



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 157 OF 2014

FRANCIS RAPHAEL AMBEKO NYAGAMBI.....PLAINTIFF

= VERSUS =

ANJELINE MORAA AMUKOYE.....DEFENDANT

J U D G M E N T

1. The plaintiff filed a suit through a plaint dated 7th August 2014 seeking for judgment against the defendant praying that;

- a) **An order for declaration that the plaintiff is the legal and rightful owner of parcel number SOUTH TESO/ANGOROM/1907**
- b) **An order for cancelation of the defendant's name and registration on land parcel number SOUTH TESO/ANGOROM/1907 and revert the same into the name of the plaintiff.**
- c) **Costs of this suit.**
- d) **Any other further relief that deems fit and just grant by this Honourable Court.**

2. The plaintiff pleaded that the defendant on 24th December 2013 without any colour of right and without the consent of the plaintiff mischievously, maliciously and fraudulently caused the suit land to be transferred in her name through someone who purported to be the plaintiff. He particularised the alleged acts of fraud on the part of the defendant as follows;

- i. *Attaching fake passport photo which is not of the plaintiff on the transfer of land forms.*
- ii. *Quoting and attaching a fake identification card number and personal identification number (PIN) on transfer forms which does not belong to the plaintiff.*
- iii. *Imposing a signature on the transfer of land forms which does not belong to the plaintiff.*
- iv. *Purporting that the plaintiff appeared before the commissioner of oaths on 24/12/2013 to execute the transfer of land forms when he did not.*
- v. *Quoting a wrong address number on the letter of consent and on the forms for application for consent of the land control board which does not belong to the plaintiff.*
- vi. *Imposing a signature on the forms for application of consent which does not belong to the plaintiff.*
- vii. *Failing to disclose the nature of which she acquired the suit parcel thereof whether by sell, gift, lease etc.*
- viii. *If she purports to have bought the suit parcel herein she failed to produce a land sale agreement duly executed by the plaintiff.*

3. The defendant filed her defence on 10th October 2014 where she denied the allegations in the plaint that she had maliciously and fraudulently transferred the suit land to her name. She stated that she had validly and legally purchased the suit land for a consideration of Kshs.750,000/= after conducting her due diligence and prayed that the plaintiff's suit be dismissed with costs.

4. The hearing of the case commenced on 17/2/2016 with the plaintiff giving his evidence in chief as PW1, stating that he bought the parcel

of land No. SOUTH TESO/ANGOROM/1907 in 1987 from one Wafula who was then the chairman of the County Council of Busia. **PW1** said he was issued with a title deed and he developed the plot which building is roofed but not completed. He continued to state that the numbers in his Identity Card differs from the number the Identity Card he has now because when he bought the land in 1987, he had the first generation identity card which had the number appearing on the title deed while his current Identity is third generation with a different number. The witness produced the Identity Card as *Pex 1* and the title deed as *Pex 2*.

5. The plaintiff further states that he decided to gift the land to one of his sons. When the son carried out a search in June 2014, they discovered that the land was in the name of the defendant. He reported the matter to the police station on receipt of this information and the defendant was summoned to the police station where she was asked if she had seen him and she said no. **PW1** also stated that he did not know the defendant before their meeting at the police station. He then visited the suit land and found out that the defendant has hired people to develop it. He concluded by saying on advise of the Land Registrar he filed this suit as it is the court that can order for cancellation of title deed.

6. He produced the transfer form as *Pex 3* and pointed that the photograph on the form is not him. He produced the green card as *Pex 4* which shows the defendant as the registered owner of the suit land and copy of search conducted in 2009 as *Pex 5* showing him as the owner as at that time. He produced the caution as *Pex 6* and a copy of the fake PIN (xxxxx) used in the land transaction as *Pex 7*. The plaintiff produced a copy of his genuine PIN (xxxx) as *Pex 8*. He produced the application for consent from the Land Board which he never signed as *Pex 9*. He stated that the signature on the document was not his. The witness went further to produce the stamp duty declaration form bearing his name as *Pex 10* and stated that he never saw it nor signed it. He produced a copy of the Identity of seller who purported to be him as *Pex 11*. He produced the fake title deed that was surrendered to the Lands office during the transfer as *Pex 12* and the letter of consent purportedly sent to him as *Pex 13*. He asked the court to cancel the title deed issued to the defendant.

7. On cross-examination by the defendant's advocate, Mr. Bogonko, the plaintiff stated that his Identity Number is xxxx issued on 11/10/2012 which was a replacement of his lost Identity. That he did not have a copy of the police abstract to confirm he reported the loss of Identity to the police. He admitted that people can have similar names but their appearance could be different and hold different Identity Numbers. The genuine title deed shows a different Identity Number from the number of the Identity Card he has now. **PW1** further agreed that he had nothing to prove that the impugned Identity Card is forged or fake but insisted that the Identity Number written against the name of the seller in the green card is not his. He was not aware whether the seller sold the land genuinely. He stated that the PIN used was fake or different since the number provided is not his. He is calling all the documents fake because they are not his.

8. The plaintiff called Washington Wafula Obwogo, on 28/5/2019 as his second witness. **PW2** stated that before retiring to farming, he was employed by the defunct East Africa Community as the Director of Budget and later he became a councillor in Busia Town Council. **PW2** continued in evidence that he owned land parcel number. South Teso/Angoromo/ 1011 which he subdivided and sold the resultant plots to different people. One of those people he sold to is the plaintiff in this case.

9. **PW2** adopted his written statement dated 7/12/2017 as his evidence where he stated that he was the registered owner of land parcel South Teso/Angoromo/1011 and on April 8th 1987, he obtained permission from Amagoro Land Control Board to subdivide the said land parcel into 14 plots measuring 50x100. After the subdivision, he sold the plots to the people who required them and one of them people was the plaintiff. He attached the application for consent to area Land Control Board to be allowed to subdivide his land produced as *Pex 14* and the letter of consent as *Pex 15*. He paid Kshs.3,925/= for mutation form and he produced the receipt as *Pex 16*. The witness stated that the plot sold to the plaintiff was No. South Teso/Angoromo/1907.

10. On cross-examination by Mr. Bogonko learned counsel for the defendant **PW2** stated that he is 92 years old and he owned South Teso/Angoromo/1011. That they had a sale agreement but he does not have a copy in court neither could he recall the purchase price since it was done a long time ago. He confirmed signing a land transfer form for the plaintiff though he has not shown the said form. On the application form to the Land Control Board, there is no Identity card number shown. On re-examination he stated that the documents he has produced here are the only ones he managed to get.

11. The defence case proceeded on 11/2/2021 with **DW1**, Anjeline Moraa Amukoye giving her evidence in chief. **DW1** stated that she is a resident of Ebenezer Burumba and she is a business-woman. She does not know the plaintiff but stated that she purchased L.R. South Teso/Angoromo/1907 on 11/12/2013 from Francis Raphael A. Nyagambi of Identity Number xxxx at a price of Kshs.750,000/=. An agreement was drawn and duly executed. **DW1** asserted that before buying the land, a Mr. Charles Barasa came and told her about the land that was for sale. Charles (deceased) linked her up with the vendor and she went and viewed the land and then proceeded to do a search which search showed the land was registered in name of the vendor. After executing the agreement, she processed a title deed. She added that there was a house self-contained on the plot and the inside finishes had not been done.

12. **DW1** further stated that one day she got a call from the C.I.D informing her about a complaint of stealing land lodged against her. According to her, she bought the land lawfully and relied on the documents she filed which are produced as *Dex 1-6* as they appear on the list. **DW1** argues that the plaintiff's Identity Card No. xxxx does not resemble the one she found indicated in the green card which was Identity Card number xxxx. The passport photos used do not belong to this plaintiff but their names are the same. She prayed that the plaintiff's case be dismissed with costs.

13. The defendant was cross-examined by Mr. Juma for the plaintiff wherein she denied purchasing the suit parcel for Kshs.500,000/= as indicated in the green card. That the sale agreement was done before Mr. Bogonko advocate and the person selling the land gave her a title deed. She went to the police station and stated that she did not know the plaintiff. The plaintiff also confirmed at the station he does not know her. **DW1** agreed that *Pex 4* shows the original owner is Washington and she did not know who he is. The defendant closed her case.

14. The parties agreed to exchange written submissions within two weeks each. Both parties filed their submissions which the court has looked at and considered. The plaintiff filed his submissions on 16th February 2021. The plaintiff submitted that the defendant fell into the hands of conmen who took her money and gave her fake documents. The plaintiff further submitted that the plaintiff has proved his case to the required standard and should be granted the orders sought together with costs. The defendant filed her submissions on 10th March 2021.

The defendants submitted that the plaintiff has not proved his case to the standard required where a party alleges fraud. That particulars of the alleged fraud relate to the seller who sold the suit property to the defendant and there is nothing fraudulent about it. She urged the court to determine the suit in favour of the defendant with costs.

15. In light of the above, the issues up for determination before this court are;

- a) *Whether the sale and transfer of the suit land to the defendant was irregular, or fraudulent*
- b) *Whether the defendant's title ought to be cancelled and revert to the plaintiff*
- c) *Who should pay costs?*

16. On the first issue, Section 26 of the Land Registration Act provides;

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.*

17. The plaintiff has stated that he discovered the registration of the defendant as owner of the suit land when he conducted a search in June 2014. Upon the discovery, he visited the suit land and found a house being constructed causing him to report to the police and also register a caution on the title. The plaintiff's claim is that the defendant fraudulently acquired and transferred the suit land to her name and listed the particulars of the fraud. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

18. Section 80(1) of Land Registration Act provides that **“subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”**. The plaintiff has the burden to prove to this court that the defendant as a title holder was involved in or party to the fraud. The plaintiff gave evidence through the documents produced how he acquired the suit title and that he had put up a structure on it although the interior finishes were not completed. The plaintiff called the original owner of the land who gave evidence as **PW2**. Mr Wafula confirmed subdividing his parcel no South Teso/Angoromo/1011 and selling one of the resulting portions to the plaintiff. Mr Wafula did not know the defendant and the defendant corroborated this evidence by stating that she also did not know who **PW2** was.

19. One of the documents the plaintiff relies on and produced in evidence is his Identity card Number xxxx which does not match the Identity Number xxxx given as the one belonging to the person who did a transfer to the defendant. The court has noted that the Identity Number registered on the green card and the title deed (*Pex 2*) issued in 1987 which according to the plaintiff was surrendered by the defendant to the lands office bears the number xxxx/xx. The plaintiff stated that his first generation Identity Card got lost and he cannot remember its number. The plaintiff stated further that the passport photograph in *Pex 3* is neither him nor is the person known to him. The defendant conceded that she neither knew the plaintiff before this suit nor did they have any dealings over the suit land. The defendant did not call the evidence of the person who sold her the land.

20. Although the burden of proof was not upon her, once she became aware that there existed two people with similar name, she acquired a burden to prove that she was a bonafide purchaser for value without notice. In the Ugandan Case of ***Katende Vs Haridar & Company Ltd (2008) 2EA 173*** it was held that *“for a purchaser to successfully rely on the bonafide doctrine, (he) must prove that; he holds a certificate of title, he purchased the property in good faith; he had no knowledge of the fraud, he purchased the title for value consideration; the vendors had apparent valid title, he purchased without notice of any fraud and he was not party to any fraud”*. In this instance, she ought to have called a witness who helped her in identifying the person who sold her the land or expert witness to authenticate her transfer documents. Secondly, as held in the ***Alice Chemutai Too Case***, the defendant need not be a party to the fraud for her title to be cancelled. If the person who sold her land had no good title to pass then her title cannot stand under the provisions of Section 26(1)(b) of Land Registration Act. The plaintiff has demonstrated that the identity of the person who sold and transferred the land to the defendant was questionable.

21. On the second issue, in the case of ***Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others [2015] eKLR*** Justice Sila Munyao held that:

*“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these*

vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.” **(Underline mine for emphasis)**

22. In the current case, the plaintiff has shown indeed that there was fraud in the transfer and registration of the defendant as the owner of the suit land. It was incumbent upon the defendant to demonstrate that she was not a party to the fraud nor was she aware of the fraud. Although counsel for the defendant during cross-exam stated that two different people can share bear similar names, the plaintiff confirmed he was not the person mentioned in the transfer documents produced by the defendant. The defendant did not call evidence to contradict the plaintiff's ownership claim over the suit land. This would have been easily done by calling the person who sold her the land to exclude her from the accusation of being party to the fraud. Section 112 of the Evidence Act stipulates that **“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”** The defendant cannot allege being an innocent title holder without discharging the burden of proof of her innocence.

23. In light of the evidence adduced, I am satisfied that the plaintiff has proved his claim against the defendant therefore he is entitled to the orders sought. Accordingly, I enter judgement in his favour as follows;

a) An order be and is hereby made declaring the plaintiff as the legal and rightful owner of parcel number SOUTH TESO/ANGOROM/1907

b) An order be and is hereby issued directing the defendant to surrender her title to the Land Registrar Busia County for rectification of the register of the suit title by cancelation of the defendant's name and registration on land parcel number SOUTH TESO/ANGOROM/1907 and revert the same into the name of the plaintiff.

c) In default of the defendant surrendering the title as ordered in paragraph (b) above within thirty (30) days hereof, the Land Registrar shall proceed to rectify the register without the need for surrender of the original title.

d) Costs of this suit awarded to the plaintiff

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF JULY, 2021.

A. OMOLLO

JUDGE