



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 777 OF 2017

(Formerly Nairobi ELC No. 580 of 2014)

DICKSON SINKEET MAPI (Suing as the personal representative of

BENJAMIN MAPI OLE PARTIMO – deceased).....PLAINTIFF

VERSUS

NAISENYU PARGARNA MUTUNKEI.....DEFENDANT

JUDGEMENT

By a Plaint dated the 16th April, 2014 and amended on 13th June, 2018, the Plaintiff prays of judgment against the Defendant for: -

- a) A Mandatory Order directed to the Defendant ordering her to forthwith and unconditionally deliver up and surrender to the Plaintiff the Original Title Deed to Land Reference No. Kajiado/ Kaputiei Central/ 1766.
- b) A permanent injunction restraining the Defendant, her family, kin, agents, employees or servants from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number Kajiado/ Kaputiei Central/ 1766.
- c) A Declaration that the Plaintiff is the absolute, rightful and bona fide owner of Land Reference Number Kajiado/ Kaputiei Central/ 1766.
- d) A declaration that the Defendant irregularly, fraudulently and in contempt of the Court Order dated 9th December, 2017 transferred Land Reference Number Kajiado/ Kaputiei Central/ 1766 to her name and order for Cancellation of the Defendant's title and all entries made therein.
- e) A declaration order that the title to Land Reference Number Kajiado/ Kaputiei Central/ 1766 reverts to the proprietorship of the Plaintiff Benjamin Mapi Ole Partimo or his estate.
- f) General Damages for fraud;
- g) Costs of this suit;
- h) Any other relief that this honourable court may deem just and fair to order.

The Defendant filed her Defence dated 5th May, 2014 which was amended on 9th April, 2018 where she denied the averments in the Plaint except for the descriptive and jurisdiction of the court. She admits that the Plaintiff is her cousin and they exchanged land wherein she gave him three acres in Kitengela while he agreed to transfer land parcel number Kajiado/ Kaputiei Central/ 1766 measuring fifty (50) acres, hereinafter referred to as 'the suit land' to her. Further, they agreed that the said three acres were to be transferred directly to the buyer to reduce transaction expenses but the Purchase price was paid to the Plaintiff. She states a buyer Machanga bought two (2) acres while another buyer Haron Karimi Kingori bought the remaining one (1) acre. She explains that they stayed without the title until 2007 as the Plaintiff informed them it was misplaced but later availed it. She confirms she sent her son Moses Tait to pick certain documents from the Plaintiff which included copies of Identity Card, Copy of PIN, passport size photos, signed Transfer Form and Consent of the Land Control Board to effect transfer of suit land to her. She contends that she learnt of the allegation of the lost title from the Plaintiff who had called and advised her to lodge the transfer for registration immediately as his wife including son had hatched a plan to lie that the title was lost. She claims

when she went to the Land Registry she met a Registrar called Wambua who informed her that someone had applied for a provisional Certificate of Title in respect of the title she had on the grounds that it was lost. Further, the Plaintiff, his wife and son were in the Land Registry and disowned knowledge of the Defendant after which the Land Registrar referred them to the CID Kajiado. She insists the CID investigated the issue and the Plaintiff was charged with the offence of giving false information to a person employed in the public service. She reiterates that she has been in possession of the suit land since 2009, constructed a 'Boma' thereon for her herdsman and has had cows therein since 2009. Further, that upon the demise of the Plaintiff, the criminal case against him abated after which the CID returned to her all the Completion documents.

The Plaintiff filed his reply to Defence dated 17th July, 2018 wherein he denied the averments in the Defence and contended that he never met the Defendant in Kitengela and is a stranger to the buyers Wilson Machanga Wambura as well as Kingori. He insists the KRA PIN produced by the Defendant is a forgery. He claims the Defendant colluded with the CID to frame charges against the Plaintiff to force him to concede and let her transfer the land in her name. He reiterates that the Defendant has no proprietary interest in the suit land as she obtained a transfer in her name contrary to the Court Order issued on 9th December, 2014.

Evidence of the Plaintiff

The Plaintiff Dickson Sinkeet Mapi who is a legal representative to the estate of Benjamin Partimo testified as PW1 and confirmed that the Defendant who was his auntie had fraudulently obtained registration of land parcel number Kajiado/ Kaputiei Central /1766 measuring 50 acres in her name. PW1 disputed the documents the Defendant had used in effecting registration to herself. It was his testimony that all the documents presented including the Transfer Form, Consent of the Land Control Board and PIN Certificate were all forged. He insisted that there was no Sale Agreement between the deceased and the Defendant confirming the exchange of the two parcels of land. Further, that the Defendant had never taken occupation of the suit land as he used it to herd livestock. In cross examination, he admitted he had been charged together with his father for giving false information to a public servant but the father died before the said criminal case was concluded. Further, that he was also discharged after the father's demise. He produced various documents including copy Certificate of Title; Certificate of Official Search; Receipts; Copy of Gazette Notice issued on 19th November, 1993, Affidavit sworn by the Plaintiff dated 1st August, 2013; Charge Sheet in Kajiado Criminal Case No. 306 of 2014; Documents in the said Criminal Case; Undated Application for Consent of Land Control Board; Undated Transfer of Land Form; and Copies of two PIN Certificates as exhibits.

Evidence of the Defendant

The Defendant Naisenyo Pargama Mutunkei as DW1 testified that in 2002 she entered into an agreement with the deceased Plaintiff Benjamin Partimo for the exchange of land. She explained that she had three (3) acres of land in Kitengela while the deceased had the suit land. Further, that they agreed with the deceased that he would obtain buyers for the three acres of land but the transfer would be done directly to the buyers as the title was still in DW1's husband's name. She insisted that the land in Kitengela was transferred to two purchasers who paid the purchase price to the deceased. She confirmed that the deceased gave her all the completion documents in respect to the transfer of the suit land and in 2014 urged her to urgently effect transfer in her name as the wife and son wanted to claim the title was lost. She averred that when she proceeded to the Lands Office and lodged the completion documents, she was informed the Title Deed she had was reported lost. She met the deceased, his son and wife at the Lands Office but he denied exchanging the land with her. The Land Registrar Mr. Wambua, referred the matter to the CID Kajiado and after investigation the deceased and PW1 were charged in court for giving false information to a public servant. However, the deceased died before the matter was concluded and PW1 was discharged. She claims she was returned to the documents which had been seized by the CID and she later transferred the suit land in her name. She confirmed taking possession of the suit land in 2009, putting up a boma for her herdsman and rearing livestock thereon. In cross examination, she confirmed there was no Agreement for exchange of land. She explained that it is her husband who entered into the Sale Agreements with the two buyers Wilson Machanga Wambura and Kingori for the three acres. She further confirmed that she saw the deceased given Kshs. 400,000/=. She insisted the documents she presented in court were genuine. Further, the transaction with the deceased was genuine. She explained that it is the deceased who took her to Mary Ngechi Advocate. She produced various documents including Two copies of Title Deed to the suit land in the name of Benjamin Partimo Mapi and another in Defendant's name; Letter of Consent dated the 4th December, 2013; Copy of Application for Consent LCR No. 144/12/13; Copy of Transfer; Copy of Identity Card and PIN for Benjamin Mapi Partimo; Sale Agreement between Pargama Mutunkei Lamo and Wilson Machanga dated 21st March, 2002; Copy of Title for Kjd/ Kitengela/ 14649; Charge Sheet in Criminal Case No. 306 of 2014; and Copy of Stamp Duty Assessment and Pay in Slip as her exhibits.

DW2 Pargama Mutunkei Lamo in his testimony explained that he is the husband to DW1 and the three acres of land they were exchanging with the deceased belonged to him. He confirmed having gone to a lawyers office and executing Sale Agreements with the two purchasers Wilson Machanga Wambura and Kingori but the deceased received the purchase price.

DW3 Wilson Machanga Wambura confirmed purchasing two acres of land in Kitengela. He testified that although he entered into a Sale Agreement dated the 21st March, 2002 with Pargama Mutunkei, he paid the purchase price in an Advocates' office which was received by the deceased Benjamin. He explained that in the first instance, he paid Kshs. 250,000/= . He confirmed that he received the title deed first as he had commenced the transaction earlier but entered into the Sale Agreement later on, out of trust. He further confirmed paying the Survey fees which was undertaken before the Sale Agreement as he wanted to see the beacons. In cross examination, he insisted the Sale Agreement was genuine even though he received his title before payment. He however could not recall the sequence of the transaction. In re examination he clarified that he paid Kshs. 250,000/= at the time of signing the Agreement but had paid some monies amounting to Kshs. 50,000/= and Kshs. 18,000/= survey fees prior to that.

DW4 Paul Tonui who was the Land Registrar Kajiado explained the history of the suit land. He testified that the deceased had lodged a complaint with his Colleague Mr. Wambua that his title deed was lost. They proceeded to gazette the loss before issuance of a new title. It was his testimony that before they could issue a new title, the Defendant lodged the Original Title including Completion documents for purposes of transferring suit land in her name. He explained that Mr. Wambua referred the matter to the CID, who upon investigation and referring documents presented to the Document Examiner, discovered the said documents had been signed by the deceased, culminating in his being charged for giving false information to a public servant. It was his testimony that after the deceased demise, the CID removed the restriction and the Defendant was registered as owner of the suit land in 2016. He produced copy of Certified Green Card for Suit Land and

Presentation Book as his exhibits. In cross examination, he stated that the documents of transfer were presented to Mr. Wambua failed to register them immediately because subject parcel was under investigation.

DW5 Corporal Jackson Langat who was the investigating officer previously based at the Kajiado DCI office, explained that the Land Registrar referred the issue of the lost title and presentation of the original title by the Defendant to the Lands' Office for purposes of transfer, to them for investigation. He testified that after the investigation and referring the documents to the Documents Examiner, it revealed that the said documents were indeed signed by the deceased, culminating in his being charged for giving false information to a public servant. Upon investigation, PW1 who had reported the loss of the Certificate of Title and was issued with a Police Abstract was later charged jointly with the father. The criminal case abated at the instance of the deceased but was withdrawn in respect to PW1.

Submissions

The Plaintiff in his submissions reiterated his claim and insisted there was no spousal consent, no agreement for exchange of land; Defendant obtained registration when caution was subsisting; there were discrepancies in the PIN Certificates and that the Defendant orchestrated the criminal proceedings against the deceased. Further, that the Defendant was in contempt of Court for proceeding to obtain title to the suit land despite the existence of court order directing that any dealings on the suit land were stopped. He further submitted that the Transfer has no Day Book presentation number and the application for Land Control Board was undated. Further that the Sale Agreement dated the 21st March, 2002 is also a forgery. He stated that the suit land should hence revert back to the Deceased estate. The Plaintiff annexed a copy of the decision in **Elijah Makeri Nyangwara V Stephen Mungai Njuguna & Another (2013) eKLR** to buttress his averments.

The Defendant in her submissions contended that she did not fraudulently acquire suit land. She submitted that the Plaintiff had failed to provide evidence to prove she hid the title deed from him. She further submitted that there was no explanation on how the title deed found its way to her hands together with the Land Control Board Consent and all documents required to effect transfer. She insists the Plaintiff has not led evidence to prove the consent of the Land Control Board was obtained illegally and that she acquired suit land fraudulently. She averred that the transfer of the suit land was procedural. To support her averments, she relied on the decisions of **Alice Chemutai Too V Nickson Kipkurui Korir & 2 others (2015) eKLR** and **Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR**. She submitted that she entered into an oral agreement for the exchange of land in 2002 and performed her part of the contract. She relied on the testimony of DW3 where he confirmed that the Plaintiff was given the money. To support this arguments she relied on the decisions of **Anderson Omondi Owandho (suing as the legal representative of the Estate of Thomas Owandho Rajwai (Deceased) V Augustinos Ondiek (2017) eKLR; Joseph K. Cheron V Kiplagat Kimiti (1995) eKLR**. On the allegation of fraud in respect to the PIN Certificate, her contention was that the Plaintiff never called any witness from KRA to prove this. On the allegations of discrepancies in the Defence testimonies, she submitted that they stayed without title as the Plaintiff claimed to have misplaced it. Further, on the issue of the Sale Agreement prepared after the title, DW3 explained that he did so for purposes of his records. She further submitted that the receipt dated 21st March, 2002 for Kshs. 132,000 issued by Omangi Advocate is not legal fees as claimed by the Plaintiff but for purchase of land as it is a receipt from the Client account and not office account. She denied orchestrating criminal proceedings against the Plaintiff and relied on the evidence of DW5. On the issue of lack of spousal consent, she insists the wife of Benjamin Mapi never took any legal action in respect to this. To support her averments, she relied on the decision of **Aga Wanjiru Mwaniki V Jane Wanjiru Mwaniki (1997) eKLR**. She also submitted that the transfer of the suit land to her was procedural as she booked the documents Benjamin Mapi had duly executed and affixed with his passport size photos, Consent of the Land Control Board, Identity Card, PIN and Stamp Duty duly paid. Further that Benjamin Mapi told her to book the documents as his wife and son had reported the title as lost and were in the process of obtaining a provisional one. She insists she has been in possession of the suit land and constructed a boma for the herdsman thereon.

Analysis and Determination

Upon consideration of the pleadings filed herein including the Plaintiff, Defence, Witnesses' Testimonies, Exhibits and Submissions the following are the issues for determination:

- Whether the Defendant adhered to the proper legal process to acquire the suit land.
- Whether the Plaintiff is entitled to the Orders sought in the Plaintiff.
- Who should bear the costs of the suit.

As to whether the Defendant adhered to the proper legal process to acquire suit land and if the Plaintiff is entitled to the Orders sought in the Plaintiff.

The Plaintiff contends that the Defendant illegally acquired the suit land and forged documents which she presented to obtain the Certificate of Title. The Defendant on the other hand insists she entered into an oral agreement to exchange land with the deceased and performed her part and procedurally obtained title to the suit land after receiving the requisite documents from Benjamin Mapi Partimo. PW1 in his testimony insisted he had not seen any documents to confirm his father exchanged land with the Defendant. He explained that the deceased had reported loss of his title in 2013 and the said loss was gazetted. He referred to the PIN which was used to transfer the land and stated that the same did not belong to the deceased. He referred to the respective documents including the ID Number, Transfer Form, and Application for Land Control Board Consent and insisted they were all fake. During cross examination he admitted that his father was charged in a criminal case no. 306 of 2014 for giving false information to a person employed in a public office because he had reported the loss of his title deed to the Police and Land Registrar. He stated that his father died before the suit was determined. He confirmed that he was not present when the father reported the loss of the title deed. Further, he was not present when the father went to the Land Control Board. He explained that in the Application for consent of the Land Control Board, both his father's ID Numbers (new generation and old) are indicated therein. I note in the evidence of the DW5, it emerged that it is actually PW1 who reported the loss of the title deed to the Police and not his father as he alleged in his evidence in chief. Further, this is actually corroborated in the Police Abstract which was issued to that effect. PW1 insisted the suit land was vacant contrary to the averments of DW1 and DW2 that they took possession thereon, constructed a boma and had been rearing livestock on it. On this point, I note in his witness statement PW1 did not indicate if the suit land was vacant and if he was indeed the

one grazing thereon. From the evidence of PW1, he failed to demonstrate how the Defendant obtained the Original Title Deed to the suit land, Deceased Passport Photograph, duly filled in Transfer Form, Consent of the Land Control Board for purposes of effecting the transfer of the suit land to herself. On perusal of the affidavit which the deceased had sworn on the loss of the title deed, I note he indicated the same got lost in a matatu. Further, I note the Application for Consent of the Land Control Board and the Transfer Form were purportedly signed by the deceased. DW5 confirmed in his testimony that upon taking the deceased specimen signature to compare with the one on the Transfer Form and Application for Land Control Board Consent, which was sent to the Documents' Examiner within the DCI Headquarters, he got a report that the said signatures were from the same person, and this culminated in Benjamin Mapi Partimo being charged for giving false information to a person in public office. It was his testimony that the deceased died before the case was concluded. He denied colluding with the Defendant to institute the criminal charges against the deceased and his son as alleged and insisted that it is the Land Registrar Wambua who called them when DW1 had presented the Original Title Deed which had been reported lost as well as the Transfer Documents to the Lands Office. DW1 in her testimony explained that they entered into an Agreement to exchange land with the deceased. She was giving the deceased their 3 acres at Kitengela while he was to give them 50 acres at Ipollosat (Konza). It was her testimony that the deceased opted to have the said three acres sold and to be given money instead. Further, that the deceased advised that instead of the land being transferred in his name, it was easier for the same to be done directly to a purchaser's name. DW3 in his testimony confirmed that the monies he paid as purchase price of Kshs. 250,000 in the lawyers' office, which he handed to Pargarna Mutunkei Lamo was in turn handed over to the deceased Benjamin Mapi Partimo as they were together. He explained that the survey was undertaken before the Agreement was done as he wanted to see the beacons. He however could not recall the sequence of transaction. DW4 in his testimony confirmed that the Land Registrar Wambua is the one who referred the matter to the CID. Further that a Title Deed has been issued to the Defendant on 1st March, 2016. He confirmed that as per the Presentation Book where all transactions are recorded, it indicated the Transfer was from the deceased Benjamin Partimo Mapi to the Defendant.. He clarified that his office received request to replace the title deed and referred to the Gazette Notice dated the 8/11/2013. He could not recall if the deceased presented an affidavit indicating suit land was matrimonial property. He explained that there were restrictions on the Green Card but the same was removed by the CID on 17th February, 2016 because the criminal case had been withdrawn. He further confirmed that the Lands Office had issued a title to the deceased on 10th December, 2009 which title was later alleged to be lost. The Plaintiff claims the Consent of the Land Control Board was forged but did not bring a witness from the said Board to prove this averment nor produce proceedings of the date when the said Consent was issued. Further, I note the Consent of the Land Control Board was obtained in 2013 and the Plaintiff never sought to quash it if indeed it was fake as alleged.

The Plaintiff alleged fraud on the part of Defendant but in the evidence that I have analyzed above, I opine that he did not demonstrate how the Defendant had obtained the completion documents duly signed including the deceased passport photograph for purposes of transfer. In the case **Vivo Energy (K) Ltd -vs- Maloba Petrol station Ltd and Others (2013) KLR**. The Judges of Appeal while citing in approval the case of **R.G. Patel -vs- Lalji Makanji (1957) EA 314** held that ***"allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."***

Based on the evidence before me and in relying on this decision, I find that the burden of proof was upon the Plaintiff to prove fraud on the part of the Defendant but he failed to discharge it.

The Plaintiff insisted that in the absence of an agreement, there is no proof of the transaction. However, I note that the oral agreement was entered into in 2002 before the amendment to the Law of Contract. Further, I note there was part performance of the agreement as well as the Defendant's possession of the suit land, hence I deem the said oral agreement for exchange of land as valid. On the issue of cancellation of the Defendant's title, I note the Plaintiff claims the Defendant obtained title during subsistence of the Court Order dated the 9th December, 2014. The Defendant explained that she was not informed of the Court Order by her Advocate. Upon perusal of the Court Records, I note the said Ruling was delivered on 9th December, 2014 in the absence of the Defendant. Further, the Plaintiff had not indicated whether the same was served upon the Defendant and the Land Registrar to register it on the Green Card. In the circumstance, I will proceed to exonerate the Defendant and not cite her for contempt. On the issue of the title held by the Defendant, I wish to make reference to Section 26(1) of the Land Registration Act which provides that:

"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. '

Further, in the case of **Alice Chemutai Too v 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 title holder. 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 title holder 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. "I stand by the above words and I am unable to put it better than I did in the said dictum.'

Further, Section 80 (2) of the Land Registration Act provides that **'The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'**

Based on the evidence before me and in associating myself with the legal provisions cited above as well as the quoted authorities, I find that the deceased indeed signed the Transfer Form, Obtained Consent of the Land Control Board, furnished his Passport Photograph and PIN to enable the Defendant obtain title to the suit land. It is trite that once the Transfer Form had been duly signed and Consent of the Land Control Board obtained, there was intent of the deceased to dispose of the said land and hence his proprietary rights over the said land extinguished. The Plaintiff has relied heavily on the wrong PIN Number which was in the custody of the Defendant but to my mind, I am persuaded by the evidence of DW1 that all these documents including the PIN were given to her by the deceased as the Plaintiff has not indicated if the ID Numbers indicated therein were incorrect. Further, based on the evidence from the Land Registrar, all the requisite documents were presented before the Certificate of Title was issued to the Defendant

It is against the foregoing that I find that the Defendant's title is indeed protected by section 26(1) of the Land Registration Act and I will decline to cancel it. I further make a finding that the Plaintiff is hence not entitled to the orders sought in the Plaintiff.

It is against the foregoing that I find that the Plaintiff has not proved his case on a balance of probability and will proceed to dismiss it with costs to the Defendant.

Dated Signed and Delivered via email this 27th Day of May, 2020

CHRISTINE OCHIENG

JUDGE