



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 30 OF 2002.

WILLIAM WASHINGTON OMAKADA:::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

JOHN WANYONYI ETYANG :::::::::::::::::::::::::::::::::::DEFENDANT

J U D G M E N T.

In the beginning, one **Francis Kiprotich Tuwei**, was the absolute proprietor of a portion of land described as parcel No. 332 Maridadi and situated at Maridadi Kwanza area of Trans Nzoia District. The property measured approximately 8.5 acres but was later sub-divided into four (4) portions measuring 1.5 acres, 1 acre, 2 acres and 4 acres thereby creating portion **No. Trans Nzoia/Maridadi/538**, (i.e. portion No. 538) among other portions.

This portion No. 538 is the subject of this dispute in so far as its ownership is claimed by both the plaintiff, **William Washington Omakada**, and the defendant, **John Wanyonyi Etyang**.

In the plaint dated 22nd March, 2002, it is pleaded that the suit land measures approximately 1.15 hectares and was registered in the name of the plaintiff and a title-deed issued on 17th January, 2002.

That, on or about the 28th January, 2002, the defendant unlawfully and without any colour of right or interest or prior authority of the plaintiff trespassed into the suit land and commenced construction and cultivation thereon with the intention of permanently remaining thereon and carrying out his unlawful activity whereas the property was purchased by the plaintiff from the said Francis Tuwei who signed the necessary land control board and transfer forms thereby rendering title to the plaintiff without any objection from the defendant or any other person.

That, by reason of the defendant's unlawful occupation of the suit land, the plaintiff has suffered loss and damages and therefore prays for a declaration that the suit land solely belongs to him and that the defendant's occupation is unlawful.

The plaintiff also prays for an eviction order against the defendant, his family members, his servants and/or agent from the suit property and the costs of this suit.

In his amended defence and counter-claim dated 30th May, 2005, the defendant denies that the plaintiff is properly and legally registered as the proprietor of the suit land and avers that in the month of November, 1999, he requested the plaintiff to assist him find and purchase land measuring two (2) acres and in that regard the plaintiff found the suit land belonging at the time to Francis Tuwei. Thereafter, on the 19th November, 1999, the plaintiff, Francis Tuwei and himself (defendant) entered into a sale agreement in

which he purchased two (2) acres of the suit land and paid the agreed purchase price.

The defendant further avers that after the purchase he took possession of the land and immediately commenced developments thereon even though the plaintiff claimed that the land was to be shared between the two of them, a claim which is factually false. That, a criminal case instituted by the plaintiff with a view to having him (defendant) vacate the suit land ended with his acquittal and despite several forceful attempts made by the plaintiff, he (defendant) declined a refund through the local administration of Ksh. 95,000/= being the purchase price for the suit property.

The defendant contends that the title obtained by the plaintiff for the suit land was so obtained by fraud and ought to be cancelled as the plaintiff registered himself as the absolute proprietor knowing that he (defendant) was entitled to two (2) acres of the land and as he (plaintiff) manipulated records in his favour by misusing and abusing his position as a lands official.

The defendant further contends that the plaintiff misrepresented facts to the relevant registry and failed to involve Francis Tuwei in the transaction. He (defendant) denies being in illegal occupation of the suit land and contends that any Land Control Board consent involving his portion of the suit land is null and void. He counter-claims against the plaintiff to the effect that the plaintiff holds the suit land in trust for him and should therefore transfer it to him having fraudulently obtained the title thereof.

The defendant therefore prays for an order that the plaintiff holds the title to the suit land in trust for him and an order directing the plaintiff to execute the necessary land control board and transfer forms in his (defendant's) favour and in default the Deputy Registrar of this court to execute the same. He also prays for the costs of the counter-claim and the main suit.

In his testimony, the plaintiff **William Washington Omakada (PW1)**, confirmed that the defendant approached him for assistance to purchase two (2) acres of land and in that regard they entered into an agreement dated 3rd December, 1999 (P. Exh. 1) for the purchase by them of 2.8 acres of land from Francis Kiprotich Tuwei of which the defendant was to get two (2) acres while he (plaintiff) was to get one (1) acre. They obtained the consent of the Land Board and sub-divided the land. But, the defendant later changed his mind and decided to return his two (2) acres. He made the decision before the Land Control Board whose chairman was the District Commissioner (D.C.)

The plaintiff testified that he made a refund of Ksh. 98,000/= for the defendant's two (2) acres through the D.C. He was thereafter granted the consent to process title for the entire portion of land. The D.C gave him a letter dated 24th December, 2001 (P. Exh. 2) acknowledging receipt of the refund money. He later obtained a copy of a letter dated 28th December, 2001 (P. Exh. 3) from the D.C. To the defendant requesting the defendant to collect the refund money. He produced a copy of the consent for the title deed (P. Exh. 4) and indicated that the suit land was transferred to him from Francis Tuwei without any encumbrances. He produced the necessary green card (P. Exh. 5) and the title deed. (P. Exh. 6).

The plaintiff contended that he was not holding the suit land in trust for the defendant and that he did not obtain the title deed by fraud and as such, the defendant ought not be registered as the proprietor of the land and since he was refunded his money he ought to be evicted from the land.

An Assistant Lands Registrar, **Aggrey Kavehi (PW2)**, produced relevant documents i.e. a green card (P. Exh. 5) and (P. Exh. 7) relating to the suit land and confirmed that the plaintiff applied for transfer on 7th February, 2001 and necessary consent was given on 16th January, 2002 after which the registration of the suit land was effected on 17th January, 2002. He (PW2) produced the additional documents (P. Exh. 8).

The defendant's testimony was an indication that he purchased the suit land for Ksh. 95,000/= and an agreement (D. Ex. 1A) was entered to that effect on 19th November, 1999 between him, the plaintiff and the actual owner of the land Francis Tuwei.

He (defendant) took possession in the year 2000. He appeared before the land control board together with Francis Tuwei and obtained the necessary consent for sub-division of the land to cater for his two (2)

acres. He produced the necessary application and consent (D. Exh. 1 a-b) but was never issued with a title deed. He later in the year 2002 learnt that a title deed respecting the suit land was issued to the plaintiff.

He (defendant) proceeded to the lands office and placed a caution on the suit land. He produced the application form and receipt for the caution (D. Exh. 3 a-b). His caution was however rejected allegedly at the instance of the plaintiff. He produced a letter to that effect dated 27th May, 2004 (D. Exh. 4). He was later called to the D.C.'s office vide a letter dated 7th August, 2001 (D. Exh. 5) asking him to return the letter of consent of the land board. He returned the said consent and another application was signed by Francis Tuwei. He could not understand why he was asked to return the consent letter but later discovered that it was part of a scheme by the plaintiff and Francis Tuwei to defraud him of the suit land which he purchased and fully paid the purchase price. He contends that the plaintiff "grabbed" the suit land from him yet he occupies the land to date. He urged this court to cancel the title deed issued to the plaintiff and to order for the issuance of a fresh title deed in his name.

Shem Mutsami Mutali (DW2), confirmed that he authored the letter dated 7th August, 2001 (D. Exh. 5) on instruction from the D.C. He indicated that the defendant entered the relevant meeting but he could not remember whether he (defendant) brought the required documents. He (DW2) stated that he did not see the defendant at the land board meeting. He (DW2) denied that he colluded with the D.C. in destroying a title deed, a letter to the land board and a consent letter allegedly produced by the defendant. He confirmed that there was an agreement in which the defendant indicated that he was no longer interested in the suit land and wanted a refund of his money. He (DW2) indicated that a consent letter is normally not re-called unless an issue arises. He said that he could not remember attending a land board meeting in which the defendant was given a letter of consent.

From the pleadings and the evidence, the basic issue arising for determination is whether any valid sale agreement or any other agreement respecting the suit land exists or existed between the plaintiff and the defendant. The validity and existence of such agreement would be a crucial factor in determining whether or not the plaintiff is entitled to the orders sought in the plaint and also determine the standing of the defendant's counter-claim.

In his testimony, the plaintiff implied that the suit land was purchased jointly by himself and the defendant and that it initially comprised three (3) acres which was to be shared between them with the plaintiff getting one (1) acre and the defendant two (2) acres.

However, the implication given by the defendant was that he entered into a separate and distinct sale agreement with the original owner of the land for the purchase of two (2) acres. Accordingly, he paid the agreed purchase price and took possession of the suit land to await registration of the land in his name.

Apparently, the plaintiff did not dispute the said transaction between the defendant and the original owner of the land i.e. one Francis Tuwei, but indicated that the defendant later changed his mind and decided to surrender the two (2) acres to him (plaintiff) for a refund of his (defendant's) purchase price.

The plaintiff said that he accepted the arrangement and refunded the defendant's purchase price thereby paving way for him to obtain the title deed for the suit land. Indeed, a title deed for the suit land dated 17th January, 2002, was issued to the plaintiff (i.e. P. Exh. 6).

The defendant however, contended that the issuance of the title deed to the plaintiff was fraudulent and was aimed at depriving him of the ownership of the suit land being the actual purchaser thereof as depicted in the agreement said to be dated 19th November, 1999 (D. Exh. 1A) in which the plaintiff acknowledged the receipt of Ksh. 90,000/= from the defendant as deposit for two (2) acres in Maridadi plot No. 332 belonging to one Francis Bor. The outstanding balance of Ksh. 5,500/= was to be paid at a later stage. The agreement was signed by both the plaintiff and the defendant in the presence of one Maxwell Musekulovi.

Basically, the said agreement is the single most important document that the defendant relied on to lay

claim to the suit land against the plaintiff.

Although the agreement was strictly not a sale agreement between the defendant and the original owner of the land but rather an acknowledgement of receipt of the purchase price by the plaintiff, it showed that either the plaintiff was acting as an agent of the original owner of the land or he and the defendant were engaged in a transaction for sale of land which did not belong to any of them.

It may be assumed that the original owner of the land Francis Tuwei is the same person referred to as Francis Bor in the aforementioned agreement (D. Exh. 1A). Neither the plaintiff nor the defendant called him to testify. It is not therefore known whether or not he sold his land through the plaintiff and hence the receipt of the purchase price by the plaintiff from the defendant.

The witness to the agreement was also not called to testify to shed more light on the transaction.

It may therefore be said that there was no valid agreement between the defendant and the original owner of the land for the purchase of the suit land by the defendant. In the circumstances, the deposit received by the plaintiff from the defendant was fraudulently obtained by the plaintiff thereby rendering the “**agreement**” (D. Exh. 1A) a fraudulent transaction, null and void for any enforcement. It would thus follow that any other transactions that took effect on the basis of the invalid agreement were also null and void “*ab-initio*”. These included the alleged taking possession of the land by the defendant and the alleged surrender of the land to the plaintiff by the defendant upon refund of the purchase price to the defendant.

Other documents produced by the defendant to render credence to his claim over the suit land including the letter of consent dated 22nd March, 2001 (D. Exh. 2 a-b), the caution dated 25th May, 2004 (D. Exh. 3), the letter dated 27th May, 2004 (D. Exh. 4) and the letter from the D.C. Dated 7th August, 2001 (D. Exh. 5) were all irrelevant in the attempt to enforce the fraudulent transaction between the plaintiff and the defendant in relation to the portion of land referred to in the so-called sale agreement (D. Exh. 1A).

In sum, the defendant's claim to the suit land is not supported by cogent and credible evidence in as much as it was based on a fraudulent transaction between the defendant and the plaintiff which culminated in a fraudulent and invalid agreement (D. Exh. 1A).

The remedy available to the defendant against the plaintiff is in damages. Therefore, the counter-claim against the plaintiff is without merit.

With regard to the plaintiff's claim against the defendant, a valid sale agreement dated 3rd December, 1999 (P. Exh. 1) entered between the plaintiff and the original owner of the land establishes the purchase of the suit land by the plaintiff from the original owner, Francis Kiprotich Tuwei.

The agreement (P. Exh. 1) was a clear disclosure of the fraudulent nature of the earlier agreement entered between the plaintiff and the defendant (i.e. D. Exh. 1A). It showed that the plaintiff did not honestly deal with the defendant with regard to the suit land and ended up “double dealing” the defendant by offering a higher purchase price to the vendor who was a willing participant in the plaintiff's machinations.

Simply put, the defendant “conned” of the land by the plaintiff.

Be that as it may, the plaintiff with the support of the vendor successfully processed and obtained registration of the suit land in his name on the 17th January, 2002. This was a first registration as depicted in the title deed (P. Exh. 6).

Despite all the processing and obtaining of the title-deed by the plaintiff over a period of time, the suit land was already in the possession of the defendant by dint of his earlier fraudulent agreement with the plaintiff and from what has been stated hereinabove regarding that agreement (D. Exh. 1A) It would not be far fetched for this court to opine that the registration of the land in the name of the plaintiff was

achieved by misrepresentation of material facts to the land registrar on the part of the plaintiff. It is no wonder that the defendant contended that the plaintiff took advantage of his employment at the land registry to process for and obtained the title deed to the suit land.

A title deed obtained by fraud or misrepresentation may be cancelled as provided by section 80 of the Land Registration Act, 2012. The applicable provision under the repealed Registered Land Act (Cap 300 LOK) was section 143. It is the same Act under which the material title deed (P. Exh. 6) was issued in accordance with sub-section 27 and 28 which conferred an absolute and indefeasible right of ownership similar to the current sub-section 25 and 26 of the Land Registration Act, 2012.

However, under section 26 of the Land Registration Act, 2012, the person named as proprietor of land is the absolute and indefeasible owner subject to any encumbrances. Such person's title is not subject to challenge except on ground of fraud or misrepresentation to which the person is proved to be a party.

It has herein been established that the plaintiff has never been in actual possession of the suit land and that he was party to a fraudulent scheme which led to the land being registered in his name. It would therefore be fair and just for this court to decline to grant the prayers sought by him in the plaint and instead order that his title-deed (P. Exh. 6) be canceled forthwith in terms of section 80 of the Land Registration Act, 2012. the appropriate register may accordingly be rectified but the defendant who is in occupation of the land is at liberty to make a fresh application for the registration of the land in his name subject of course to the goodwill of the original owner i.e. Francis Kiprotich Tuwei also known as Francis Tuwei Bor or Francis Bor.

Otherwise, both the main suit and the counter-claim are dismissed. Each party to bear own costs.

[Delivered and signed this 23rd day of December, 2014.]

J.R. KARANJA.

JUDGE.