



Birongo Farmers Cooperative Society Limited v Ongwacho & 4 others (Environment & Land Case 68 of 2016) [2023] KEELC 15975 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 68 OF 2016**

M SILA, J

MARCH 8, 2023

BETWEEN

BIRONGO FARMERS COOPERATIVE SOCIETY LIMITED PLAINTIFF

AND

ABEL MORANG'A ONGWACHO 1ST DEFENDANT

PATRICK MOKAYA NYANGWESO 2ND DEFENDANT

JAMES MAKORI KIBAGENDI 3RD DEFENDANT

ANNAH NYAKERARIO OTWOMA 4TH DEFENDANT

THE LAND REGISTRAR, KISII COUNTY 5TH DEFENDANT

JUDGMENT

(Plaintiff being a society owning land; the suit land transferred to the 1st defendant by the 2nd – 4th defendants who purported to be officials of the Society; evidence presented being that the 2nd – 4th defendants are not the officials of the Society; documents used to transfer the title being forgeries; purported minutes claimed to be for the Society affirmed not to be of any of the meetings of the Society; the KRA PIN used not being a number recognized by KRA; the Director of Registration of Persons indicating that the Identity Card numbers used do not belong to the names of the 2nd – 4th defendants; the Certificate of Registration purporting to be of the plaintiff used in the transfer not being the plaintiff's registration certificate; land sold at 10% of the value; clear that the suit land was sold through fraudulent means; 1st defendant cannot qualify to be an innocent purchaser for value as due diligence would have revealed that the sale was fictitious; title of the 1st defendant cancelled and order made that registration do revert back to the plaintiff)



A. Introduction And Pleadings

1. This suit was commenced through a plaint filed on 11 March 2016. The plaintiff has pleaded that she is the proprietor of the land parcel Central Kitutu/Daraja Mbili/66. The said land is currently registered in name of the 1st defendant. The plaintiff contends that she has never sold this land nor transferred her title to the 1st defendant. It is pleaded that on 26 January 2016, the plaintiff noticed strange cheque deposits amounting to Kshs. 2,000,000/= into her account and on inquiry, was informed that they were deposits for the sale of the suit land. She pleads that the suit land is worth Kshs. 100,000,000/= and she could not have sold it at 2% of the value. She has pleaded that the 1st defendant recruited the 2nd, 3rd and 4th defendants into a corrupt scheme to make them present themselves as officials of the plaintiff and caused the 5th defendant to gazette the title as lost when it was not. It is claimed that they thus procured a parallel title to be issued and used it to transfer title to the 1st defendant. The plaintiff pleads that the 2nd, 3rd and 4th defendants were not her officials and not authorized to transact over her land. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-
 - (a) A declaration that the plaintiff is the rightful owner of land parcel Central Kitutu/Daraja Mbili/66.
 - (b) An order for the reversion and cancellation of the transfer and registration of the title Central Kitutu/Daraja Mbili/66 in the name of the 1st defendant.
 - (c) In the alternative, and without prejudice to the above, damages for the true value of the land parcel Central Kitutu/Daraja Mbili/66.
 - (d) Permanent injunction to restrain the defendants from trespassing or dealing with the parcel Central Kitutu/Daraja Mbili/66.
 - (e) A declaration that the 1st defendant is holding the title to Central Kitutu/Daraja Mbili/66 in trust for the plaintiff.
 - (f) Such other or further relief deemed fit to grant.
 - (g) Costs of the suit.
2. The 1st defendant filed defence and asserted to be the rightful proprietor of the suit land. He pleaded that he purchased the land on a willing seller-willing buyer basis. He denied all particulars of fraud. He pleaded that the institution of this suit is fraudulent and irregular, committed by one Silver Nyangoka Ongeri. It is claimed inter alia that he is purporting to act as Chairman of the plaintiff and has presented documents without the permission of the plaintiff.
3. The 2nd, 3rd and 4th defendants were served through advertisement in the newspaper as it was said that they could not be traced. They appointed counsel, M/s Mogire & Company Advocates, and raised a preliminary objection that the suit has abated for failure to serve summons within time. The preliminary objection was dismissed in a ruling delivered on 8 March 2019. I have not seen any statement of defence filed by them nor did they participate in the suit from that time.

B. Evidence of the Parties

(i) Plaintiff's evidence

4. PW-1 was Kennedy Mokuwa Ongiri, the Manager of the plaintiff which is a Farmers Cooperative Society (FCS) Limited. He testified that Birongo FCS Limited was registered in the year 1959. In October



1976, the Society purchased the suit land from one Dr. Gekonde and was issued with a title deed. She never sold the land to anyone and used the land to grow maize. He testified that in the year 2015, some people came to the land claiming to have purchased it. They did a search and discovered that the land was now registered in name of one Peter Aoga Angwenyi. They complained to the police and the Land Registrar, and the latter cancelled this registration of Mr. Angwenyi and restored the property to the name of the plaintiff. On 25 January 2016, on a visit to the bank, they discovered a sum of Kshs. 2,000,000/= deposited into the plaintiff's account. They were not aware of this deposit and on inquiry, they were informed that the money was deposited through three banker's cheques. The person who deposited the money was the 4th defendant and they were advised that it was deposit for purchase of the suit land. He said that the 4th defendant is unknown to them and the plaintiff had not sold the land. They checked with the Lands office and discovered that title had been transferred to the 1st defendant. They obtained copies of the documents used to transfer the land including the transfer instrument, and the Kenya Revenue Authority (KRA) Personal Identification Number (PIN). He testified that the PIN used is not that of the plaintiff and he had a letter from KRA to verify this. He also faulted the certificate of registration used to effect transfer as it showed the plaintiff as a business name which it is not. They reported to the Criminal Investigations Department (CID) and the defendants were arrested and charged with forgery. He had a valuation report of the property showing that it is valued at Kshs. 30,000,000/=.

5. Cross-examined, he stated that he was employed as a Manager in the year 2002. He is the custodian of the records of the Society. He mentioned the officials of the society to be Silver Nyangoka Ongeru as Chairman, the Secretary one Omwenga, and the Treasurer, one Josephine Makori. Mr. Ongeru was appointed Chairman on 15 September 2014. He asserted that at no time did the plaintiff pass a resolution to sell the suit land and insisted that any minutes to that effect are fraudulent. He testified that the Society never offered the property for sale nor invited any bids for its purchase and that any invitation for bids was fraudulent. He stated that the 2nd, 3rd and 4th defendants are not members of the Society and hold no office in the Society. He was not aware of any divisions in the management of the Society. He testified that he is the one who issues notices of meetings and that signatories to the accounts are the Chairman, Treasurer and himself as Manager. He stated that the Society still holds its original title deed. He added that the defendants manipulated minutes of the Society with an object to defraud her of the land.
6. PW-2 was Silver Nyaboe Nyangoka Ongeru. He testified that he has been Chairman of the Society since the year 2014. He referred to minutes said to be of the Society for a meeting allegedly held on 18 November 2015 and other minutes which he described as false. He refuted the sale agreement dated 24 December 2015, which is the purported sale agreement that sold the land to the 1st defendant. He claimed that the persons named therein as selling the land on behalf of the plaintiff were fictitious. He had a letter dated 24 April 2017 from the Registrar of Persons, advising that the Identity Cards in the sale agreement are for other people and does not tally with the names indicated therein. He testified that what was used to transfer the property was a Certificate of Business Name dated 14 May 1958 yet what the plaintiff holds as its Registration Certificate is one issued under the Cooperative *Societies Act*, dated 21 July 1959. He added that a fake KRA PIN purporting to be of the plaintiff was used and referred to the letter from KRA stating that they do not have any PIN number P051931076Z which was the PIN number said to be of the plaintiff in the transfer. He referred to what he stated was the proper PIN of the plaintiff. He testified that the 1st defendant placed an advertisement in the Kenya Gazette that the Society has lost its original title deed yet the Society has possession of it. He testified that the rubber stamp used was also not of the Society and referred to what he stated was the genuine rubber stamp. He testified that the Society had not entered into any transaction to warrant transfer of the sum of Kshs. 2,000,000/= into her accounts. The cheques were deposited by one Anna Nyakerario



- Otwoma and he stated that he does not know such a person and further referred to the letter of the Registrar of Persons to assert that this person does not exist. The money is still in their account. He also referred to a list of names purportedly given by the Ministry of Industrialization and Enterprise Development as the list of the plaintiff's officials which he stated lists the false officials. He pointed to a letter from the District Cooperative Officer which he stated indicates the correct officials. He was aware that the 1st defendant was charged with a criminal offence, but the others were not as they disappeared.
7. PW-3 was Steve Mokaya, the Land Registrar, Kisii. He testified that the plaintiff became registered as proprietor of the suit land in the year 1976. On 30 December 2015, the suit land was transferred to the 1st defendant and title issued. He outlined various anomalies regarding this transfer. He pointed out that the letter of consent to transfer was fake as it was signed by the D.C Kisii Central instead of the D.C Kitutu Central; that the letter from the Cooperatives Department was issued from the office in Nyamira instead of the office in Kisii; that what was used for the transfer was a Certificate of Business Name and not the Certificate issued under the *Societies Act*. He was of opinion that the 1st defendant irregularly got registered as proprietor of the suit land. He observed that there was a record of gazettelement of the title said to be lost which gazettelement was done in name of Birongo Farmers' Cooperative Society without the word 'limited'. Cross-examined, he stated that their register shows that the plaintiff was registered under entry No.4. Entry No. 6 shows proprietorship in name of Paul Gwaro Nyakundi; entry No. 8 proprietorship of one Charles Ooga Angwenyi; then proprietorship of the 1st defendant. He testified that the Land Registrar cancelled these entries as fraudulent, meaning that the title reverted back to the plaintiff. In his view, the Land Registrar has power to rectify the register where there is fraud. On the transfer to the 1st defendant, he stated that there was gazettelement that the original title was lost; that a transfer instrument was prepared and stamp duty was paid. He testified that in respect of Cooperative Societies, clearance is usually obtained from the Cooperatives Commissioner and there was one given in this instance. In re-examination, he stated that the Land Registrar only receives documents and cannot guarantee their authenticity. He clarified that the current status is that the title is in name of the 1st defendant who was issued with title on 30 December 2015.
 8. PW-4 was Corporal John Kinyua Kamoche from the DCI office, Kisii. His evidence was that the plaintiff through its Chairman and other officials made a report that their parcel of land has changed proprietorship. He investigated the names of the persons said to have sold the land and got a report from the Registrar of Persons that the Identity Cards given differ from the names in their records. He added that some of the documents used for the transfer do not contain the word 'Limited' and a Certificate of Business Name was used. He continued that the officials of the Society who made the report had the original title deed despite there being a Gazette Notice that title is lost. He also received rubberstamp impressions and handwriting signatures in various minutes purporting to be of the Society which he subjected to a handwriting expert. The result was that these were not written by the officials of the Society. He also got the KRA PIN, used to transact, which was not of the plaintiff. He testified that two people were charged with criminal offences, of forgery of documents and making documents without authority. Those charged are the plaintiff and one Felix Onsare Mokaya.
 9. With the above evidence, the plaintiff closed his case.

(ii) Defendants' evidence

10. DW-1 was the 1st defendant. He testified that the 2nd, 3rd and 4th defendants approached him and informed him that they were selling the suit land. They were brought to him by a land broker called Mokaya. They informed him that they were officials from the plaintiff Society. He sent them to his Advocate to verify and the information he got from his advocate was that they are the true officials of



the Society. His advocate handled the transaction on his behalf. He testified that he is not the one who gave instructions for gazettment of the title as lost. He negotiated the purchase price and agreed at Kshs. 3,000,000/= . He paid Kshs. 1,000,000/= in cash and the balance of Kshs. 2,000,000/= through three bankers' cheques, which were deposited in the Society account, which account was given to him by the 2nd – 4th defendants. He denied being involved in any fraud and believed that the persons he dealt with were genuine. He asserted that the transaction was valid and that the land is now properly registered in his name as proprietor.

11. Cross-examined, he testified that Mr. Mokaya, the alleged land broker, did not show him any letter of authority from the plaintiff. The sellers came with the original title deed which is what was used to transfer the land to him. He did not know that the title emanated from a Gazette notice. He could not identify the persons in the transfer form as the 2nd – 4th defendants. He was not aware that the ID card numbers indicated therein belonged to other people. He did not know that the plaintiff is not registered under a Business Name but under the *Societies Act*. He testified that the PIN Certificate used is what his advocate presented and was not aware that it is not the genuine PIN Certificate of the plaintiff. He did not go to the Land Control Board as it was his advocate who went. He did not go to the office of the plaintiff to verify the transaction. He stated that minutes authorizing the sale were forwarded to his advocate and stated that he does not know how Societies hold meetings. He acknowledged that he is facing criminal charges. He distanced himself from the preparation of the documents used to transfer the land to him, his evidence being that they were presented to him by the sellers. He stated that if there were any defects, this would not be his fault, his role being to pay the purchase price.
12. With this evidence, the 1st defendant closed his case.
13. Neither the 2nd, 3rd and 4th defendants appeared at any of the hearings of the case and neither did their counsel. Their case was closed without any evidence being presented on their behalf. I invited counsel to file submissions, and I have seen the submissions of counsel for the plaintiff and counsel for the 1st defendant. No submissions were filed by counsel for the 2nd, 3rd and 4th defendants. I have taken into account these submissions before arriving at my decision.

C. Disposition

14. What is in issue is the proprietorship of the land parcel Central Kitutu/Daraja Mbili/66. This land was previously registered in the name of the plaintiff before a transfer to the 1st defendant was effected on 30 December 2015 and the 1st defendant issued with title. It is the position of the plaintiff that she never sold the suit land to the 1st defendant and therefore his title needs to be cancelled. The 1st defendant on his part asserts that he purchased the suit land above board after persons who introduced themselves as officials of the plaintiff sold the same to him. He has stated that he was approached by persons who held themselves out as being officials of the plaintiff and he dealt with them in good faith.
15. Well, from the evidence, it is apparent that the 2nd, 3rd and 4th defendants could not have been officials of the plaintiff and they could not have had authority to transact on behalf of the plaintiff. The 1st defendant relies on a letter dated 17 March 2015 allegedly from the Ministry of Cooperative Development which claims that the 2nd, 3rd and 4th defendants were officials of the Society and their ID cards are indicated. It has turned out that these ID card numbers are of other people not bearing names that are similar to those named as the 2nd, 3rd and 4th defendants. This is apparent from the letter dated 25 April 2017 from the Director of National Registration. The 1st defendant has not presented copies of the ID cards of the people that he transacted with and that alone informs you that he was dealing with fraudsters. These people cannot be said to be officials of the plaintiff. The plaintiff herself has stated



that these are not her officials and this is buttressed by the letter from the Sub-County Cooperatives Officer dated 29 October 2015. It provides that the following were her officials:- Silver Nyangoka, Chairman; Benson Omwega, Hon. Secretary; Mrs. Josephine Maikuri, Treasurer; and Kennedy Ongiri as Society Secretary Manager. There are also Harron Onsarigo, Joyce Onkwani and Johnson Ogutu Kebaki as Committee Members. None of the 2nd, 3rd or 4th defendants feature here.

16. It is obvious that the 2nd, 3rd and 4th defendants proceeded to manufacture minutes alleging that the Society has decided to sell the suit land which could not be the case. PW-1 the Manager of the Society was categorical that these are not minutes of the Society. In those minutes, the 2nd, 3rd, and 4th defendants of course held themselves out to be officials of the plaintiff and purported to pass a resolution for the sale of the suit land. Such fake minutes, not being minutes of the Society, are incapable of binding the Society.
17. Moreover, the documentation used in transacting the land is dubious. First, the fraudsters had to have a Certificate of Title and they proceeded to gazette that the certificate of title of the suit land is lost. This they did through the Gazette Notice No. 5245 of 17 July 2015. That Gazette Notice states that Birongo Farmers' Co-operative Society have reported that their title is lost. The plaintiff has pointed out that the word 'limited' is missing from this notice. That is significant for one would not know whether the entity complaining is the plaintiff or whether there is other entity which is not a limited liability company. Whatever the case, the original title deed was always in the hands of the officials of the plaintiff and was not lost. This was certainly an attempt to procure a parallel title for purposes of transacting. It is common knowledge that for transfer to be effected, one needs to present the PIN Certificate of both buyer and seller and if one of the parties is a juristic person, then the Certificate of incorporation needs to be given. In our instance, the PIN Certificate that was used is not of the plaintiff. There is the letter from Kenya Revenue Authority attesting to this which affirms that there is no record of the PIN number used to transact. The plaintiff produced her genuine PIN Certificate which is not that which was used to transfer title to the 1st defendant. In addition, the Certificate of Registration used to transfer title was not that of the plaintiff. What was used was a business name which is not the certificate of registration held by the plaintiff. Finally, the transfer form was executed by persons who had no capacity to bind the plaintiff. If at all these were genuine officials of the plaintiff, you would expect them to be bold enough to come to court and present their case. If indeed they were authorized to sell the land on behalf of the plaintiff, they would have no shyness in coming to court. Their total absence from this case is telling in itself.
18. The long and short of it is that the purported sale of the suit land to the 1st defendant was fraudulent. There was clear fraud on the part of the 2nd, 3rd and 4th defendants. It is claimed that the 1st defendant is an innocent purchaser for value. I am not persuaded. He had capacity to verify who the correct officials of the plaintiff were. He could have gone to the office of the plaintiff to confirm the purported minutes that were presented to him. He could have asked for copies of the identity cards of the people he was dealing with. Even the selling price itself ought to have put any reasonable person into suspicion. The land was valued at about Kshs. 30,000,000/= yet the purchase price was about 10% of its value. Who sells land at 10% of the value? In addition, there was the alleged payment in cash to the purported officials of the plaintiff. The plaintiff was a Society and not an individual. How could it accept payment in cash? There were very many red flags which ought to have put the 1st defendant into suspicion and inquiry. In fact, simple due diligence would have informed him that the plaintiff is not selling the land and that he is dealing with conmen. He cannot thus plead to be an innocent purchaser for value.



19. Section 26 of the *Land Registration Act*, does not offer protection to title that is acquired through fraud, misrepresentation or via a corrupt scheme. Neither does it offer protection to title procured irregularly and/or illegally. That section is drawn as follows:-

26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- c) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

20. The title herein was certainly procured through a fraud committed by the 2nd, 3rd and 4th defendants. The 1st defendant is therefore holding a title that was acquired illegally, unprocedurally or through a corrupt scheme. His title is thus impeachable under the provisions of section 26 (1) (b) and is liable to be cancelled.

21. I proceed to order the cancellation of the title of the 1st defendant. I direct the Land Registrar, Kisii, to cancel the entry in the register indicating that the 1st defendant is proprietor. The register should reflect that the rightful proprietor of the suit land is the plaintiff. The 1st defendant is also permanently restrained from being upon, entering, or dealing with the suit land. The result is that the plaintiff's case succeeds. The defendants will shoulder the costs of the suit jointly and/or severally.

22. Before I close, I am alive to the fact that there is Kshs. 2,000,000/= in the plaintiff's account which was deposited by the 1st defendant. This will need to be returned to the 1st defendant. The plaintiff is at liberty to deduct its taxed costs from this amount and return whatever balance will be left to the 1st defendant.

23. Judgment accordingly.

DATED AND DELIVERED THIS 8 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

