



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 18 OF 2016**

**SOPHIA KANYOKORA KARUME.....PLAINTIFF**

**VERSUS**

**ANTONY MAGOCHI MWANGI.....1<sup>ST</sup> DEFENDANT**

**SYDIAN BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

In plaint dated 10<sup>th</sup> February 2016 and filed on 11<sup>th</sup> February 2016, the plaintiff sued the 1<sup>st</sup> defendant seeking a declaration that the registration of the land parcels No. MWERUA/BARICHO/1464 and MWERUA/BARICHO/1465 in favour of the defendant (read 1<sup>st</sup> defendant) was fraudulent and the said registration be revoked. The plaintiff also sought costs of the suit. On 13<sup>th</sup> January 2018, the plaintiff amended her plaint by adding Sidian Bank Ltd as the 2<sup>nd</sup> defendant herein and sought the following prayers:

***a. A declaration that the 1<sup>st</sup> defendant registration as owner in L.R. TITLE No. MWERUA/BARICHO/1464 & 1465 was fraudulent and therefore null and void.***

***b. A declaration that the obtaining of a loan by the 1<sup>st</sup> defendant from the 2<sup>nd</sup> defendant with security of L.R. Title No. MWERUA/BARICHO/1465 was also fraudulent and therefore null and void.***

***c. That this Honourable Court be pleased to cancel and order the titles to L.R. Title No. MWERUA/BARICHO/1464 & 1465 in the name of the 1<sup>st</sup> defendant be cancelled and the District Land Registrar issue new Titles in the name of the plaintiff.***

***d. Costs of and incidental to this suit be provided for and be borne by the 1<sup>st</sup> defendant.***

***e. Any other such/such other/further order/relieves as this Honourable Court might deem fit/just to grant.***

On 11<sup>th</sup> March 2016, the defendant (read 1<sup>st</sup> defendant) filed his defence and on 4<sup>th</sup> September 2018, the 1<sup>st</sup> defendant amended his defence. On 29<sup>th</sup> January 2019, the 2<sup>nd</sup> defendant through the firm of P.M. Muchira filed a Notice of Appointment. When this case came up for hearing on 10<sup>th</sup> February 2019, counsel for the plaintiff requested for adjournment as he had not served the counsel for the 1<sup>st</sup> defendant. Mr. Rurige who appeared for the 2<sup>nd</sup> defendant stated that he had been instructed that the 2<sup>nd</sup> defendant had no interest in the matter as the loan had been fully settled. The case was scheduled to 4<sup>th</sup> February 2020 for hearing.

**PLAINTIFF'S CASE**

The plaintiff testified on oath and stated that she knows the 1<sup>st</sup> defendant as she would see him going round. She stated that she has no business with him and that she has not lived with him and she has no relationship with him. She stated that she has never sold any of the portions/parcels of land now in his name. The plaintiff referred to her list of documents dated 13<sup>th</sup> July 2018. They are mutation forms by J.M. Ruthuthi Consultants Surveyors, Green card to L.R. Title No. MWERUA/BARICHO/1461, 1462, 1463, 1464, 1465 & 1466 and a judgment in Criminal Case No. 324 of 2014 CM's Court Kerugoya between Republic and Antony Magochi Mwangi. The plaintiff stated that she had complained to the Police that someone by the name Antony Magochi Mwangi had stolen her land. She testified in that case after the 1<sup>st</sup> defendant was charged. The Court gave its judgment and held that the sub-division done to her land by Antony Magochi Mwangi (1<sup>st</sup> defendant) was null and void.

## 1<sup>ST</sup> DEFENDANT'S CASE

Despite filing a defence to the plaintiff's claim, the 1<sup>st</sup> defendant did not attend Court to prosecute the same. The defence case was therefore closed.

## 2<sup>ND</sup> DEFENDANT'S CASE

The 2<sup>nd</sup> defendant through the firm of P.M. Muchira stated that the 2<sup>nd</sup> defendant had no interest in the suit property L.R. No. MWERUA/BARICHO/1465 since the loan the subject of which the 2<sup>nd</sup> defendant had been enjoined in these proceedings has since been repaid in full. The learned counsel stated that they shall release the title deed to whoever the Court directs.

## ANALYSIS AND DETERMINATION

The plaintiff's claim is for cancellation of the title deeds for land parcels No. MWERUA/BARICHO/1464 and 1465. The grounds for the cancellation of those titles are fraud particulars of which are shown on the plaint. The plaintiff testified on oath and stated that she did not sell the 1<sup>st</sup> defendant the parcels of land No. MWERUA/BARICHO/1464 and 1465. She stated that she has never entered into a sale agreement with the defendant and that she has never made an application to the Land Control Board to transfer the suit properties to the 1<sup>st</sup> defendant. The plaintiff also testified that she has never attended the Land Control Board with a view to transfer the suit properties to the 1<sup>st</sup> defendant and that the suit properties at no time appeared in the agenda before the Ndia Land Control Board meeting and therefore the consent to transfer was not issued.

It is the plaintiff's contention that she did not execute the transfer instruments to transfer the suit properties in favour of the 1<sup>st</sup> defendant and that the defendant duped her into believing that she was to avail Passport size photos, copy of the National Identity Card and PIN for sub-division of land parcel No. MWERUA/BARICHO/760 yet the defendant acquired these important documents for fraudulent transfer of the suit properties to himself. The plaintiff also produced a judgment before the Chief Magistrate's Court (Kerugoya) in Criminal Case No. 324/2014 where the 1<sup>st</sup> defendant was charged with three counts relating to the suit properties. Though the 1<sup>st</sup> defendant was not convicted in the three counts, the trial magistrate made the following observations at Page 3 thereof:-

***"..... All those subsequent transactions were void and the original title still belongs to the estate of the deceased and I was of the opinion that PW1 should have obtained a confirmed grant before sub-division and effecting transfer and if indeed the accused knew the process very well, he ought to have known that PW1 had no authority to conduct any further dealings on the land before confirmation of the grant ...."***

The testimony given by the plaintiff puts into question the manner in which the 1<sup>st</sup> defendant acquired the titles to the two parcels of land L.R. No. MWERUA/BARICHO/1464 and 1465. Other than merely denying the plaintiff's claim in his statement, the 1<sup>st</sup> defendant did not challenge the plaintiff's testimony given on oath. The plaintiff's testimony and all the documents produced in evidence therefore remain unchallenged. The fact that the suit has not been opposed means that the plaintiff's evidence remained unchallenged and uncontroverted.

In the case of *Matex Knitwear Limited Vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, Lesiit J, citing the case of *Autar Singh Bahra and Another Vs Raju Govindji, HCCC No. 548 of 1998* held thus:

***"Although the Defendant has denied liability in an amended Defence and Counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged, but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail"***

Again, in the case of *Munyororo Vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 (unreported)*, the Court held:

***"The Plaintiff proved on a balance of probability that she was entitled to the orders in the plaint and in the absence of the Defendants and their counsel to cross-examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a Court of law should be able to act upon"***

I agree with the above decisions suffice to state that it is not in every case where the defendant had not called evidence that the plaintiff's case must invariably be deemed to be proved on a balance of probabilities. The trial Court must satisfy itself that the evidence led is such that without contradiction by the defendant, it is sufficient to prove the claim. The facts alleged must be full and accurate to support the averments contained in the plaint. I am satisfied that the facts given by the plaintiff in her testimony are full and accurate to support the plaint.

## DISPOSITION

In the final analysis, I enter judgment for the plaintiff as follows:

**1. A declaration that the 1<sup>st</sup> defendant Registration as owner in L.R Title no. MWERUA/BARICHO/1464 and MWERUA/BARICHO/1465 was fraudulent and therefore null and void.**

2. A declaration that the obtaining of a loan by the 1<sup>st</sup> defendant from the 2<sup>nd</sup> defendant with L.R. Title No. MWERUA/BARICHO/1465 as security was also fraudulent and therefore null and void.

3. The Titles to land parcels No. MWERUA/BARICHO/1464 and MWERUA/BARICHO/1465 in the name of the 1<sup>st</sup> defendant Antony Magochi Mwangi be and are hereby cancelled and the County Land Registrar Kirinyaga directed to issue new Titles in the name of the plaintiff SOPHIA KANYOKORA KARUME.

4. The costs of this suit to be borne by the 1<sup>st</sup> defendant.

5. The Title deed in respect of L.R. No. MWERUA/BARICHO/1465 held by the 2<sup>nd</sup> defendant to be released to the plaintiff to be surrendered for cancellation and issuance of a new Title in her name.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 29<sup>th</sup> day of May, 2020.

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Muriithi holding brief for Wambugu Kariuki for Plaintiff

2. Mr. Rurige for 2<sup>nd</sup> Defendant

3. 1<sup>st</sup> Defendant – absent

4. Okatch – Court clerk