 2013. Defendant testified as DW 1 and relied on his evidence affidavit sworn on 15<sup>th</sup> August, 2013.

**SUMMARY OF PLAINTIFF’S CASE.**

1. That some years back, PW 2, who is a son to the Plaintiff was contracted by Defendant to do some furniture at Kshs.107,000/=.
2. That PW 2 did work valued at Kshs.54,000/= but was unable to clear the remainder. The defendant reported the matter to the police who started looking for PW 2.
3. That Plaintiff offered the Defendant a security for the debt of Kshs.53,000/= in the form of his

title deed for land parcel south Teso/Angoromo/2834 as he feared PW 2 would lose his job with Teachers Service Commission if he was arrested for the debt.

4. That later, Defendant asked the plaintiff to sign some documents and copy of his identity card claiming that they needed an agreement to allow him hold the title deed.
  5. That in the year November, 2010, PW 2 called Defendant to pay him the debt but Defendant declined. Later, when Plaintiff and PW 2 went to lands office to check the status of the land, as Plaintiff wanted to sell a portion to meet the expenses of his daughter's burial, he found the land had been transferred into the Defendant's names.
  6. That when he approached the Defendant, he was unco-operative and demanded to be paid Kshs.1,000,000/= if plaintiff wanted the land back.
  7. That Plaintiff instructed counsel to make a follow up and when he got copies of the documents used in the transfer, he discovered they were forgeries as he had not given Defendant his passport photograph yet there was one. That the PIN number used was different from his. That he had not attached the Land Control Board Consent. That he had not gone to Ingosi N. Luhombo advocate who had allegedly witnessed the transfer form.
  8. That his PIN certificate was number A006232912C while the one on the transfer documents was A001189484D.
  9. That the Plaintiff filed a caution on the land on finding Defendant had transferred it to his name but the caution was later lifted by the Land Registrar in 2012.
10. That Plaintiff had not sold the land to the Defendant and that he had not transferred it to him knowingly.

#### **SUMMARY OF DEFENDANT'S CASE.**

1. That in 2003 he contracted PW 2, who is his cousin, to do some furniture for him and paid him Kshs.100,000/=.
  2. That over a year later, PW 2 had not completed the work and that he reported matter to the police.
  3. That Plaintiff, on discovering that the matter had been reported to the police, offered a security for the remaining work by depositing the title deed with Francis Wafula.
  4. That PW 2 failed to do the work and when Defendant wanted to revive the matter with the police, Plaintiff pleaded with him and offered to transfer the land to him in settlement of the matter.
  5. That Defendant accepted and in the company of plaintiff and PW 2 went to Land Office and signed all the relevant forms and left them with one Barasa who works in the lands office.
  6. That he was subsequently issued with the title deed on 23<sup>rd</sup> July, 2008 and that the transaction was therefore lawful.
  7. That he had no land sale agreement with Plaintiff and did not pay him any money for the land.
  8. That Plaintiff was to transfer to him another piece of land whose size was two plots but sold it to another person instead. He added that he should be allowed to keep the land subject matter of the suit.
  9. That all the papers for Land Control Board and transfer were signed at the lands office and none at the Plaintiff's home.
10. That the Plaintiff and his son attended the Land Control Board.
11. That he could not remember how the transfer forms were taken to M/S. Ingosi & company Advocates

#### **SUMMARY OF PLAINTIFF'S COUNSEL SUBMISSIONS.**

1. That Plaintiff gave the Defendant the title deed of the suit land as security for the money paid to his son, PW 2, by the Defendant. This was to safeguard PW 2 job with the Teachers Service Commission as Defendant had involved the police in the matter.
2. That the events described and anomalies found in the documents of transfer shows that the plaintiff did not voluntarily transfer the land to the Defendant.
3. That section 3 of the Law of Contract, Cap 23 of Laws of Kenya requires agreement for sale of

land be in writing and there was no written sale agreement between the Plaintiff and Defendant in this case.

4. That Defendant had engaged in illegal and fraudulent transactions when he transferred the land to his names.

### **SUMMARY OF DEFENDANT'S COUNSEL SUBMISSION.**

1. That the suit land was transferred to the Defendant by the Plaintiff in lieu of Kshs.100,000/= PW 2 owed Defendant.
2. That the Plaintiff signed all the necessary documents to enable Defendant transfer the land to his names at the lands office.
3. That Plaintiff has failed to prove fraud on the part of the Defendant and asked the court to follow the Court of Appeal decision of **IDDI NDOMBI –VS- WILLIAM MAERO KISUMU** C.A.C.A NO. 254 of 1997 where the court confirmed the High court finding that the Appellant had failed to prove that the Respondent had defrauded him out of his land. The court added that it was the Appellant who was seeking to do defraud the Respondent.
4. That Plaintiff has failed to proof fraud on the part of the Defendant and his case should be dismissed with costs.

### **ISSUES FOR DETERMINATION.**

1. Whether Plaintiff gave the defendant the title deed for land parcel South Teso/Angoromo/2834 as security/ guarantee or satisfaction/payment for his son's debt to the Defendant.
2. Whether Plaintiff voluntarily transferred the said land to the Defendant.
3. Whether Defendant acquired good title to the land.
4. Whether Plaintiff is entitled to the prayers or any of the prayers sort.

### **FINDINGS.**

1. That the son of the Plaintiff, who testified as PW 2, had an agreement with Defendant to make him some furniture for which he was paid for in advance.
2. That PW 2 failed to complete the work forcing Defendant to seek the assistance of the police.
3. That when plaintiff learnt that police were looking for his son, PW 2, he approached Defendant and offered his title deed for the suit property as guarantee for the uncompleted works value.
4. That PW 2 failed completely to complete the work and Defendant indicated he would revive the matter with the police.
5. That the Plaintiff and the Defendant never entered into a legally recognized and enforceable agreement that could have led to the Defendant acquiring proprietorship of the suit land.
6. That whatever transfer documents plaintiff signed and or handed over to the Defendant, either at his home or the Land's office, were not signed or given out of the Plaintiff's free will. They were obtained by coercion as the Defendant had involved the police in a purely commercial transaction with the aim of forcing PW 2 to pay up or face penal consequences which would have had negative repercussions on his employment as a teacher.
7. That Plaintiff had no obligations in the agreement entered into between PW 2 and Defendant and in the absence of a legally binding arrangement, the Defendant coerced the Plaintiff into signing some documents which he used to transfer the suit land to his names. The fact that Defendant and Plaintiff admitted that they did not go to M/S. Adungosi Advocate for the signing of the transfer forms and the difference in the PIN number used to the one in the Plaintiff's PIN certificate, goes to confirming that the process used in effecting the transfer was not above board. That the admission by the Defendant that he was to initially only get two plots but Defendant ended up transferring the suit land that is larger goes to show the Plaintiff did not voluntarily transfer the land to the Defendant.
8. That unlike the Appellant in Kisumu C.A.C.A No. 254 of 1997, **IDDI NDOMBI –vs- WILLIAM MAERO**, who had in previous judicial proceedings admitted to having sold the six acres of land to the Respondent, there is no evidence to suggest the existence of a land sale agreement between the parties in this case over the suit land. If anything the plaintiff in this case was not

involved in the deal between PW 2 and Defendant and only came in to help his son, PW 2, from being arrested for the debt by offering his title deed as guarantee or security for the outstanding works. However, when finally PW 2 wanted to pay the outstanding debt, Defendant declined and Plaintiff later discovered that the Defendant had transferred the land to his names and hence this suit. The foregoing facts shows Defendant did not acquire a good title over the suit land as the process was tainted with fraud and misrepresentation.

From the foregoing, I find that the Plaintiff has proved on a balance probabilities that he was coerced and tricked by the Defendant through the involvement of the police and being asked to sign some document which were used to transfer the suit land to the Defendant's names without his consent. This amount to a fraudulent transaction which was attained through misrepresentation. The Plaintiff is therefore entitled to the prayers sort and I enter judgment for him against the Defendant in the following terms.

1. That the Land Registrar, Busia County, do rectify the register for South Teso/Angoromo/2834 by deleting the names of the Defendant, Vincent Ogutu Onyango and reverting the proprietorship of the suit land to the names of the Plaintiff, Hezekiah Omondi M. Mwanza.
2. That the Defendant do pay the Plaintiff the costs of this suit.

It is so ordered.

**S. M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 3<sup>RD</sup> DAY OF APRIL, 2014**

**IN THE PRESENCE OF;**