



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 478 OF 2016**

**MICHIRA OTUKE.....PLAINTIFF**

**VERSUS**

**YUVENALIS MOSIOMA MIRORO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff who was the registered owner of Land Parcel Number CENTRAL KITUTU/MWABUNDUSI/962 entered into an agreement with the Defendant for the sale of a portion of the said parcel of land measuring 50 feet by 100 feet. The Defendant took possession of the suit property after which he had the land sub-divided and he was issued with a title deed in respect of Land Parcel Number CENTRAL KITUTU/MWABUNDUSI/1420. The Plaintiff then realized that the Defendant was occupying more land than what he had sold to him as he was encroaching on the Plaintiff's land. This prompted the Plaintiff to institute proceedings before the Kisii Municipality Land Disputes Tribunal vide Land Case no. 14 of 2010. The complaint was heard and the Tribunal established that the Defendant had unlawfully obtained a portion of land measuring 0.21 Ha in excess of what he had bought. The award of the Tribunal which had been adopted as a judgment of the court was however quashed vide Kisii HCC Misc Application No. 88 of 2010. It is against this background that the Plaintiff filed suit against the Defendant seeking the following reliefs:

- a) A declaration that the inclusion of a portion measuring 0.21Ha in L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 in favour of the Defendant was fraudulent, illegal, null and void.
- b) An order of cancellation and /or rectification of the registered in respect of L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 with a view to excising the portion measuring 0.21 Ha and reverting the same to the plaintiff.
- c) An order of eviction be issued against the Defendant in respect of the portion measuring 0.21Ha of L.R No. CENTRAL KITUTU/MWABUNDUSI/1420
- d) A permanent injunction restraining the Defendant from entering upon, cultivating, occupying, encumbering and/or dealing with the portion measuring 0.21 Ha. of the suit land that is, L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 in such manner and/or otherwise detrimental to the interests of the plaintiff.
- e) Costs of this suit be borne by the Defendant
- f) Such further and/or other relief as the Honourable court may deem fit and expedient to grant.

2. In his Statement of Defence dated 7<sup>th</sup> September 2011, the Defendant denies that he has encroached on the Plaintiff's land. He further denies the allegations of fraud made against him and states that there were more than two sale agreements between him and the Plaintiff in respect of L.R No. CENTRAL KITUTU/MWABUNDUSI/962 which culminated into the registration of L.R No. CENTRAL KITUTU/MWABUNDUSI/1420. He denies that he is the one who called the surveyor to sub-divide the land.

3. In his Reply to Defence dated 8<sup>th</sup> September 2011 the Plaintiff denies that there were 2 sale agreements between him and the Defendant and states that he only sold the Defendant a portion measuring 50 feet by 100 feet. The suit was set down for hearing and both parties testified and called witness.

**PLAINTIFF'S CASE**

4. The Plaintiff testified that he entered into a written agreement with the Defendant for the sale of a portion of land measuring 50 feet by 100 feet out of his land parcel No. CENTRAL KITUTU/MWABUNDUSI/962. He produced a copy of the sale agreement dated 28<sup>th</sup> October

1998 as Plaintiff's exhibit 1. He then sub-divided the land and executed the necessary documents to enable the Defendant obtain a title for the portion that he had bought. He signed blank forms and handed them over to the Defendant who later single-handedly used the same to acquire a separate title known as L.R No. CENTRAL KITUTU/MWABUNDUSI/1420.

5. The Plaintiff stated that the Defendant obtained a title for a larger portion of land than what he had sold to him. He produced a copy of the Certificate of official search in respect of land parcel No. CENTRAL KITUTU/MWABUNDUSI/1420. He told the court that he did not enter into any other sale agreement with the Defendant other than the one dated 28<sup>th</sup> October 1998. He stated that he did not know how the Defendant ended up with a larger portion. When he discovered the anomaly, he filed a complaint at the Kisii Municipality Land Disputes Tribunal vide case No. 14 of 2010. The Plaintiff produced a copy of the proceedings of the Tribunal case together with the subsequent proceedings where the award was adopted as a judgment of the court and later challenged vide Kisii HCC Miscellaneous Application No. 88 of 2010.

6. Steve Mokaya, the Kisii County Land Registrar who testified as PW 2 confirmed that the Plaintiff was the original owner of land parcel no. 962. The said title was closed on 9<sup>th</sup> August 2006 when the land was divided into 6 portions namely; L.R NO. CENTRAL KITUTU/MWABUNDUSI/1338, 1339, 1340, 1341, 1342 and 1343. He told the court that he had no records in respect of L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 and that the said title did not originate from L.R No. CENTRAL KITUTU/MWABUNDUSI/962. Upon cross-examination he stated that title no. 1420 does not exist.

7. Christopher Kamau, the County Surveyor (PW3) testified that after L.R No. CENTRAL KITUTU/MWABUNDUSI/962 was sub-divided into 6 portions, L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 was unprocedurally created by manipulating the map. Upon cross-examination, he stated the title no. 1420 was not supported by proper documentation as the consent to sub-divide was issued for six parcels of land while the mutation form was for seven parcels. He concluded that parcel no. 1420 may have been superimposed.

### **DEFENDANT'S CASE**

8. The Defendant testified that he had purchased a parcel of land measuring 50 feet by 100 feet. He told the court that he later bought an extra parcel of land from the Plaintiff adjacent to the river at Kshs. 30,000 though they did not take the measurements of the said portion. He produced a document dated 22<sup>nd</sup> March 2008 as Defence exhibit 1. He said that it was the Plaintiff who applied for consent of the Land Control Board. He produced the consent of the Land Control Board, the application for consent of the Land Control Board, mutation forms, Registry Index Map and certificate of official search in respect of title no. 1420 as defence exhibits 2 to 6 respectively. He also produced a copy of the title deed in respect of L. R No. CENTRAL KITUTU/MWABUNDUSI/1420 as defence exhibit 8.

9. Upon cross-examination the Defendant denied that he manipulated the mutation forms and stated that if there was any manipulation, it was done by the Plaintiff and the surveyor. He denied that his title was superimposed and insisted that he was given the number by the Lands Office.

### **ISSUES FOR DETERMINATION**

10. Having considered the pleadings, evidence and rival submissions, the following issues fall for determination:

- i. Whether the Plaintiff entered into two sale agreements with the defendant in respect of L.R No. CENTRAL KITUTU/MWABUNDUSI/ 962.
- ii. Whether the Defendant fraudulently or unlawfully obtained a larger parcel of land than he had purchased from the Plaintiff and registered it as L.R NO. CENTRAL KITUTU/MWABUNDUSI/ 1420.
- iii. Whether title No. CENTRAL KITUTU/MWABUNDUSI/ 1420 should be cancelled and/or rectified with a view to excising the portion measuring 0.21 Ha and reverting the same to the Plaintiff
- iv. Whether the Plaintiff is entitled to the reliefs sought.

### **ANALYSIS AND DETERMINATION**

11. The first issue for determination is whether the Plaintiff entered into two sale agreements with the Defendant in respect of L.R No. CENTRAL KITUTU/MWABUNDUSI/ 962.

12. It is common ground that the Plaintiff entered into an agreement dated 28<sup>th</sup> October 1998 for the sale of a parcel of land measuring 50 feet by 100 feet from L.R No. CENTRAL KITUTU/MWABUNDUSI/ 962. What is in contention is the second agreement for an additional parcel of land measuring 0.21 Ha. The Defendant produced Defence Exhibit 1 which he purports to be an agreement dated 22<sup>nd</sup> March 2008.

13. A close look at the said document shows that it does not state that the Plaintiff is selling an additional parcel of land to the Defendant nor does it specify the parcel number or dimensions of the alleged additional parcel of land. Furthermore, whereas the Defendant testified that he paid the Plaintiff an additional sum of Kshs. 30,000 in the form of building materials, the said "agreement" indicates that the defendant was to pay Kshs. 15,000 to the plaintiff as a present. From the evidence on record, I am not persuaded that there were two sale agreements as the only valid agreement is the one dated 28<sup>th</sup> October 1998.

14. With regard to the second issue, the onus was on the Plaintiff to prove fraud. In the case of **Gichinga Kibutha v Carolyne Nduku (2018) eKLR** the court observed as follows:

*“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. At page 427 Bullen & Leake & Jacobs, Precedents of Pleadings 13<sup>th</sup> Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App Case 685, 697, 701, 709, Garden Neptune v Occident (1989) 1 Lloyd’s Rep 305, 308, Lawrence v Lord Norrey (1880) 15 App. Cas 210a2t 221 and Davy v Garret (1878) 7 Ch D. 473 at 489 it is stated that :*

*“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, though it not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved.(1) “General allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice.”*

15. At paragraph 13 of the Plaintiff, the Plaintiff has pleaded fraud and set out the particulars thereof but the evidence adduced did not prove all the allegations of fraud. For instance, the Plaintiff admitted that he signed blank forms but he did not say that he was manipulated or tricked into signing the forms. Additionally, the court was not shown any Transfer forms from which it could infer that the Plaintiff’s signature was forged. In the circumstances, I am unable to hold that fraud was proved.

16. That said, there is ample evidence to show that title no. CENTRAL KITUTU/MWABUNDUSI/1420 was not obtained procedurally. The Plaintiff was categorical that he only sold to the Defendant a portion of land measuring 50 feet by 100 feet and he did not know how the Defendant ended up with a bigger portion than what he had bought. The Land Registrar who testified as PW2 stated that L.R No. CENTRAL KITUTU/MWABUNDUSI/ 962 was sub-divided into 6 parcels of land numbers 1338, 1339, 1340, 1341 1342 and 1343 respectively and that land parcel no. 1420 was not within this series. He told the court that there was no parcel file in respect of land parcel No. CENTRAL KITUTU/MWABUNDUSI/ 1420 as it did not exist. PW3 stated in no uncertain terms that L.R No CENTRAL KITUTU/MWABUNDUSI/ 1420 was created unprocedurally by manipulating the map and superimposing it on an existing number.

17. On the other hand, the Defendant maintained that he entered into a second agreement with the Plaintiff for an additional parcel of land though he did not specify the acreage of the additional portion. He told that court that his parcel of land was included in the mutation form.

18. The Plaintiff applied for consent of the Land Control Board to sub-divide his land into six portions on 22.7.1998 and he obtained the said consent on 29.7.1998. This was before he entered into a sale agreement with the Defendant. In his testimony, the Plaintiff stated that at the time he sold a portion of land parcel no. 962 to the Defendant, he had already sold part of it to 3 persons and given his 3 sons a portion of the said land. Unfortunately, he did not produce the mutation form that was used to sub-divide the land into six portions as he said he did not have it at the time he testified. However, he told the court that the Defendant had come up with his own mutation form which included a seventh portion of land.

19. According to the Defendant, both the application for Land Control Board consent and consent letter were altered to show that the sub-divisions were supposed to be six instead of the initial seven. He contends that his portion was included as the seventh one. If this was the case, the serial number for the Defendant’s title would have been in the same series as the other six. In any case PW2 testified that his records revealed that parcel no. 962 was closed upon sub-division on 9.8.2006 when six new parcels were created. Parcel no. 1420 was not among the six parcels.

20. In view of the foregoing, I reject the Defendant’s version that parcel no. 1420 was included in the sub-divisions that were done on 9.8.2006. The Certificate of Official Search in respect of land parcel number 1420 produced by the Defendant indicates that the Defendant was registered as the proprietor of the said title on 22.4. 2008 and the title deed does not indicate that it was a sub-division of land parcel no. 962. This means that the root of title no. 1420 is doubtful as it was obtained through a faulty process. It is therefore my finding that the title for land parcel no.CENTRAL KITUTU/MWABUNDUSI/ 1420 was registered unprocedurally and unlawfully.

21. Section 26 (1) (b) of the **Land Registration Act** provides that the person named as proprietor of the land is the absolute and indefeasible owner thereof and the title of that proprietor shall not be subject to challenge, except where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Even though, I agree with counsel for the Defendant that the Plaintiff did not carry out the unlawful acts on his own without involving the surveyor and other officials at the Lands office, he was definitely privy to the unlawful acts.

22. I now turn to the issue as to whether the title for land parcel no. CENTRAL KITUTU/MWABUNDUSI/ 1420 should be cancelled. Section 26 (1) (b) of the Land Registration Act provides 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 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 grounds of fraud, or misrepresentation to which 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**

23. Having made a finding that title No. CENTRAL KITUTU/MWABUNDUSI/ 1420 was obtained unprocedurally and unlawfully, the same is liable to be cancelled. However, since the Plaintiff admits that he sold a parcel of land measuring 50ft by 100 feet to the defendant and put him in possession thereof, it will be necessary for the register to be rectified so that the Defendant is issued with a title measuring 50 feet by 100 feet. The remaining 0.21 Ha shall revert back to the Plaintiff. I therefore find that the Plaintiff has proved his case on a balance of probabilities. In order to meet the ends of justice, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that the inclusion of the portion of land measuring 0.21Ha in L.R No. CENTRAL KITUTU/MWABUNDUSI/1420 in favour of the defendant was unprocedural and unlawful.

b) Title No. CENTRAL KITUTU/MWABUNDUSI/1420 is hereby cancelled.

c) The parcel of land which is currently occupied by the Defendant and which was illegally registered as L.R CENTRAL KITUTU/MWABUNDUSI/1420 be re-surveyed and a portion measuring 50 feet by 100 feet be registered in the name of YUVENALIS MOSIOMA MIRORO (defendant) while the portion measuring 0.21Ha be excised therefrom and the same do revert to the name of MICHIRA OTUKE (Plaintiff).

d) Upon prayer (d) being implemented, a permanent injunction is hereby granted restraining the Defendant from entering upon, cultivating, occupying, encumbering and/or dealing with the Plaintiff's portion of land measuring 0.21 Ha currently registered as part of L.R CENTRAL KITUTU/MWABUNDUSI/1420 in such manner as is detrimental to the interest of the Plaintiff.

e) The Defendant to give vacant possession of the portion measuring 0.21 Ha currently registered as part of L.R CENTRAL KITUTU/MWABUNDUSI/1420 within 30 days failing which eviction shall issue upon application.

f) The costs of this suit shall be borne by the Defendant.

**Dated, signed and delivered electronically via Zoom this 23<sup>rd</sup> day of April 2020.**

**J.M ONYANGO**

**JUDGE**