



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 2 OF 2021

{Formerly in the Environment & Land Court at Kisii Case No. 4 of 2021}

JUSTRY P. LUMUMBA NYABERI..... PLAINTIFF

=VERSUS=

DICKSON MAINYE MAKORI.....1ST DEFENDANT

LAND REGISTRAR, NYAMIRA COUNTY.....2ND DEFENDANT

OBADIAH KEMARI KINARI.....3RD DEFENDANT

HASSAN MAYIGA KIAGE.....4TH DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated 3/2/21 in which the Plaintiff sought for Judgment for the following orders: -

- (a) Specific performance of the said agreement.
- (b) Further or alternatively, damages for breach of the said agreement.
- (c) An order that the registers of property, known as **EKERUBO SETTLEMENT SCHEME/312** be cancelled and the original title be reverted to in the names of the 1st Defendant.
- (d) In the alternative, the name of the 1st Defendant in the register be removed and instead the Plaintiff's name be inserted.
- (e) A declaration that he is entitled to a lien on the said property in respect of any damages and costs.
- (f) Costs of this suit.
- (g) Any other relief the court deems fit to grant.

It is the Plaintiff's case that pursuant to an agreement dated 24/6/15 the 1st Defendant Dickson Mainye Makori entered into an agreement with the Plaintiff to sell to him the property known as **EKERUBO SETTLEMENT SCHEME/312** together with all the improvements thereon measuring 3.975 Hectares out of **EKERUBO SETTLEMENT SCHEME/286** the latter measuring 4.8 Hectares with all the improvements thereon situate at Nyamira County at the consideration of Kshs. 8,446, 875/=. The sum of Kshs. 1, 500, 000/= was transferred to the 1st Defendant's Bank Account and both parties applied to Borabu Control Board for consent to sub-divide which consent was given on 24th June 2015 and after this consent was obtained on 15/7/2015 consent was obtained to transfer **EKERUBO SETTLEMENT SCHEME/312** to the Plaintiff and when all the transfer documents were ready the Plaintiff went to Nyamira Lands Office to establish that the land was still intact to enable him lodge the transfer documents so that he could transfer the balance of the purchase price of Kshs. 6,946,875/= only to find out that the suit land had been resub-divided and transferred to the 3rd and 4th Defendants respectively. By this time the Plaintiff already had the original Tile Deed to the entire suit land **EKERUBO SETTLEMENT SCHEME/286** which the Plaintiff pleaded that it could have been done fraudulently with the collusion of all the Defendants since he had the original Tile documents. The Plaintiff therefore requests this Honourable Court to give him judgment for Specific Performance of the agreement dated 24th June 2015.

After the filling of this suit and the issuance of the summons by this court, both the 1st and 2nd Defendants were served with summons to enter appearance in the usual conventional way of personal service. The 3rd and 4th Defendants could not be traced for service and on

21/10/21 the Plaintiff was granted leave to serve the said Defendants with summons to enter appearance by way of substituted service through the *Daily Nation* Newspaper which was effected in the *Daily Nation* issue of Monday, 8/10/21 and an Affidavit of service filed in court on 10/11/21. Judgment in default of appearance was then entered on 9/12/21 and on 25/1/22 the matter proceeded to full hearing.

During the hearing, the Plaintiff adopted his written statement dated 8/2/21. He also added that he had called the 1st Defendant severally to find out why he failed to transfer the suit land to him and did in fact transfer the said land to other people. These calls fell on deaf ears. While adducing sworn evidence in court, the Plaintiff said that he was all along ready, able and willing to pay the balance of the purchase price. He added that the documents of Title and transfer documents were handed over to him by the 1st Defendant immediately consent was given by the Borabu Land Control Board in his favour. The transfer forms were duly executed in his favour. But when he went to have the suit transferred to him he realized that what he had contracted for i.e. parcel No. **EKERUBO SETTLEMENT SCHEME/312** had been closed and in its place were now **EKERUBO SETTLEMENT SCHEME/317** in the name of the 3rd Defendant Obadiah Kemari Kinari, **EKERUBO SETTLEMENT SCHEME/318** in the name of Hassan Mayiga Kiage, the 4th Defendant and **EKERUBO SETTLEMENT SCHEME/319** measuring 0.702 Hectares in the name of the 1st Defendant, Dickson Mainye Makori. The Plaintiff was not told by the Land Registrar the acreage allocated to **EKERUBO SETTLEMENT SCHEME/317** and **EKERUBO SETTLEMENT SCHEME 318** respectively. After this discovery the plaintiff has unsuccessfully tried to call the 1st Defendant who has adamantly refused to pick his calls hence the institution of this suit. In support of this case, the Plaintiff produced in court the following documents:

1. Plaintiff's letter to the 1st Defendant dated 19/8/15.
2. Copy of cheque dated 19/4/15 No. 000656 payable to the 1st Defendant.
3. Certificate of official search dated 24/6/15 in respect of **EKERUBO SETTLEMENT/286**.
4. Original Title Deed in respect of **EKERUBO SETTLEMENT SCHEME/286**.
5. Copy of PIN Certificate in respect of the 1st Defendant.
6. Letter of consent in respect of sub-division of **EKERUBO SETTLEMENT SCHEME/286** dated 24/06/15.
7. Letter of consent in respect of transfer of **EKERUBO SETTLEMENT SCHEME/312** dated 15/7/2015.
8. Demand letter dated 4/9/20.
9. Mutation form dated 10/6/15.
10. Original Sale Agreement dated 24/6/15.

In the Mutation Form dated 19/06/2015, the parcel of land known as **EKERUBO SETTLEMENT SCHEME/286** measuring 4.8 Hectares was sub-divided into 3 to produce **EKERUBO SETTLEMENT SCHEME/311** measuring 0.548 Hectares, **EKERUBO SETTLEMENT SCHEME/312** measuring 3.975 Hectares and **EKERUBO SETTLEMENT SCHEME/313** measuring 0.127 Hectares. The 1st Defendant was to transfer to the Plaintiff **EKERUBO SETTLEMENT SCHEME/312** measuring 3.975 Hectares. The Plaintiff's interest was limited to **EKERUBO SETTLEMENT SCHEME/312** measuring 3.975 Hectares and all the improvements thereon. Mr Nyaberi said that he was not shown the latter documents relating to the suit land in the lands office. Although the 2nd Defendant did not enter appearance to the suit despite having been served with summons to do so, I summoned him to court so that he could shed light as to how his office allowed the sub-divisions of **EKERUBO SETTLEMENT SCHEME/286** into **EKERUBO SETTLEMENT SCHEME/317**, **EKERUBO SETTLEMENT SCHEME/318** and **EKERUBO SETTLEMENT SCHEME/319** without the original Title Deed. Mr. Charles Mwendwa Mutua, the Land Registrar, Nyamira said that he joined the station in August 2016 and that when this transaction was taking place, he had not joined the Lands Office, Nyamira. But that he has tried to trace the documents relating to the transactions between the 1st Defendant on one hand and the 3rd and 4th Defendants on the other without the slightest success. The only thing he could see in the office is the consent issued in favour of the 3rd and 4th Defendants. However, Mr. Mutua admits that whatever procedure was followed to have the suit land change hands from the 1st to the 3rd & 4th Defendants was not proper nor legal.

He says that the land should not have been sub-divided into **EKERUBO SETTLEMENT SCHEME/317**, **EKERUBO SETTLEMENT SCHEME/318** and **EKERUBO SETTLEMENT SCHEME/319** without the original Title Deed which was in the Plaintiff's possession with documents of transfer already executed in the latter's favour. He did also tell the court that the original Title Deed was never surrendered and that it was reported lost by the 1st Defendant. The alleged loss was never gazetted and the documents that facilitated the sub-division and transfer of the suit property to the 3rd and 4th Defendants were missing in Nyamira Lands Office. After Mr. Mutua was shown the original Title Deed in the Plaintiff's possession to date he was quick to point out that there was no doubt that the same was genuine. He concluded that he cannot understand how the suit land was sub-divided and transferred to the 3rd and 4th Defendants. When Cross-examined by Mr. Ondari for the Plaintiff, the Land Registrar said that the suit land was transferred to the 3rd and 4th Defendants irregularly and whenever such a thing happens the recourse is to cancel the resultant Titles. He said his office received 2 complaints, one from the Plaintiff and the other from someone who had been sent by the Plaintiff. From the time he received the first complaint the Land Registrar advised his staff not to release any information concerning the suit land unless such a request was in writing and the response was also to be in writing, for record purposes. The Land Registrar also said that he commenced the process of cancelling the Tiles mentioned above i.e. **EKERUBO SETTLEMENT SCHEME/317**, **EKERUBO SETTLEMENT SCHEME/318** and **EKERUBO SETTLEMENT SCHEME/ 319** respectively. The officer also said that he wrote to the 1st, 3rd and 4th Defendants requesting for information but could not proceed with the process because the Plaintiff filed the current suit. On his instructions his office did not even dispatch the letters aforesaid.

He says that he has never seen any of the 3 Defendants who have been sued together with him. Even the area chief, Esise location told the Land Registrar that he was not aware of the sub-divisions in favour of 3rd and 4th Defendants and that it is still unknown to the Land Registrar who signed the mutation forms in respect to the latter transactions.

Under Section 31 of the Land Registration Act No. 3 of 2012;

(1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.

(2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.
The Land Registrar, Nyamira, Mr. Mutua informed the Court that he could not understand how the land EKERUBO SETTLEMENT SCHEME/286 was sub-divided into EKERUBO SETTLEMENT SCHEME/317, EKERUBO SETTLEMENT SCHEME/ 318 and EKERUBO SETTLEMENT SCHEME/ 319 without the original Title Deed and the resultant parcels issued with Title Deeds just on the mere word of mouth that the original (mother) Title had been misplaced and could not be traced by the 1st Defendant. Assuming that this were the case the provisions of Section 33 of the Land Registration Act No. 3 of 2012 then came into play. Under Section 33 of the Act:

(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the charge that the certificate of title or a certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

(6) Upon the issue of a replacement certificate no further dealings shall be carried out using the replaced certificate

This process was not followed at all I believe because the 1st Defendant feared that had the process been put in motion, the Plaintiff herein would have risen to the occasion and explained that the “lost” Title Deed was in his possession. It also beats my mind how the resultant Titles were issued without leaving any trace of footprints in the Lands office. Who carried out the sub-divisions? Who carried out the Transfers and who authorized the same? Where were the consents to sub-divide and transfer the land obtained? Was the requirement of a statutory declaration by the registered proprietor of EKERUBO SETTLEMENT SCHEME/286, the 1st Defendant herein, that the certificate of title had been lost ever made and if so, where is the statutory declaration? Both the Land Registrar and the Plaintiff testified they have never come across any Gazette Notice containing the publication of such Notice of loss or any local newspaper of nationwide circulation containing the Notice of the loss. Had the alleged loss been brought to the attention of the Plaintiff I am sure he would have ran to the lands office to report that he was the one holding the Title Deed in respect of EKERUBO SETTLEMENT SCHEME/286 having received the same from the 1st Defendant in broad daylight. Even if the same would have escaped the Plaintiff’s attention, there is no way the Land Registrar would have issued a new Title Deed without evidence of the publication of the loss. The upshot of this is that the 1st Defendant is guilty of fraud from whose fruits he cannot be allowed to benefit.

The Torrens system of registration from which our Registration of Titles system is derived emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect any particular parcel of land. Any registration obtained by fraud is void.

We have not seen the Title Deeds that were issued herein in respect of EKERUBO SETTLEMENT SCHEME/317, EKERUBO SETTLEMENT SCHEME/ 318 and EKERUBO SETTLEMENT SCHEME/ 319. Even the Land Registrar who is the public custodian of all the Title Deeds in the county cannot explain how his office facilitated the transfer of the suit property to the 3rd and 4th Defendants and admits that the same was carried out unprocedurally. Unfortunately, the 1st, 3rd and 4th Defendants failed to seize the opportunity availed to them by this Court to explain how it happened.

Section 26 of the Land Registration Act No. 3 of 2012 provides that:

“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..... and the title of that proprietor shall not be subject to challenge, except: -

(a)

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

I see no other way that the alleged Titles to the 3rd and 4th Defendants could have been acquired other than illegally, unprocedurally and/or through a corrupt scheme in which the 1st Defendant must have no doubt played a very big role. Could 3rd and 4th Defendants have been innocent purchasers for value? Could they have been equally or partly guilty? And if not, do they have a clean Title?

Without the participation of the 2 in this suit which must be deliberate since they were properly served, we are not able to get answers to the last 2 Questions.

However, assuming they were innocent purchasers for value, the next Question is whether they acquired a clean Title to the suit property.

The 1st Defendant had already contracted to sell part of the suit property way before the suit property was transferred to the 3rd and 4th Defendants. i.e. on 24th June 2015. He contracted to sell to the Plaintiff 3.975 Hectares out of 4.8 Hectares. The portion that now remained was 0.825 Hectares which the 1st Defendant was free to sell to any other willing buyer but without carrying out any further sub-division that was in conflict with **EKERUBO SETTLEMENT SCHEME/312** on the ground. There are no documents availed by the 2nd Defendant to show what acreage was sold to the 2 other Defendants nor any mutation forms, approved or otherwise, that could help us assess the situation on the ground. The same are said to be non-existent. It is therefore doubtful whether the 1st Defendant still had a good Title to pass to any subsequent purchaser.

This Court therefore finds that the Plaintiff's claim is well founded and that he has proved his case on a balance of probabilities and accordingly gives Judgment to the Plaintiff against the Defendants as follows:

(a) An order of Specific performance is hereby made giving effect to the Agreement of sale between the Plaintiff and the 1st Defendant dated 24th June 2015 upon payment by the Plaintiff of Kshs. 6,946,875/= being the balance of the purchase price within the next Thirty (30) Days from the date of this Judgment which monies shall be deposited in the 1st Defendants account or in the alternative the monies to be deputed in this Court to be held on Account of the 1st Defendant to be released to the 1st Defendant upon request.

(b) An order that upon surrender of the original Title Deed by the Plaintiff and upon proof of payment of Kshs. 6,946,875/= by the Plaintiff the 2nd Defendant do hereby cancel all the entries made on **EKERUBO SETTLEMENT SCHEME/286** subsequent to 24th June 2015 and in its place the sub-divisions **EKERUBO SETTLEMENT SCHEME/311** measuring 0.548 Hectares, **EKERUBO SETTLEMENT SCHEME/312** measuring 3.975 Hectares and **EKERUBO SETTLEMENT SCHEME/313** measuring 0.127 Hectares be registered.

(c) An order that **EKERUBO SETTLEMENT SCHEME/312** measuring 3.975 Hectares be registered in the name of the Plaintiff herein.

(d) An order that **EKERUBO SETTLEMENT SCHEME/311** measuring 0.548

Hectares and **EKERUBO SETTLEMENT SCHEME/313** measuring 0.127

Hectares be registered in the name of the 1st Defendant.

(e) The costs of this suit shall be borne by the 1st Defendant.

This is the Judgment of the Court.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF FEBRUARY, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Onderi

Defendants: N/A