



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**LAND & ENVIRONMENT CASE NO.321 OF 2013**

**(FORMERLY KAKAMEGA ELC 266/2013)**

**NASHOM ASEKA.....PLAINTIFF**

**VERSUS**

**MOSES SUDI OTOA.....1<sup>ST</sup> DEFENDANT**

**THE A.G / LAND REGISTRAR BUNGOMA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

[1] The plaintiff in this case states that he is the registered owner of Bukusu/S. Kanduyi/2285. That he learnt that on 2/8/2013 the said land was transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The plaintiff avers that he did not participate in the process of transferring the land to the 1<sup>st</sup> defendant and he therefore states that the said transfer was fraudulent. In his plaint he has set out the particulars of fraud on the part of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. The plaintiff prays for orders that, the transfer of S. Bukusu/S. Kanduyi/2283 to the name of 1<sup>st</sup> defendant was fraudulent, irregular and unlawful and that the said parcel should be re-transferred to the plaintiff. He prays that the Court do order for general damages and costs of the suit in his favour.

[2] The first defendant filed a statement of defence in which he denied that the sale was fraudulent. He alleged that he carried out a search in the Land office Bungoma and verified the ownership of the property. He stated that it is only a Criminal case that can establish the true owner of the suit property.

This case was fixed for hearing on 1<sup>st</sup> October 2015. A hearing notice was served on the advocates for the 1<sup>st</sup> defendant on 23<sup>rd</sup> March 2015. The second defendant was also served on 29<sup>th</sup> April 2015. The service was done by a process server one Habil Juma Wanyama of P.O. Box 1130 Kakamega.

[3] On the date of hearing on 1<sup>st</sup> October 2015, the plaintiff's advocate sent Mr. Makokha to hold his brief. The case was set for 2.30p.m. The defendant never attended but Mr. Otsiula advocate appeared for the Counsel for the defendant. The plaintiff gave evidence that he is the owner of E. Bukusu/S.Kanduyi/2283 and that he was registered in July 1984. He said that he went to the land office after a tip of by a friend that his land is registered in the name of someone else. He did a search and found that it was registered in the name of one Moses Sudi Otoa on 2/8/2013. He produced a search to that effect. He said that he went to the police station and reported the matter. The police obtained from the land office documents, a consent to transfer land, purporting and copies of the application to transfer land purporting that the plaintiff had applied for the same.

He said that the signature in the application to transfer the suit land was a forgery, and the consent used to transfer the said land was also a forgery. He said he did not sign the transfer of land form and the photograph accompanying the transfer was not his. He said that the Personal Identification Number (P.I.N.) was not his. That his P.I.N was A000202169H. He denied ever signing the transfer P. Exhibit 4 and he produced his correct P.I.N. as P. Exhibit 5. He denied that the Identity Card used was his and produced a photocopy of his Identity Card. He denied ever selling his land or ever having transferred it to anyone or even having done any transaction since acquiring the same. He prayed that the said transfer be revoked.

[4] Mr. Otsiula for the defendant who had taken part in the suit proceedings and who had cross examined the plaintiff applied for adjournment to another date for defence hearing. I rejected that application for adjournment since the firm of Risper Abuga for the defendant was served way back on 23/3/2015 and the Attorney General was equally served on 29/4/2015. Further Mr. Otsiula admitted that the 1<sup>st</sup> defendant was aware of the hearing date and had not attended the Court for hearing of the case. The defence case was closed and the case was set down for judgement.

[5] After having heard the plaintiff I am convinced that the plaintiff is the owner of E. Bukusu/S. Kanduyi/2283. I am convinced that he never sold it to anyone. That the application for Land Control Board consent for transfer, the subsequent consent to transfer the suit land were all forgeries. The photograph on the transfer is not of the plaintiff. The Personal Identification quoted on the transfer does not belong to the plaintiff. The same is a forgery. The plaintiff has denied that the transfer document transferring the plot to the 1<sup>st</sup> defendant is his own. I believe him.

[6] I hold that alleged transfer of E. Bukusu/S. Kanduyi/2283 to the first defendant arose out of a forgery. No title could therefore pass to the first defendant. The suit land shall be retransferred to the plaintiff by the Land Registrar Bungoma Land Registry. I was not shown any evidence that the land Registrar Bungoma was involved in this forgery at all or that he was party to the same. The case against the 2<sup>nd</sup> defendant therefore fails with no order as to costs and the second defendant did not come to Court to defend the same. No general damages were proved to have been suffered by the plaintiff and I will not order any to him. The plaintiff shall have the costs of this suit from the 1<sup>st</sup> defendant and interests from the date hereof.

It is so ordered.

**DATED at BUNGOMA this 2<sup>nd</sup> day of December, 2015**

**S.N. MUKUNYA**

**JUDGE**