



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 9 OF 1993**

PUSHATI OLE SHUNGUR.....1ST PLAINTIFF

DAVID KAPOLONYOI SHUNGUR.....2ND PLAINTIFF

-VERSUS-

RIGOGO CHONJO FARMERS CO.LTD.....1ST DEFENDANT

CHEPNYALILIET SELF HELP GROUP.....2ND DEFENDANT

**JUDGMENT**

The Substantive Suit is expressed in the Further Amended Plaint dated 29th April 2005 whereof **Pushati Ole Shungur** the Plaintiff avers that in 1984, he made a verbal agreement with **Rigogo Chonjo Farmers Co. Ltd**, the 1st Defendant to sell to the 1st Defendant **L.R.no.Narok/Cismara/134** at an agreed price of Kshs.600,000. The Plaintiff admits he received Kshs.198,000 from the 1st Defendant leaving a balance of Kshs.402,000 awaiting the Land Control Board consent. The Plaintiff stated that he was shocked to learn that the 1st Defendant had transferred the aforesaid land to itself yet the outstanding consideration of Kshs.402,000 had not been paid to him and without the requisite Land Control Board consent. The Plaintiff beseeched this court to find that the 1st Defendant had obtained title by fraud and proceed to cancel the title.

In the Plaint it is also contended that on 29th September 1993 **Chepnyaliliet Self Help Group**, the 2nd Defendant colluded with the 1st Defendant and the Narok District Land Registrar to have the suit land transferred to the 2nd Defendant despite the fact that there was in existence a restriction registered against the title. It is the Plaintiff's contention that the 2nd Defendant was not a bonafide innocent purchaser for valuer, hence the 2nd Defendant together with its members should be evicted from the land. The Defendants filed a joint and further defence to generally deny the Plaintiff's allegations of fraud.

When the suit came up for hearing two witnesses each testified from the Plaintiff side and that of the defence. At the close of evidence learned counsels from both sides filed their written submissions. I have considered the evidence and the rival submissions. Though the parties filed the agreed issues, Mr. Migiro learned advocate for the Plaintiff later departed and filed his own issues stating that he was prompted to do so due to the changing nature of the case. The agreed issues filed were six while those filed by the Plaintiff's advocate are four. However, I am of the view that the following issues commend themselves for determination.

- i. **Whether or not the 1st Defendant obtained a valid title.**

- ii. **Whether the 1st Defendant had a good title to pass to the 2nd Defendant.**
- iii. **Is the Plaintiff entitled to the remedies sought?**

I will begin with the first issue as to whether the 1st Defendant obtained a valid title **L.R.no.Narok/Cis-mara/134**. According to the evidence of David Shungur his father, the late Pushati Shungur did not attend the Land Control Board meeting to obtain the Land Control Board consent to transfer the land to the 1st Defendant. He was also categorical that there was no valid written sale agreement for the land. He also pointed out that on 29th September 1993 a prohibitory order was registered against the title hence no transaction could take place. The late Pushati Shungur's evidence which he gave before S.K.Obosso, an arbitrator was produced in evidence. He told the arbitrator that he did not take the 1st Defendant to the Land Control Board because he had not been paid the purchase price in full. He even purported to refund the amount he had initially received by paying the District Officer who had been tasked to manage the affairs of the 1st Defendant. **Njoroge Wainaina** (D.W.1) the 1st Defendant's Secretary stated that the Plaintiff sold the land to the 1st Defendant through Duncan Commercial Agencies at Kshs.304,000. It is the evidence of D.W.1 that they successfully applied for a Land Control Board consent on 16th June 1987. I have examined the evidence and it is clear that the Land Control Board appears to have given consent on 16/6/1987. The Plaintiff denies having attended the Land Control Board meeting. The Land Control Board minutes of the aforesaid date simply states that the Plaintiff applied for consent which application was approved. It does not expressly state that the vendor attended the meeting. The amount quoted to be the price on the application form is Kshs.304,000 yet the amount the Plaintiff states to have sold the land is Kshs.600,000. The evidence of D.W.1 tendered before the arbitrator further contradicts this figure. In the final analysis, the 1st Defendant has failed to show that it paid the consideration in full. There is also no evidence that the sale transaction was in writing as required by law. There is also no reliable evidence to prove that the vendor on his agent attended the Land Control Board meeting. For the above reasons, I find that the 1st Defendant did not validly obtain a good title. Its acquisition is shrouded in mystery.

Having concluded the first issue leads me to the second issue as to whether or not the 1st Defendant had a good title to pass to the 2nd Defendant. I have already come to the conclusion that the 1st Defendant's title is faulty. It goes without saying that he had no good title to convey to the 2nd Defendant. Even if the 1st Defendant had good title to pass to the 2nd Defendant since evidence was led to show that the Plaintiff had caused a prohibitory order registered against the aforesaid title on 16th June 1993. The order restricted all dealings with the land. The 1st Defendant admitted that the land was transferred to the 2nd Defendant on 29th September 1993 despite the fact that a prohibitory was in situ and had not been vacated. The 2nd Defendant is said to have proceeded to cause the land to be subdivided and allocated to its members. **Kipkemoi Arap Kitur alias Joseph Kitur** (D.W.2) testified on behalf of the 2nd Defendant. He told this court that the 2nd Defendant purchased the land from the 1st Defendant at a price of Kshs.800,000. D.W.2 said that he did not know about the restriction placed on the title until the time he wanted to have it subdivided. In his evidence in cross-examination, D.W.2 he admitted knowledge of the existence of the prohibitory order. D.W.2 even admitted that he was informed by the Narok District Land Registrar of the existence of the prohibitory order registered against title, but the duo namely 1st and 2nd Defendants still went ahead to present documents to transfer title from the 1st Defendant to the 2nd Defendant and most probably after greasing the palms of the District Land Registrar. D.W.2 confidently admitted that the Land Registrar interpreted to them the prohibitory order before effecting the transfer of title. In the circumstances, the 2nd Defendant cannot be regarded as an innocent purchaser for valuer. The title the 2nd Defendant has, was obtained in contravention of a prohibitory order. I am convinced the 2nd Defendant with the connivance of the 1st Defendant acquired **L.R.no.Kericho/cis-mara/134** by fraud hence I am entitled to order for the rectification of the register under the provisions of **Section 143** of the **Registered Land Act (now repealed)**.

The last issue to be considered is easy to determine. The question is whether the Plaintiff is entitled to the Judgment as prayed? The Plaintiff has proved his case to the required standards in civil cases hence he is entitled to Judgment. I enter Judgment in favour of the Plaintiff as against the 1st and 2nd Defendants in terms of prayers (a) A, (b) A, (b)AA, (c) and (e) of the Further Amended Plaint dated 29th April 2005.

**Dated, Signed and delivered in open court this 26th day of June, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

Mr. Motanya holding brief for Mr. Migiro for Plaintiff

N/A Mr. Mutai for Defendant