



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Environmental & Land Case 120 of 2010**

**STEPHEN MUSUNGU KOKONYA ..... PLAINTIFF**

**VERSUS**

**HENRY WAKABILI BARASA**

**NICODEMUS WAKABILI KUNINIKA**

**BENSON KHAEMBA MBAISI**

**CATHERINE NABANGALA MBAISI.....DEFENDANTS**

**JUDGMENT**

The plaintiff filed his claim seeking orders for cancellation of land title deed comprised in East Bukusu/N. Kanduyi 4744 and revert it to the previous registered owner and/or trustee Nicodemus Wakabili Kuninika – the 2<sup>nd</sup> defendant. His alternative prayer is for this court to make an order authorizing the Executive Officer of court to sign all relevant forms transferring 0.3 ha from title No. East Bukusu/N. Kanduyi 4744 to him. He also prayed for costs of the suit.

The 2<sup>nd</sup> defendant filed a statement of admission on 25<sup>th</sup> May 2011 admitting all the contents of the plaintiffs claim. He also entered/filed appearance. There was no appearance for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. An interlocutory judgment was entered in favor of the plaintiff as against the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants on 25<sup>th</sup> July 2011 and endorsed by the Deputy Registrar.

The plaintiff therefore set down his suit to hearing on a formal proof. There are two affidavits of service filed in court. One dated 22<sup>nd</sup> November 2010 filed by Winslaus Mureya who served the 4<sup>th</sup> and 3<sup>rd</sup> defendant in Nairobi at their place of work and the second dated 3<sup>rd</sup> May 2011 served in the 1<sup>st</sup> defendant.

During the hearing, the plaintiff adduced evidence that he bought the portion measuring 0.3 ha of land from title E. Bukusu/N. Kanduyi/4744 from the 1<sup>st</sup> defendant and witnessed by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant was/is the administrator of the land belonging to the Wakabili's.

He produced a sale agreement in support of his case. He states that he began the process of sub-division and obtained consent to sub-divide produced as exhibit 2 and drawn mutation forms exhibit 3. The 2<sup>nd</sup> defendant also signed transfer forms in their favour. When he visited the lands office, he discovered the land had been transferred to the names of the 3<sup>rd</sup> & 4<sup>th</sup> defendants. The plaintiff produced a search marked as exhibit 4 to confirm this position. His further evidence is that he tried to persuade the 3<sup>rd</sup> & 4<sup>th</sup> defendant to surrender the title to enable him get his title but they failed thus necessitating this suit. His prayer therefore is for cancellation of the title to enable him get his portion he had bought.

The sale agreement produced as exhibit 1 was entered into on 7<sup>th</sup> May 2008 while the 3<sup>rd</sup> & 4<sup>th</sup> defendants got registered as proprietors on 2<sup>nd</sup> February 2009.

Consent to subdivide is also dated 13<sup>th</sup> January 2009 prior to the 3<sup>rd</sup> & 4<sup>th</sup> defendants being registered. In the case of Job Muriithi Waweru vs. Patrick Mbatia (appl. No. 32 of 2007 high court at Nyeri) e KLR,

Justice Makhandia quoted section 159 and 143 of the Registered Land Act (*repealed*). In section 143 which is equivalent to Sec. 80 of the Land Registration Act he held that the title cannot be cancelled/rectified for so long as the registered proprietor was not party to the omission, fraud or mistake in consequence of which the rectification is sought. In that case, the respondent did not cause the omission, fraud or mistake or subsequently contributed to it by his act, neglect or default. In paragraph 6 of the plaint, the plaintiff pleaded that the land transfer was done secretly and discreetly in collaboration and/or connivance of the defendants jointly and severally. It is clear to this court that order the 4<sup>th</sup> & 3<sup>rd</sup> defendants be cancelled and the register be rectified to read the 2<sup>nd</sup> defendant's name to enable the plaintiff get a title to a portion of the suit land he bought. The defendants are thus be served with this decree. If 30 days service of the order upon the 3<sup>rd</sup> & 4<sup>th</sup> defendants they fail to surrender their title for cancellation, the Registrar is hereby ordered to cancel it and rectify register in respect of E. Bukusu/N. Kanduyi/4744 to read the names of Nickodemus Wakabili Kuninika. Thereafter admission filed by the 2<sup>nd</sup> defendant confirms the statement in paragraph 6 of the plaint. The 3<sup>rd</sup> & 4<sup>th</sup> defendants in spite of being served with the pleadings chose not to defend it. At the time of transfer of title to 3<sup>rd</sup> & 4<sup>th</sup> defendants, the 2<sup>nd</sup> defendant knew he was doing a mistake. He had already obtained consent to subdivide the land and signed the transfer in favour of the plaintiff. This court finds the 2<sup>nd</sup> defendant guilty of fraud/mistake in transferring the land to 3<sup>rd</sup> & 4<sup>th</sup> defendant and he has admitted as much. I do allow the plaintiff to proceed and register the mutations. If he fails to obtain signature of the 2<sup>nd</sup> defendant where required, the Executive Officer shall then sign those documents that will facilitate him attain the title for portion of the suit land measuring 0.3 ha.

I make no order as to costs as the suit was undefended.

**JUDGMENT DATED, SIGNED, READ and DELIVERED** in open court this 12<sup>th</sup> day of March 2013.

**A. OMOLLO**

**JUDGE**