



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 788 OF 2015**

**JACOB O. ODHOCHE.....PLAINTIFF**

**VERSUS**

**TOM ONDIEK.....1<sup>ST</sup> DEFENDANT**

**SAMSON OBUNDE KAMIRE.....2<sup>ND</sup> DEFENDANT**

**WANDIGA OLUM.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

Jacob Ogwen Odoch (*hereinafter referred to as the Plaintiff*) came to this court by way of further amended plaint filed on 26/6/2000 against Tom Ondiek and Samson Obunde Kamire and Wandiga Olum (*hereinafter referred to as the Defendants*) claiming that in or about the year 1993, the Plaintiff bought the whole of parcel No. Kabondo/Kakangutu East/801 measuring about 2.8 hectares from Gilbert Apiyo Abuto now deceased who later on transferred the same to the plaintiff and Title Deed issue thereon in the Plaintiff's name. The whole transaction was done and passed through the relevant land control Board Committee on 3/3/1993 whereupon the land was transferred to the plaintiff and a Title Deed issued thereon in his name.

The plaintiff has since then enjoyed the quiet possession, occupation and proprietorship of the said land where one of his homesteads are situated.

In or about the year 1997/1998 on diverse dates, the defendant, his servants or agents unlawfully entered the plaintiff's said parcel of land and occupied a portion thereof and continues to occupy the same against the will of the plaintiff and is trespassing and continue to trespass thereon.

The plaintiff avers that during the year 1999 the second defendant and the third defendant in collusion with the first defendant wrongfully and unlawfully entered into the plaintiff's said parcel of land and continue to cultivate a portion thereof and are trespassing thereon without the consent of the plaintiff or lawful authority from the plaintiff. The **particulars of collusion** are entering into the said portion of land in order to evict the plaintiff and acquire interest therein.

By reasons of the matters herein stated above the defendant, his servants or agents have deprived the plaintiff possession, use occupation and enjoyment of the said portion of land and the plaintiff has suffered loss and damages.

The Plaintiff prays for a **declaration that the defendants jointly and severally are trespassers on the said parcel of land and a prohibitory injunction against the defendants jointly and severally their servants or agents from entering into the said parcel of land or otherwise cultivating or ploughing the same or any part thereof.**

Moreover, the plaintiff prays for a mandatory injunction to the defendants jointly and severally to vacate the said parcel of land and to restore the plaintiff into possession. Furthermore, an order of eviction against the defendants jointly and severally from the said parcel of land. Lastly, a declaration that the plaintiff is the proprietor of the said parcel of land and is entitled to the use and exclusive possession thereof plus general damages for trespass and costs of this suit.

The 1<sup>st</sup> Defendant filed amended defence and counter claim stating that the portion of the suit land occupied by himself forms a principal part of his grandfather's land which upon the death of his father devolved upon the defendant as heir to their estate. The Defendant further states that he lived on and occupied the Suitland all his life and erected a homestead thereon and the effect of the Plaintiff's suit would be totally to disinherit him, thereby leaving him landless.

The Defendant maintains that if the Plaintiff bought the suit land in 1993 (which is denied), then the said transaction was already null and void by the time he purported to obtain Land Control Board consent in March 1993, the subsequent transfer was therefore of no effect and did not pass title to the plaintiff, it being tainted with illegality.

The defendant maintains that only part of the suit land was sold to Gilbert Apiyo Abuto by the defendant's grandfather that if the said Gilbert Apiyo Abuto acquired title over the entire suit land and sold the same to the Plaintiff, then the said sale was fraud and mistake and the Defendant shall claim the part of the suit land occupied by himself.

The Defendant further maintains that the Plaintiff suit is misconceived and utterly incompetent by the time the transfer of the title was effected in the name of the plaintiff, the defendant had vide Oyugis SRM's succession cause No. 3 of the 1998 been appointed as the sole Administrator of the Estate of Gilbert Apiyo Abuto aforesaid, and the said grant of letters of administration is yet to be confirmed. The defendant asserts that the plaintiff's title to the suit land is fraud and/or mistake and the same amounts to unlawful interference with the Estate of the said Gilbert Apiyo Abuto (Deceased). The Defendant maintains that the Plaintiff's suit is misconceived and utterly incompetent.

In the counter claim, the 1<sup>st</sup> Defendant states that the plaintiff obtained title fraudulently and the same should be revoked. The 1<sup>st</sup> Defendant prays for rectification of the register in respect of Land parcel Kabondo/Kakangutu East/801 by directing cancellation of entry no. 7 and 8 dated 4/6/1998 vesting title to the Plaintiff and restoring title in Gilbert Apiyo Abuto (deceased). The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant abated upon their death and no substitution was done.

When the matter came up for hearing, the plaintiff testified that he bought the land from Gilbert Apiyo Agutu in 1993. Gilbert Apiyo Agutu died on 3.4.1997 according to the death certificate. When he bought the land Gilbert transferred the land to him and they did not reduce the agreement into writing. He obtained a consent of the land control board. A transfer form was prepared. The transfer is dated 27.8.1997 and that is the date Gilbert Apiyo Agutu signed.

That the Plaintiff signed before the District Officer Homa Bay, at the District Commissioners office. The day he signed the deceased was not there. They went to D.C' office twice but he cannot remember the dates. He was with clerks from lands office. Gilbert Apiyo signed the documents before he died on another date. That the plaintiff was registered as proprietor on 4.6.1998 and on the same date title was issued. He knew that the land was a part of the estate of the deceased. He was not interfering but was going by the agreements they had reached.

He had paid to Gilbert money and they had completed the transaction, that the only thing remaining was transfer. He knew of the succession cause No. 3/08 but it was forgeries. He did not object the grant letters of administration for estate of the deceased. He wrote a letter to High Court Kisumu and the file was forwarded to Homa Bay. Gilbert lived on the land and one part is still with a dispute. That the Plaintiff paid for the land to Gilbert Apiyo.

PW2 Esau Aloo Odera states that he works with the Lands office at Homa Bay. He had documents for the parcel of land in dispute. The green card was first registered in the names of Ginga Othira who was issued title in 1971. Ginga Othira sold the land to Gilbert Opiyo Abuto who was issued with the title deed in 1975. Gilbert Opiyo Abuto sold to Jacob Ogweno Odhoch in 1998. The title deed was issued on 4/6/1998. The transfer to Gilbert Abuto was registered on 12/1/1973. The transfer in name of Jacob Ogweno was registered on 4/6/1998.

On cross examination, he states that the transfer was executed by the transferer before Olum Okuku and advocates on 22/8/1997. It was not executed by the Lands Registrar but the commissioner of oaths.

PW3 Patrick Ligale Ingutia the Registrar of Births and deaths testified that Gilbert Opiyo Abuto died on the 3/4/1997 and therefore could not have signed the documents in August 1997. PW4, stated that Ginga Othira went to the board with a person he had sold the land to but did not have the records.

DW1 states that the suit land was in his grandfather's name. His grandfather was Gilbert Apiyo Agutu. The suit parcel of land belonged to his grandfather. He states that the plaintiff registered the land in his name fraudulently. The Defendant stated that his father was Joseph Ondiek Apiyo and grandfather was Gilbert Apiyo Abuto. He did not know Ginga Othira very well. On cross examination, he states that Gilbert Apiyo Obuto is a brother to his grandfather. DW3 Erick Ouma Ogonda states that the land belonged to his grandfather Gilbert Apiyo Abuto. He is the defendant's cousin. At the moment, the Defendant stays on the land as a grandchild.

DW4 George Otieno Wandaga states that his father and the defendant's father are brothers. Their grandfather Gilbert Opiyo Abuto owned the suit land. His homestead is on the land.

In determining this dispute, the court has looked at the transfer of land registered on the 4<sup>th</sup> of June 1998. The same was purportedly executed by the Vendor Gilbert Apiyo Abuto on the 22/8/1997 and yet PW3, the District Land Registrar Kisumu testified that the death of the said Gilbert Apiyo Agutu occurred on 3/4/1997 in Nairobi. He could not have signed document in August 1997 and yet he died on 3/4/1997. The transfer appears to have been executed by someone else and not the deceased owner of the land.

Courts have held time and again that any title is indefeasible however title obtained illegally cannot be protected by the law.

I have considered the evidence on record and rival submissions and do find that the land is currently registered in the plaintiff's name. Section 24 the Land Registration Act No. 3 of 2012 provides

**(a) the registration of a person as the proprietor of land shall vest in**

**that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

(b) the registration of a person as the proprietor of a lease shall vest

in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25. provides

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26. provides:-

(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.

Section 26 excludes from protection of law titles to property obtained fraudulently or through misrepresentation, to which a person is proved to be a party and where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

The Court of Appeal in the case of **Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallace Muthare (deceased) & 5 others**, restated that the Torrens System was applicable in Kenya and acknowledged that under the system the title of a bonafide purchaser for value without notice of fraud could not be impeached. The judges in the case observed thus: -

**“The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”**

In this case, I do find that though the plaintiff is registered as proprietor of the suit land and therefore Sections 24 and 25 of the Land Registration Act apply, the transfer form was not executed by the deceased Gilbert Opiyo Abuto and therefore the document was not capable of transferring any interest to the plaintiff. Moreover, the plaintiff did not produce a sale agreement and admitted that there was none. Section 3 (3) of the law of Contract Act provides:

**“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

In absence of a contract, the plaintiff has no cause of action. On the other hand, the defendant has demonstrated that the deceased Gilbert

Apiyo Abuto was his grandfather and that he has lived on the parcel of land all his life and constructed a homestead thereon and that the suit parcel of land was family land.

The upshot of the above is that the plaintiff's suit is dismissed with costs.

The counter claim is allowed and Judgment is hereby entered in terms that the land registrar do rectify the register in respect of Land parcel Kabondo/Kakangutu East/801 by cancellation of entry no. 7 and 8 dated 4/6/1998 vesting title to the Plaintiff and restoring title in the name of Gilbert Apiyo Abuto. Costs of the suit to the defendant. Orders accordingly.

**DATED AT KISUMU THIS 13<sup>th</sup> DAY OF MAY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**