

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 219 OF 2012

FLORENCE MORAA NYAMARI PLAINTIFF

VERSUS

HENRY NYANCHIO ONDARA DEFENDANT

JUDGMENT

1. **The Plaintiff brought this suit against the defendant on 27th June, 2012** seeking an order that the defendant be ordered to transfer to her all that parcel of land known as **LR. No. Bassi/Bosansa/2371** (hereinafter referred to as “**the suit property**”) failure to which the Deputy Registrar of this court be at liberty to execute all documents as may be necessary to convey the suit property to her. The Plaintiff’s suit was brought on the grounds that sometimes in the year 2000, the Plaintiff purchased the suit property from one, **Abel Moranga Morebi** and that the defendant who at all material times the area assistant chief was her witness to the agreement that she entered with the said Abel Moranga Morebi (hereinafter only referred to as “**Abel**”). When the Plaintiff purchased the suit property, it was part of a larger parcel of land which had to be sub-divided before the Plaintiff could be issued with a title for the portion that she had purchased. The Plaintiff has claimed that when Abel was sub-dividing the larger parcel of land so that he may issue to the people who had purchased portions of it including the Plaintiff, the defendant through fraud and trickery caused himself to be registered as the proprietor of the parcel of land that the Plaintiff had purchased from Abel which was now registered as **LR. No. Bassi/Bosansa/2371** (“**the suit property**”). All attempts made by the Plaintiff to have the defendant to transfer the suit property to her failed leaving her with no alternative but to institute this suit.
2. The defendant was served with the Summons to enter appearance but did not do so within the prescribed time. On 3rd August, 2012, the Plaintiff requested for interlocutory judgment to be entered against the defendant which was duly entered by the deputy registrar on 8th August, 2012. The matter was thereafter listed for formal proof on 2nd May, 2013. The Plaintiff gave evidence and called two witnesses. In her evidence, the Plaintiff testified that she purchased the suit property from Abel and that the defendant was her witness to the agreement. The suit property is situated at a place called Nyacheki and at the material time she was residing at Suneka. For this reason, she left the defendant to look after the suit property and to follow up the issue of the title deed from Abel. The title deed was supposed to be issued in her name. That the defendant did follow up the issue of the title deed but fraudulently caused the same to be issued in his own name. That it is Abel who informed her that a title deed for the suit property had been issued in the name of the defendant. The Plaintiff produced as exhibit a copy of the agreement for sale that she entered into with Abel dated 6th May, 2000(P. Exhibit 1) and a copy of a certificate of official search dated 11th August, 2010 (P. Exhibit 2) in respect of the suit property which shows that the defendant is registered as the proprietor of the suit property. On realizing that she had been defrauded by the defendant, the Plaintiff reported the matter to the area chief and later to the police but she did not get any assistance. She was left with no alternative but to bring these proceedings. She stated that the suit property is vacant but that the defendant has prevented her from using it. She urged the court to order the defendant to transfer the suit property to her.
3. The Plaintiff’s first witness was **Abel Moranga Nyangau (“Abel”)**. Abel corroborated the Plaintiff’s testimony. He testified that he was the original owner of the suit property and that he sold the suit property to the Plaintiff in the year 2000 for kshs.36,000/= which amount he was paid in full by the plaintiff. That the defendant was the Plaintiff’s agent and that the defendant told him that the Plaintiff had authorized him to have the suit property transferred into his name and then he

would later on transfer the property to the Plaintiff who was by then staying at Suneka. He therefore transferred the suit property into the name of the defendant on the understanding that the defendant would transfer the same to the owner who is the Plaintiff. The Plaintiff's second witness was, **Nyangacha Nyachio ("Nyachio")**. He testified that the Plaintiff and the defendant are known to him and that the Plaintiff is his niece. He corroborated the evidence that had been given by the Plaintiff and Abel. He testified that the Plaintiff bought the suit property from Abel and that he was asked by the Plaintiff and the defendant to go and see the property and that he was present when the Plaintiff and Abel entered into an agreement for the sale of the suit property and he was one of the witnesses to the agreement. He stated that he is also known as Jackson Onyancha which is not his real name in his identity card but the name by which he is known at his home area and which is the name that he used when he witnessed the agreement between the Plaintiff and Abel .

4. The Plaintiff closed his case with the evidence of Nyachio. She informed the court thereafter that she wished to rely on the evidence on record and urged the court to enter judgment in her favour as prayed in the plaint. I have considered the Plaintiff's claim against the defendant as pleaded and the evidence tendered in proof thereof. It is my finding that the Plaintiff has proved her case against the defendant on a balance of probability. The Plaintiff has proved that she purchased from Abel a portion of land measuring 25 feet by 100 feet on 6th May, 2000. This portion was part of a larger parcel of land that Abel had sold to a number of people. The defendant and Nyachio were the Plaintiff's witnesses to the agreement for sale that the Plaintiff had entered into with Abel. When Abel ultimately sub-divided the hitherto larger parcel of land so that he may transfer to each purchaser of the portions thereof their individual parcels, the defendant represented to Abel that he had been instructed by the Plaintiff who was not staying at the place where the land in question was situated to have her parcel transferred to the defendant who will in turn transfer the same to the Plaintiff. Abel in good faith transferred the parcel of land which had been purchased by the Plaintiff which after the sub-division was given parcel number, **LR. No. Bassi/Bosansa/2371 ("the suit property")** to the defendant on the understanding that the defendant would thereafter transfer the same to the Plaintiff. The defendant has since refused to transfer the suit property to the Plaintiff and has denied the Plaintiff access and use of the same. Attempts made by the Plaintiff to settle the matter out of court did not bear fruit as the defendant refused to co-operate. The Plaintiff was left with no alternative but bring the matter to court. Abel and Nyachio gave evidence in support of the Plaintiff's claim against the defendant. Nyachio confirmed that he was a witness to the agreement between Abel and the Plaintiff and that it is the Plaintiff who purchased the suit property. Abel also confirmed that it is the Plaintiff who purchased the suit property from him and that he had transferred the suit property to the defendant on his representation that he was authorized by the Plaintiff to have the property transferred to him and that he would later on transfer the same to the Plaintiff. The defendant was served with the Summons to enter appearance but chose not to defend the suit. The evidence given by the Plaintiff and his witnesses is therefore not controverted. The Plaintiff having proved that she is the one who purchased the suit property and that the defendant caused the same to be registered as the proprietor of the same through acts misrepresentation and fraud, the Plaintiff is entitled to have the suit property transferred to her name. The defendant having had the suit property transferred to him by Abel on the understanding that he would cause the same to be transferred to the Plaintiff must be taken to be holding the title of the same in trust for the Plaintiff.
5. I therefore find the Plaintiff case to have been proved and proceed to enter judgment for the Plaintiff against the defendant as prayed in paragraph (a) of the plaint. The defendant shall transfer the suit property to the Plaintiff within 45 days from the date of being served with a copy of this judgment failure to which the deputy registrar of this court shall be at liberty to execute all documents as may be necessary to have the suit property transferred to the Plaintiff. Before the deputy registrar proceeds as aforesaid, the Plaintiff shall file in court an affidavit of service of a copy of this judgment upon the defendant which service must be effected upon the defendant in person. The Plaintiff shall have the cost of this suit.

Delivered, dated and signed at Kisii this 7th day of February 2014.

S. OKONGO

JUDGE

In the presence of :

N/A for the Plaintiff

N/A for the Defendant

Mobisa Court clerk

S.OKONG'O

JUDGE