



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 121 OF 2009**

**BERNARD OTIENO OKOTH (Suing as the Administrator to the Estate of  
ELIZABETH AUMA AGUNDA Deceased).....PLAINTIFF**

**=VERSUS=**

**RIYAZ ABDULKARIM PASTA.....1<sup>ST</sup> DEFENDANT**  
**NAJIMUNISA RIYAZ PASTA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By way of Plaint dated 26<sup>th</sup> April 2009 the Plaintiff herein seeks the following orders:

***“(a) Nullification and cancellation of the Title Deeds issued to the Defendants in respect of parcels of land known as subdivision No. 2849 (original No. 2846/4) of section IV Mainland North, C.R.4/059/1 and more particularly delineated on Deed plan No. 99401 AND parcel of land known as subdivision Number 2850 (Original Number 2846/5) of Section IV Mainland North C.R. 41060/1 and Deed Plan No. 99402.***

***(b) Mandatory injunction do issue to the defendants from interfering [sic], selling, alienating or dealing with the parcels of land known as subdivision No. 2846 currently known as subdivision Nos. 2847 and 2854 (original No. 1058 and 1067) CR. no. 15040 delineated on survey No. 99307 which the Plaintiff is occupying and forms part of plot known as subdivision No. 2849 (original No. 2846(4) of section VI Mainland North C.R. 41059/1 and more particularly delineated on Deed Plan No. 99401 AND parcel of land known as subdivision No. 2850 (original number 2846/5 of section VI Mainland North C.R. 41060/1 and deed plan no. 99402.***

***(c) Costs and interests of the suit.”***

The dispute revolves around a parcel of land known as subdivision no. 2846, currently known as subdivision no. 2847 and 2854 (original number 1058 and 1067) C.R. no. 15040 and delineated on survey nos. 99307 (hereinafter referred to as the ‘**suit land**’). The Plaintiff is the legal representative of the estate of the late **Elizabeth Auma Agunda** (hereinafter referred to as ‘**the deceased**’) by virtue of a Certificate of Confirmation of Grant issued by the High Court in Mombasa dated 25<sup>th</sup> June 2009. The Plaintiff claims that following the judgment of **Honourable Justice Onyancha** in **Miscellaneous Civil Application No. 188 (O.S.) of 1995** the deceased Elizabeth Agunda and one Duncan Mutema Njeru were ordered to be registered as proprietors in common of the suit land.

On his part the 1<sup>st</sup> Defendant avers that he entered into an agreement for sale with the said Duncan Njeru

for the suit land on 22<sup>nd</sup> July 2006 and having paid in full the purchase price of Kshs.4.0 million the said Duncan Njeru executed a transfer in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on 20<sup>th</sup> November 2006. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant now claim that the suit land belongs to them and have been registered as the owners therefore pursuant to the transfer. They have however been unable to obtain vacant possession as the Plaintiff still resides thereon.

The parties both gave oral evidence before the court. It transpired that on the basis of a forged court order purportedly issued by **Hon. Justice John Mwera** dated 6<sup>th</sup> November 2006, the orders of Hon. Justice Onyancha granting proprietorship over the suit land to the deceased and Duncan Njeru was reviewed and it was varied to read that **Duncan Njeru alone** was to be registered as proprietor of the suit land. It is in this way that the said Duncan Njeru was able to transfer ownership of the suit land to the Defendants.

There can be no doubt that the Plaintiff is the legal representative of the estate of the deceased by virtue of holding a Confirmation of Grant made out in his favour. Equally there is no doubt that on 20<sup>th</sup> March 2003 Hon. Justice Onyancha did make orders granting ownership of the suit land to the deceased and Duncan Njeru as proprietors in common.

However as things currently stand the Defendants are the registered owners of the suit land pursuant to the transfer in their favour executed by Duncan Njeru. The Plaintiff in his evidence concedes that upon conducting a search at the lands Registry he realized that the two Defendants are now registered as the proprietors of the suit land. This fact is evidenced by the Certificate of Title **Dexb4** where said transfer appears as entry No. 2 as well as by the Certificate of Postal Search dated 20<sup>th</sup> July 2009 which lists the two Defendants as the proprietors. This is what the Plaintiff now seeks to have nullified.

The fact that the Defendants purchased the suit land from Duncan Njeru is proved by the Agreement for Sale dated 21<sup>st</sup> July 2006 **Pexb1** copies of receipts for the payment of the purchase price of Kshs.4.0 million **Dexb2** and the transfer dated 20<sup>th</sup> November 2006 in favour of the Defendants **Dexb3**. On 20<sup>th</sup> March 2003 Hon. Justice Onyancha vested Title to the suit land in the said Duncan Njeru and the deceased Elizabeth Agunda. How then did Duncan Njeru manage to sell and transfer the suit land on his own without the knowledge of the Plaintiff the legal representative to the deceased's estate? The answer lies in the Court Order dated 6<sup>th</sup> November 2006 reviewing the orders of Justice Onyancha and vesting Title fully in Duncan Njeru alone. However this court order has been proved to be a forgery. **PW2 Hon. Kiplagat Kirui** a Deputy Registrar attached to the High Court Civil Division at Mombasa Law Courts, testified that this court order of 6<sup>th</sup> November 2006 does not appear in the court records and is **not** a genuine Court Order. The question then is whether the Defendants perpetrated, participated in or were aware of this fraud. No evidence has been adduced to show that the Defendants were in any way parties to this fraud. The direct beneficiary of the fraud was the said Duncan Njeru as it enabled him to sell and transfer the suit land fraudulently and pocket a cool Kshs.4.0 million for himself.

It is trite law that where title to a parcel of land is obtained by way of fraud or misrepresentation, then such title is invalid and cannot form the basis for any future transaction. In this instant the seller who purported to transfer title to the Defendants himself acquired title by way of a fraud – using a forged court order. As such his title cannot be upheld as valid. The title purportedly held by Duncan Njeru was invalid and therefore void. He could not transfer that which he did not legally hold. As such the purported transfer of Title by Duncan Njeru to the Defendants is equally invalid and void. As per the orders of Justice Onyancha title to the suit land remains vested in the deceased (or her legal representative) and Duncan Njeru. It is only the two who can transfer valid title to a third party.

I have considered the submissions of counsel for the Defendants that by 20<sup>th</sup> March 2003 when Justice Onyancha had delivered his judgement it was one year **after** the death of Elizabeth Agunda (which occurred on 6<sup>th</sup> September 1998) and by operation of O 24 r 2, the deceased's cause of action had abated. This is more particularly in view of the fact that no application was made by the Plaintiff as the legal representative of the deceased to take over the suit on behalf of the deceased. If Duncan Njeru had simply relied on operation of law to transfer title to himself and to sell the property, then such an

argument may have merit. However it is clear that a fraud was perpetrated in order to have title transferred to Njeru. This court cannot condone or uphold such a fraud. Therefore notwithstanding the fact that the Defendants have not been shown to have participated in this fraud, they cannot benefit from the same.

The Defendants cannot be said to have been unaware of any third party claim to the suit land. The 1<sup>st</sup> Defendant told the court that when he visited the suit land he was denied access by a woman who lived there (presumably the deceased) and who had put up mabati sheets to fence the area. The 1<sup>st</sup> Defendant goes on to lament that:

***“My lawyer Mr. Sachdeva set me up. He was not supposed to pay the lawyer for Duncan until the property is vacant. Then he paid over the money before the property was vacant. My lawyer ought not to have done this. He promised to sort out the matter but he has not done it until now ....”***

Clearly the 1<sup>st</sup> Defendant blames his lawyer for the predicament in which he finds himself.

Based on the foregoing I conclude that Duncan Njeru having acquired sole proprietorship of the suit land by way of fraud, did not hold good title to the same and was therefore incapable of passing on good title to any third party. As such the Plaintiff's suit succeeds and I do allow prayers (a) and (b) of this Plaintiff. Each party to pay their own cost.

**Dated and Delivered in Mombasa this 30<sup>th</sup> day of November 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Okanga for Plaintiff

Mr. Khatib holding brief for Mr. Munyithya