



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC CASE NO. 426 OF 2016**

**FREDRICK MISUKO ONGERI.....PLAINTIFF**

**VERSUS**

**JACKLINE KWAMBOKA NYANGWECHI.....1<sup>ST</sup> DEFENDANT**

**DENNIS OMANGI.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR NAKURU.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1.The suit herein was commenced by way of a plaint filed on 10<sup>th</sup> October 2016 which was amended on 8<sup>th</sup> February 2018. The plaintiff averred that he was the owner of **LR No. Njoro/Ngata Block 2/2793** herein after referred to as the 'suit property'. He sought judgement against the defendants for:

- a. *A declaration that he is the rightful and legal owner LR No. Njoro/Ngata Block 2/2793*
- b. *Costs of the suit and interest.*
- c. *Any other and or further relief as the Honorable Court may deem fit and just to grant.*

2.The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their amended statement of defence and counterclaim and denied the averments by the plaintiff contained in the amended plaint and sought the following prayers in their counterclaim;

- (a) *A declaration that the 1<sup>st</sup> defendant now 1<sup>st</sup> plaintiff in the counterclaim is the legal owner of the suit land LR Njoro/Ngata Block 2/2793*
- (b) *Striking out of the entry of transfer in favour of the plaintiff now defendant in the counter claim and cancellation of the title deed issued in favour of the plaintiff and re-issue of replacement title in the name of the 1<sup>st</sup> defendant now plaintiff in the counter claim.*
- (c) *Costs of the suit*
- (d) *Any other relief that this honorable court may deem fit to grant.*

3.The 3<sup>rd</sup> defendant entered appearance and filed a statement of defence dated 20<sup>th</sup> November 2017.

4.At the hearing, the plaintiff adopted his witness statement filed in court on 10<sup>th</sup> October 2016. He also relied on his documents filed in court on the same date as "**PEX 1-6**" together with the supplementary list of documents which he produced as "**PEX 7 & 8**". The plaintiff testified that he wanted to buy land and he requested one Peter Ndubi to locate for him a plot to purchase. He stated that Peter Ndubi after sometime called and informed him that he had found a plot. The plaintiff testified further that on 14<sup>th</sup> July 2016 he went to be shown he plot by Peter Ndubi who he met with one Bosire and Jackline the first defendant herein.

5.On cross-examination the plaintiff confirmed that they went to see the plot on 14<sup>th</sup> July 2016 and that he negotiated the price with Douglas

Bosire who had the original title. He further stated that he met Jackline Kwamboka on 15<sup>th</sup> July 2016 and she was brought by Douglas Bosire who apparently was acting as the agent/broker. He confirmed that they did not go to the Land Control Board, that he did not have a receipt for stamp duty and that he also did not have the transfer lodged for registration. He testified that when he went on the land, he found maize planted thereon, a septic tank, and a caretaker with whom he left his phone number.

6. On re-examination, he reiterated that he met Jackline who is the 1<sup>st</sup> defendant on 15<sup>th</sup> July 2016 and paid the consideration of Ksh.1.7 Million in installments of Ksh. 500,000/=, Ksh. 900,000/= and Ksh. 300,000/=. He stated that Jackline furnished him with a copy of her PIN certificate, identity card and signed the sale agreement on 15<sup>th</sup> July 2016.

7. Peter Ndubi testified as PW2. He testified that he works as a broker and that on 15<sup>th</sup> July 2016, he met the plaintiff who told him that he wanted to buy land. He testified further that he met Douglas Bosire who informed him that he had a client who wanted to sell her parcel of land at Ngata. He stated that he later on the same day met Douglas Bosire who came with the lady owner who introduced herself as Jackline Kwamboka. He stated that they went to the suit property with Jackline who said that she was selling the land as she had a patient in the hospital. That the plaintiff liked the parcel of land and that they went to an advocate's office, signed the agreement and Jackline was paid the purchase price in instalments of Ksh. 500,000/=, 900,000 and 300,000/=.

8. On cross examination he confirmed that he had known Douglas Bosire for three years and that they went to see the land together with Jackline Kwamboka. He testified that the plaintiff first saw Jackline at the lawyers office on 15<sup>th</sup> July 2016 where they negotiated the price. He confirmed that Douglas Bosire did not participate in the price negotiations. He said Jackline had informed them that she was resident of the United States but she had a sick patient.

9. The 1<sup>st</sup> defendant testified as DW1. She stated that she is a resident of USA Minnesota State and had been sued with regards to land parcel No. **Njoro/Ngata Block 2/2793**. She adopted her witness statement dated 16<sup>th</sup> October 2017 as part of her evidence and relied on her filed bundle of documents as per her list dated 20<sup>th</sup> February 2017 which she produced as **"DEX-1-5"**. She referred to her updated passport that was produced as **"DEX-6"** and testified that it shows that she exited Kenya on 4<sup>th</sup> June 2015 and came back on 17<sup>th</sup> September 2019. She testified further that she has never met the plaintiff, Douglas Bosire or Peter Ndubi.

10. She further testified that she had never sold the suit property to anyone and was not in the country on 15<sup>th</sup> July 2016 when it was alleged she entered into the sale agreement. (**'PEX-1'**). She confirmed that the signature appearing on the purported sale agreement did not belong to her. She stated the signature was different from the one on her agreement that she produced as **'DEX 3'**.

11. On cross examination, the witness confirmed that when she left for the United States, she left all her documents with her brother in law Antony Monari for delivery to her father in law. That among the documents she left was the title deed for the suit property which inexplicably went missing from her documents later though no report of loss was made. She also stated that before she left for the United States, she fenced the suit property with barbed wire and constructed a toilet and a septic tank.

12. Denis Osiemo Omangi testified as DW2. He stated that around September 2016, he received a call from the 1<sup>st</sup> defendant who informed him that some people had gone to their plot and were claiming that it belonged to them. He stated he went to the suit property and found building materials there. He also testified that he was shown a copy of search that indicated that the suit property had been transferred to someone else. He testified further that he made a report to the CID for investigation and was advised to seek assistance from the Land Registrar Nakuru. That the plaintiff was called to the Land Registrar's office but he was not cooperative and the matter was never resolved.

13. Eric Munene Nyamu testified as DW3. He stated that he was the Land Registrar Nakuru and that previously C W Sigi was the Land Registrar. He adopted C W Sigi's witness statement filed on 13<sup>th</sup> March 2018 as part of his evidence. He tendered in his evidence, a green card of the suit property which showed a transfer from Hosea to Jackline and a Transfer from Jackline to Misuko.

14. He testified that with regards to the transfer from Hosea to Jackline, there was no consent or evidence of payment of stamp duty available on the parcel file. That with regard to the transfer from Jackline to Misuko on 19<sup>th</sup> July 2016, the original title was surrendered and that the consent of the Land Control board was missing together with the evidence of payment of stamp duty was unavailable.

15. On cross examination he confirmed that he reported to Nakuru in November 2018. He further confirmed that the transfer from Jackline to Misuko was made on 19<sup>th</sup> July 2016 and that ordinarily before a land registrar effects transfer, he has to satisfy himself that the documentation is in order. That he had a copy of Jackline's Identity Card and stated that the missing documents could have been misplaced.

16. On reexamination, he stated that during digitization of records many documents were misplaced.

17. Geoffrey Morero testified as DW4. He stated that he works with the Directorate of Immigration Services Nyayo House whose core function includes issuance of travel documents and the control of entry and exit of persons. He testified that with regards to passport No. A1899678 that belonged to Jackline Kwamboka Nyagwenchi, it was an original passport that was first used on 4<sup>th</sup> June 2015 when the passport holder exited from Kenya through JKIA. He testified further that she was admitted to the USA on 4<sup>th</sup> June 2015 as per the stamp on page 6 of the passport.

18. He also testified that the passport was again used by the holder on 17<sup>th</sup> September 2019 when she was admitted back into the country as per entry stamp No. 0451 at page 6 of the passport. That she exited the country on 30<sup>th</sup> September 2019 as per the exit stamp and that there was a VISA at page 7 issued by the USA Embassy at Nairobi on 15<sup>th</sup> April 2015.

19. On cross examination, he confirmed that he had the original passport belonging to the 1<sup>st</sup> defendant and that it was sent to him for

purposes of the testimony. He also confirmed that the visa expired on 19<sup>th</sup> June 2015 and that he does not know how she remained in the USA.

20. The court directed the parties to file and exchange their written submissions. The plaintiff in his submissions argued that he bought the suit property from the 1<sup>st</sup> defendant and a title deed was issued in his favor. While relying on Section 24(a) and 26(1) of the Land Registration Act, he submitted that from the evidence adduced, he was the indefeasible registered owner of the suit property.

21. On whether the plaintiff legally purchased, transferred and registered the suit property in his name, it was submitted that when he carried out the official search at the lands registry, he availed the fundamental supporting documents and that on 15<sup>th</sup> July 2016 he entered into the land sale agreement with the 1<sup>st</sup> defendant. He submitted further that the completion documents were surrendered to him and which documents were produced in court. That eventually he transferred the suit property to his name and has been in occupation since. That according to the evidence of the Land Registrar, all the records in the land registry show that the land was transferred from Hosea to the 1<sup>st</sup> defendant and from the 1<sup>st</sup> defendant to himself.

22. The plaintiff submitted further that since the 1<sup>st</sup> and 2<sup>nd</sup> defendants allege fraud, the onus was on them to prove the said fraud. That as per the passport produced in court by the 1<sup>st</sup> defendant, the plaintiff submitted she was issued with a Visa on 16<sup>th</sup> April 2015 which was to expire on 19<sup>th</sup> June 2015 and that it was DW4's testimony that there was no evidence by the 1<sup>st</sup> defendant indicating that she required a visa to stay in the United States of America after it expired.

23. The plaintiff also submitted that the 1<sup>st</sup> defendant did not produce any evidence to the effect that she had lost her documents and prayed that the orders sought in the plaint be granted.

24. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their submissions reiterated the evidence adduced during the trial and submitted that the 1<sup>st</sup> defendant had been issued with a title deed in her name on 12<sup>th</sup> August 2010 and that later on 19<sup>th</sup> July 2016 the suit property was irregularly and/or fraudulently transferred to the plaintiff and a title deed issued in his name. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further submitted that the land sale agreement produced by the plaintiff as "PEX-1" lacked a signature attesting to the signatures of the parties and consequently as per the provisions of Section 3(3) of the Contract Act, the said agreement is null and void. Section 3(3) of the Act provides as follows:-

*(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 CAP. 23 [Rev. 2012] Law of Contract [Issue 1] 6 (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.*

25. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further submitted that the date the 1<sup>st</sup> defendant was said to have signed the land the sale agreement was on the 15<sup>th</sup> July 2016, when she was outside the country. That the evidence affirmed that she left the country on 4<sup>th</sup> June 2015 and did not return until 17<sup>th</sup> September 2019 and could therefore not have executed the sale agreement as alleged. The 1<sup>st</sup> defendant produced her passport to prove that she indeed was out of the country as from 4<sup>th</sup> June 2015 up to 17<sup>th</sup> September 2019 and this evidence was supported by DW4 who gave evidence on behalf of the immigration Department.

26. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further submitted that the plaintiff was not an innocent purchaser without notice. The 1<sup>st</sup> and 2<sup>nd</sup> defendants pointed to the manner the transaction involving the plaintiff and the supposed owner of the suit property was conducted.

27. The full payment of the purchase price was apparently all paid in cash; Kshs500,000/= on execution of the agreement and the balance Kshs.900,000/= on 22<sup>nd</sup> July 2016 and Kshs.300,000/= on 1<sup>st</sup> September 2016 after the property had been transferred to the plaintiff. There is no evidence of acknowledgement of the payments by the vendor. There was inconsistency in the evidence of the plaintiff and Pw2, Peter Ndubi in that plaintiff asserted he negotiated the sale price with one Douglas Bosire who as per the evidence was the one who had the original title and later chaperoned Jackline Kwamboka to the advocates office for the preparation of the sale agreement. PW2 to the contrary stated that the plaintiff did not negotiate the on the sale price with Douglas Bosire would have been a crucial witness but was not called to testify. He appears to have been the person who informed PW2 of the availability of the suit land for sale and he was the only person who apparently knew the owner of the land, Jackline Kwmboka.

28. When the 1<sup>st</sup> defendant got wind that her property had been transferred out she promptly caused the 2<sup>nd</sup> defendant, who was her nephew to report the matter to the CID and make a follow up at the Lands Office. Once the report was made to the CID Nakuru, the plaintiff, PW2 and Douglas Bosire failed to present themselves to the CID officers who were carrying out investigations for interrogations on the plaintiff's acquisition of the title to the suit property. Instead they commenced these proceedings. The 1<sup>st</sup> defendant further in impugning the conduct of the plaintiff conduct of the plaintiff submitted that the transaction was completed in record 4 days from the date the sale agreement was entered into and further the plaintiff agreed that they never attended before the Land Control Board and it was therefore unclear as to how the transfer was effected without the consent of the Land Control Board which was a mandatory pre requisite under the provisions of section 6 (1) of the Land Control Board Act Cap 302 Laws of Kenya. The 1<sup>st</sup> and 2<sup>nd</sup> defendant submitted that failure to obtain the consent of the Land Control Board rendered the agreement for sale null and void and consequently the transfer to the plaintiff

was ineffectual. The 1<sup>st</sup> and 2<sup>nd</sup> defendant in support of their submissions placed reliance on the case of **James Njuguna Mwaura -Vs- Wandati Mbochi(2018) eKLR**. It was therefore the 1<sup>st</sup> and 2<sup>nd</sup> defendants submissions that the conduct of the plaintiff was not that of an innocent purchaser for value without any notice.

29. The Attorney General on behalf of the 3<sup>rd</sup> defendant in their submissions argued that the plaintiff had not adduced any evidence to the effect that the 3<sup>rd</sup> defendant was involved in any scheme to defraud him of the suit property as he alleged and relied on Section 107 of the Evidence Act Cap 80 of the Laws of Kenya: The Hon Attorney General further relying on Section 44 of the Land Registration Act, it was submitted that once the requisite documents had been presented to the District Land Registrar, they formed the basis of the issuance of a new title and there was no evidence of any collusion on the part of the Land Registrar.

### **Analysis and determination**

30. After considering the pleadings, the evidence, and the submissions of the parties, the issues that arise for determination are as follows:

1. *Whether the plaintiff legally acquired the suit property.*
2. *Whether the 1<sup>st</sup> defendant entered into the agreement of sale dated 15<sup>th</sup> June 2016 with the plaintiff for the sale of the suit property?*
3. *Whether the plaintiff fraudulently caused land parcel No. Njoro/Ngata Block 2/2793 to be transferred to his name?*
4. *What reliefs/orders should the court grant?*

31. It was not in dispute that the suit property was initially registered in the name of Hosea Barmao Chemweno on 13<sup>th</sup> May 2010 before it was transferred and registered in the name of Jackline Kwamboka Nyagwechi on 12<sup>th</sup> August 2010. On 19<sup>th</sup> July 2016, the plaintiff, Fredrick Misuko Ongeru was registered as the owner and it is this registration of the property in the name of the plaintiff that is in contest as the 1<sup>st</sup> defendant denies having been a party to the transaction.

32. The evidence adduced by the plaintiff is to the effect that he bought land parcel No. **Njoro/Ngata Block 2/2793** from Jackline Kwamboka Nyang'wechi on 15<sup>th</sup> July 2016 and was registered as the owner on 19<sup>th</sup> July 2016 and issued with a title deed. The plaintiff contends that as the registered owner of the suit property he was vested with absolute rights of ownership which were indefeasible.

33. In support of his case the plaintiff produced the sale agreement dated 15<sup>th</sup> July 2016 and the copy of title issued to him as "PEx3 and 5" respectively.

34. Section 26 (1) of the Land Registration Act 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.*

*(2) 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.*

35. The 1<sup>st</sup> defendant is challenging the title held by the plaintiff on the grounds of fraud. Fraud is a serious allegation which must be proven on a standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof of beyond reasonable doubt. The Court of Appeal in the case of **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR** held as follows:

*It is common ground 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. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:*

*'Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...'*

36. In the instant matter the 1<sup>st</sup> defendant has denied ever having sold her plot to the plaintiff and specifically has denied being party to the Agreement of sale dated 15<sup>th</sup> July 2016. She denied that the signature attributed to her in the sale agreement was signed by her. To fortify her assertions she stated she was not in the country in July 2016 when she was alleged to have signed the agreement. She produced in evidence her passport which clearly showed she exited Kenya from JKIA on 4<sup>th</sup> June 2015 and re entered the country again on 17<sup>th</sup>

September 2019. This evidence was corroborated by DW4, Geoffrey Morero principal immigration officer. The evidence by the 1<sup>st</sup> defendant respecting her absence from Kenya during the year 2016 was not impugned and/or challenged. On evaluation of the evidence I am satisfied that indeed the 1<sup>st</sup> defendant was not within the Country on 15<sup>th</sup> July 2016 when the purported agreement between her and the plaintiff was executed. It follows therefore the 1<sup>st</sup> defendant could not and was the person who executed the agreement.

37. Having come to the conclusion that the 1<sup>st</sup> defendant was neither present nor signed the agreement dated 15<sup>th</sup> July 2016, the implication is that the plaintiff may have been hoodwinked by persons masquerading as the owners and/or agents of the owner. The principal fraudster, must have been the person described as Douglas Bosire who apparently must have sourced a lady to impersonate the 1<sup>st</sup> defendant.

Nobody knows who this lady (impersonator) was. The said Douglas Bosire was the person who allegedly had the original title that belonged to the 1<sup>st</sup> defendant and after he had identified the victim, he presented the person he held out to be Jackline Kwamboka to accomplish the fraudulent transaction. It is unclear how PW2, Peter Ndubi and the said Douglas Bosire knew each other but indications were that they were both involved in land sale transactions. It is apparent from the plaintiff's evidence and witness statement that PW2 and Douglas Bosire were acting together. PW2 was aware of the availability of the plot for sale and Douglas Bosire held the original title deed to the parcel of land. Although the plaintiff stated in his witness statement that the original title was handed over to him after he paid the full purchase price, that is not borne out by the facts. From the abstract of title (greencard) the transfer to the plaintiff was effected on 19<sup>th</sup> June 2016 while the balance of the purchase price of Kshs.900,000/= and kshs.300,000/= was allegedly paid on 22<sup>nd</sup> June 2016 and 1<sup>st</sup> September 2016 respectively. There was no evidence that the consent of the Land Control Board was obtained before the registration was effected.

38. The 2<sup>nd</sup> defendant who held a power of attorney from the 1<sup>st</sup> defendant, upon discovering the 1<sup>st</sup> defendant's land had been unlawfully transferred, he lodged complaint to the CID but the plaintiff refused to co-operate upon being contacted by the CID stating that his transaction as genuine and not fraudulent. The plaintiff's conduct in my view was not such as one would have expected from a genuine and innocent purchaser. An innocent purchaser would have been eager to demonstrate and establish his innocence. In the instant case the plaintiff to thwart the investigations by the CID instituted these proceedings more or less to shield him from any interrogation by the CID. The plaintiff's position is that he acquired a genuine and valid title to the land and seeks a declaration to that effect.

39. Having held that the 1<sup>st</sup> defendant was out of the country when allegedly she participated in the transaction through which the plaintiff was registered as owner of the suit land, the allegations of fraud against the 1<sup>st</sup> defendant remain unproved. There is no evidence that the person the plaintiff dealt with was the 1<sup>st</sup> defendant.

40. Equally the 2<sup>nd</sup> defendant as soon as he discovered the title entrusted to him by the 1<sup>st</sup> defendant was missing and had been used to perpetrate fraud, he made a report to the CID to carry out investigations. He cannot be faulted and he did what any reasonable person would have been expected to do in those circumstances. I find the allegations of fraud against the 2<sup>nd</sup> defendant not proven.

41. The plaintiff has basically set up the title he holds to the suit property as entitling him to absolute ownership of the suit property. Under section 26 (1) (a) a registered title may be challenged on the ground of fraud or misrepresentation to which the person is proven to be a party; while under section 26 (1) (b) a title is challengeable if it is shown the same was acquired illegally, unprocedurally or through a corrupt scheme. On the evidence presented there is no doubt that the 1<sup>st</sup> defendant was the registered owner of the suit property as at 15<sup>th</sup> July 2016 when the plaintiff entered into the purported sale agreement for its purchase. The 1<sup>st</sup> defendant was out of jurisdiction and could not possibly have signed the agreement. There must have been a person impersonating the 1<sup>st</sup> defendant. That was criminal. Douglas Bosire who had the original title was unknown to the 1<sup>st</sup> defendant. He was not called by the plaintiff to testify even though PW2 who definitely knew him could easily have given his whereabouts. One can only speculate why he was not availed as a witness. I am satisfied that the title acquired by the plaintiff was illegally and unprocedurally obtained and in terms of Section 26 (1) (b) of the Land Registration Act, 2012 the same cannot stand.

42. The upshot is that I find and hold that the plaintiff has failed to prove his case on a balance of probabilities and the same is hereby ordered dismissed.

43. I find the 1<sup>st</sup> and 2<sup>nd</sup> defendants counterclaim proved on a balance of probabilities. I accordingly enter judgment in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the counter claim and make the following final orders:-

**1. The plaintiff's suit is hereby ordered dismissed.**

**2. A declaration is hereby issued that the 1<sup>st</sup> defendant Jackline Kwamboka Nyangwechi is the lawful legal owner of Land parcel Lr No. Njorog/Ngata Block2/2793.**

**3. The Land Registrar Nakuru is ordered to cancel the registration and title issued in the name of Fredrick Misuko Ongeri and restore Jackline Kwamboka Nyamgwechi as the registered owner of LR No. Njoro/Ngata Block 2/2793.**

**4. The costs of the suit and counterclaim are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF SEPTEMBER 2021.**

**J M MUTUNGI**

**JUDGE**