



No. 214

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 99 OF 2012**

JACKTON LIECH MBWAYO ..... PLAINTIFF

VERSUS

CHARLES RABEL LIECH ..... DEFENDANT

**JUDGMENT**

1. The Plaintiff brought this suit against the defendant on 20<sup>th</sup> March, 2012 seeking; an order that the registration of the parcel of land known as **LR. No. West Nyokal/Kanyikela/1026** (hereinafter referred to as “**the suit property**”) in the name of the defendant be cancelled and that the title of the same do revert to the Plaintiff. The Plaintiff’s claim against the defendant was brought on the grounds that; the Plaintiff is the father of the defendant and at all material times, the Plaintiff was registered as the proprietor of all that parcel of land known as **LR. No. West Nyokal/Kanyikela/1026** measuring 2.85 hectares (“**the suit property**”). The Plaintiff claimed that he was desirous of dividing the suit property among his children who included the defendant whom he had intended to give 0.70 hectares of the suit property. The Plaintiff claimed that in the process of carrying out this task, he executed blank transfer forms and applications for the Land Control Board Consent which he handed over to the defendant to enable him process a separate title for the said 0.70 hectares in his name out of the suit property. The Plaintiff claimed that instead of having only a portion measuring 0.70 hectares of the suit property transferred to his name, the defendant took advantage of the Plaintiff’s illiteracy to fraudulently cause the entire parcel of land to be transferred to his name. The defendant also caused a parcel of land known as **LR. No. West Nyokal/Kanyikela/1025** measuring 0.70 hectares (hereinafter known as “**Plot No. 1025**”) which was hitherto registered in his name to be transferred to the name of the Plaintiff. The Plaintiff claimed that he was not aware of this development until the month of January, 2012. The Plaintiff claimed that by transferring the whole of the suit property into his name, the defendant had rendered the Plaintiff’s other children who were also entitled to a portion of that parcel of land landless. The Plaintiff claimed that all attempts made to persuade the defendant to transfer the suit property back to the Plaintiff did not bear any fruit. The Plaintiff was therefore left with no alternative but to file this suit. The defendant filed a statement of defence on 4<sup>th</sup> April, 2012 denying the Plaintiff’s claim in its entirety. The defendant contended that the Plaintiff had voluntarily transferred to the defendant the suit property out of his free will and that the allegations of fraud made against him are farfetched. The defendant urged the court to dismiss the Plaintiff’s suit with costs.
2. This case came up for hearing on 18<sup>th</sup> September, 2013 when the Plaintiff and the defendant gave evidence and called one witness each. In his evidence in chief, the Plaintiff testified that; the defendant is his younger son and he had given him a parcel of land known as **LR. No. West**

**Nyokal/Kanyikela/1025 (“Plot No. 1025”).** When the time came for the defendant to put up his own home, the defendant could not do so on his own parcel of land aforesaid because the said parcel of land is on the right hand side of the Plaintiff’s homestead and according to the local customs, that side is reserved for the elder son. Due to this problem the Plaintiff and the defendant agreed that the Plaintiff would give to the defendant a portion measuring 2 acres of the Plaintiff’s parcel of land known as **LR. No. West Nyokal/Kanyikela/1026 (“the suit property”)** in exchange with the defendant’s said parcel of land so that the defendant may have land on which to put up his home. Following this agreement, the defendant proceeded to build his home on a portion of the suit property and the Plaintiff used sisal plants to mark the boundary of the portion of the suit property that he gave to the defendant following the arrangement alluded to hereinabove. A problem arose however when the actual exchange of the two parcels of land was supposed to be carried out at the lands office. Whereas under the arrangement that the Plaintiff had entered into with the defendant the suit property was supposed to be sub-divided so that the defendant may be registered as the proprietor of a portion measuring 2 acres thereof that the Plaintiff had exchanged with him, the defendant fraudulently caused the whole of the suit property to be transferred to his name. In the process, the defendant ended up with 8 acres of the Plaintiff’s land while he was only entitled to 2 acres which is equivalent to his parcel of land that he exchanged with the Plaintiff. The Plaintiff stated further that he had reserved the suit property for the sons of his younger wife who have now been rendered landless after the defendant took the whole parcel. The Plaintiff urged the court to order the defendant to retain only 2 acres of the suit property and to transfer back to him the remainder. He stated that the title in the name of the defendant with respect to Plot No. 1026 should be cancelled so that the land reverts to his name. He would then give the defendant 2 acres thereof which is already in his occupation. The Plaintiff produced as Plaintiff’s exhibits 1 (a), (b), (c), (d), (e), (f), (g) and (h) the documents that he had attached to the affidavit in support of his earlier application for interlocutory injunction.

3. The Plaintiff’s witness was, one, **Joshua Oluoch Otira (PW2).** In his testimony, PW2 stated that he is a clan elder and that the Plaintiff and the defendant are known to him. He testified that the defendant had earlier brought a claim against the plaintiff before the area assistant chief to be given more land by the Plaintiff which claim was dismissed. He stated further that the defendant lodged another claim against the plaintiff before the area chief which was again considered and found to be without merit.
4. In his evidence after the close of the Plaintiff’s case, the defendant testified that they have a problem at their home. He told the court that; the plaintiff had given him Plot No. 1025. The Plaintiff thereafter told him that he had given him the said parcel of land by mistake. When a time came for the defendant to put up his own homestead, he did soon the suit property. He has stayed on the suit property for over 20 years. In April, 2010 the plaintiff asked him to officially exchange Plot No. 1025 with the suit property and he obliged. The defendant and the Plaintiff went to Homa Bay for that purpose. They followed all the necessary procedures in doing the exchange. He produced as exhibits the documents that he had attached to his affidavit in reply to the Plaintiff’s interlocutory application for injunction as defendant’s exhibits 1 (a), (b) and (c). The defendant stated that the plaintiff booked the Land Control Board and they all appeared before the board that was chaired by the District Commissioner, Ndhiwa. The board asked them all necessary questions and ultimately approved the transaction. Thereafter, the defendant surrendered the title deed for his Plot No. 1025 and the plaintiff was issued with a new title for the property. The defendant was also issued with a title deed for the suit property. The two transactions were done at the same time. The defendant testified further that; the plaintiff had another parcel of land No. 361 at a place called South Kanyikela. That parcel of land was about 60 acres. According to the defendant, his problem with the Plaintiff arose after the Plaintiff sold about 35 acres of Plot No. 361 at Kshs. 80,000.00 per acre. This was done in the year 2011. The Plaintiff thereafter felt that he had less land and needed to acquire more. The Plaintiff then came to the defendant begging for a portion of the suit property. The Plaintiff agreed to give the defendant a cow as a consideration. The defendant declined the Plaintiff’s request because of the welfare of the other children of the Plaintiff whom he had not given land. In the same year, the defendant arranged to sub-divide the suit property among his children and the plaintiff’s children who had not been given land. This sub-division was approved and the suit property was sub-divided into 5 portions. The defendant produced the letter of consent to sub-divide, the application for the said consent dated 16<sup>th</sup> March,

2011, certificates of official search in respect of Plot Nos. 1679, 1680, 1681, 1682 and 1683 as defendant's exhibit Nos. 2(a), (b), (c), (d), (e), (f) and (g) respectively. After sub-dividing the suit property he gave two (2) portions thereof to the Plaintiff's sons, the other two portions to his own sons and he retained the last portion for himself. In his view, the problem that he has with the Plaintiff arises from the fact that the plaintiff has two wives and the Plaintiff is leaning on one side that is, on the side of his younger wife. The defendant maintained that the Plaintiff transferred to him the suit property willingly. He denied that the Plaintiff had given him only 2 acres. He urged the court to find the plaintiff's claim against him to be baseless.

5. The defendant's witness was his brother, **Silas Ojwok Liech (DW2)**. He testified that; in the year 2010, he was at Migori when the defendant told him that the plaintiff wanted to exchange his land with the defendant. The Plaintiff wanted Plot No. 1025 where he has put up a house for his younger wife and he wanted to give the defendant the suit property in exchange. At that time, the defendant was already occupying the suit property and the plaintiff had also put up a house for his younger wife on Plot No. 1025. He denied that the Plaintiff had agreed to transfer to the defendant only two (2) acres of the suit property. He reiterated the defendant's contention that the exchange was for the whole plot. After the exchange aforesaid, the plaintiff requested the defendant to give him a portion of the suit property which request was turned down by the defendant. He denied that the defendant used tricks to get registered as the owner of the suit property.
6. After the close of the defence case, the parties informed the court that they did not wish to make any submissions. I have considered the Plaintiff's case as pleaded and the defendant's statement of defence. I have also considered the evidence tendered at the hearing by both parties. In my view the issues that arise for determination herein are as follows;

**(i) Whether the defendant acquired the title to the suit property through fraud, and**

**(ii) Whether the Plaintiff is entitled to the reliefs sought.**

7. On the first issue, it is not disputed that, at all material times the Plaintiff was the registered proprietor of the suit property while the defendant was the registered owner of Plot No. 1025. It is also not disputed that Plot No. 1025 was given to the defendant by the Plaintiff when the Plaintiff was distributing his ancestral land to his children. It is also not disputed that whereas Plot No. 1025 measured 0.7 hectares only, the suit property measured 2.83 hectares. It came out in evidence that the Plaintiff has two wives. The defendant's mother is the first wife (elder wife) and she has her homestead on the suit property. The Plaintiff has a second wife (younger wife) for whom he put up a homestead on Plot No. 1025. It is not clear from the evidence on record as to when the Plaintiff married this second wife and when he put up a homestead for her on Plot No. 1025. The Plaintiff and the defendant are from the Luo tribe. The Plaintiff and the defendant agreed in their testimony that Plot No. 1025 is situated on the right hand side of the Plaintiff's homestead with the first wife who is the defendant's mother and that according to the Luo customs to which they both subscribe, the defendant could not set up his homestead on that parcel of land because that side of the homestead according to that custom is reserved for a first born son which the defendant was not. Since it is the Plaintiff who had given the defendant Plot No. 1025 as his share of the family land, the Plaintiff had to come up with a solution to this problem now that the defendant could not occupy the land. What is in dispute in this suit is the nature of the solution that the Plaintiff and the defendant came up with. According to the Plaintiff, it was agreed between the Plaintiff and the defendant that the Plaintiff would give to the defendant a portion of the suit property measuring 2 acres (approximately 0.8 ha.) which is equivalent to the size of Plot No. 1025 that was owned by the defendant and in return, the defendant would transfer to the Plaintiff Plot No. 1025. The defendant's version of this arrangement was that the Plaintiff had agreed to transfer to the defendant the entire parcel of land comprised in the suit property in exchange for Plot. No. 1025. The Plaintiff tendered evidence in support of his position and the defendant likewise. I have set out that evidence hereinabove. The Plaintiff claimed that he is illiterate a fact that was not disputed by the defendant. He claimed that after they had agreed with the defendant that the defendant would transfer to him Plot No. 1025 in exchange for a portion for the suit property, he executed several documents in blank and handed over the same to the defendant who was to arrange for Plot No. 1025 to be transferred to the Plaintiff and a portion of

the suit property measuring 2 acres to be transferred to the defendant. The Plaintiff claimed that instead of the defendant transferring only a portion of the suit property measuring 2 acres to his name, the defendant transferred the entire parcel. The Plaintiff claimed that the defendant did so fraudulently as it was contrary to the agreement that they had entered with the Plaintiff. On his part, the defendant claimed that the Plaintiff agreed willingly to transfer the entire parcel of land comprised in the title of the suit property to the defendant in exchange with Plot No. 1025, which was owned by the defendant and that the Plaintiff executed all the documents necessary to effectuate that arrangement. I have perused the instrument of transfer of the suit property to the defendant (Defendant's exhibit 1(c)) and the instrument of transfer of Plot No. 1025 to the Plaintiff (Plaintiff's exhibit 1 (f)). I have also perused the applications for consent and the letters of consents that were issued by Nyarongi Land Control Board for the two transactions (Plaintiff's exhibits 1 (b),(c),(d) and (e)). I have noted that for the suit property, the application for consent was not made for the transfer of the suit property by the Plaintiff to the defendant but for the correction of name of the Plaintiff in the register from Jackton Liech to Jackton Liech Mbwayo and a letter of consent that was issued was only for that purpose. No application was made (none was tendered in court) for the consent to transfer the suit property by the Plaintiff to the defendant and no consent was issued for that purpose. For Plot No. 1025, a consent was sought for the transfer of the property by way of exchange by the defendant to the Plaintiff and a letter of consent was issued accordingly for that purpose. The instrument of transfer of the suit property by the Plaintiff to the defendant indicated the consideration for the transfer as a gift. The same consideration was indicated in the transfer of Plot No. 1025 by the defendant to the Plaintiff.

8. The suit property was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed)(hereinafter referred to only as "**the RLA**"). Section 29 of the RLA provides that "**every proprietor who has acquired land, a lease or charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the Bankruptcy Act and to the Winding up provisions of the Companies Act, but save as aforesaid, the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.**" On the other hand, section 28 of the RLA provides that "**the rights of a proprietor, whether acquired on a first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....**" It is clear from the foregoing that the defendant's interest in the suit property is not diminished by the fact that the defendant acquired the property without valuable consideration. In actual fact, the consideration was supposed to be Plot No. 1025 that was to be exchanged with the suit property. It is not clear why in the transfer of the suit property to the defendant consideration was given as "gift". Anyway, subject to the provisions of the Bankruptcy Act and the Winding up provisions of the Companies, a proprietor of land received as a gift has the same rights as a proprietor who has acquired land for valuable consideration subject only to the provisions of the RLA.
9. In this suit, the Plaintiff has sought the cancellation of the defendant's title over the suit property on account of fraud. Fraud is one of the grounds on which a title to land save for title acquired on first registration may be cancelled by the court. Section 143 (1) of the RLA provides that the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. The Plaintiff is seeking the rectification of the register of the suit property on account of fraud. This takes me back to the question namely, whether the Plaintiff has satisfied the court that the defendant's title over the suit property was acquired through acts of fraud? I have set out above the opposing positions taken by the Plaintiff and the defendant on the issue. On my part, having considered the evidence on record, I am inclined to accept the Plaintiff's testimony as to the circumstances under which the defendant transferred to the Plaintiff Plot No. 1025 and the defendant ended up with the suit property. I am satisfied that the Plaintiff has proved on a balance of probability that the defendant transferred the entire parcel of land comprised in the title of the suit property to his name fraudulently. I see no reason at all and none was proffered by the defendant why the Plaintiff would agree to exchange the suit property which measured 2.83 hectares with the defendant's property which measures 0.70 hectares only. The Plaintiff claim that

he had agreed to transfer to the defendant only 2 acres (approximately 0.8 hectares) of the suit property which was equivalent to the size of the defendant's parcel of land which was the subject of exchange sounds reasonable and more believable. The Plaintiff's contention that he was defrauded of the suit property is supported as I have pointed out hereinabove by the fact that no consent of the Land Control Board was obtained for the transfer of the suit property to the defendant which in fact renders the transaction null and void for all intents and purposes. The evidence on record shows that, with respect to the suit property, the consent that was sought from the Land Control Board was for the rectification of name of the Plaintiff which is the consent that was granted. Due to the foregoing, it is my finding that the defendant was only entitled to 2 acres of the suit property and that he acquired the entire parcel fraudulently. That settles the first issue.

10. The second issue is whether the Plaintiff is entitled the relief sought. I have noted from the defendant's exhibits 2 (d), (e), (f), and (g) that on the same day that the Plaintiff filed this suit, the defendant caused the suit property to be sub-divided into five portions namely, **LR. Nos. West Nyokal/Kanyikela/1679, 1680, 1681, 1682 and 1683** (hereinafter referred to "**the sub-divisions**"). Following the order that was made by the court on 16<sup>th</sup> May, 2012, the land registrar placed a restriction on the titles of the sub-divisions on 20<sup>th</sup> July, 2012 pending the hearing and determination of this case. The sub-divisions therefore still remain registered in the name of the defendant. These sub-divisions in my view were effected with a view to defeating the outcome of this suit. Having made a finding that the suit property which gave rise to the sub-divisions was acquired through fraud, the sub-divisions that were effected the same day this suit was filed cannot stand. The Plaintiff is therefore entitled to the relief sought in the plaint.

11. In conclusion, it is my finding that the Plaintiff has proved his case against the defendant to the required standard. I therefore enter judgment for the Plaintiff against the defendant as follows;

- a. The registration of the parcel of land known as **LR. No. West Nyokal/Kanyikela/ 1026** in the name of the defendant, **Charles Rabel Liech** is hereby cancelled;
- b. The sub-division of the said parcel of land known as **LR. No. West Nyokal/Kanyikela/ 1026** into **LR. Nos. West Nyokal/ Kanyikela/ 1679, 1680, 1681, 1682 and 1683** is hereby cancelled and the titles of the said **LR. Nos. West Nyokal/ Kanyikela/ 1679, 1680, 1681, 1682 and 1683** are similarly cancelled;
- c. The title of **LR. No. West Nyokal/Kanyikela/ 1026** shall be reinstated in the name of the Plaintiff, **Jackton Liech Mbwayo**;
- d. The Plaintiff shall cause **LR. No. West Nyokal/Kanyikela/ 1026** to be sub-divided afresh and shall transfer a portion thereof measuring **2 acres (0.81 hectares)** to the defendant which sub-division shall take into account the area where the defendant's homestead is situated on the said property;
- e. The Plaintiff shall not transfer, lease, charge or alienate **LR. No. West Nyokal/Kanyikela/ 1026** or any portion thereof until the said portion measuring 2 acres (0.81 hectares) has been transferred to the defendant.
- f. Each party shall bear its own costs of this suit.

**Delivered, dated and signed at KISII this 7<sup>th</sup> day of February 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Plaintiff present in person

N/A for the defendant

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**