



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 54 OF 2006

SELINA MECCA WEKESA PLAINTIFF

VERSUS

KENNEDY ELLAM WEKESA [Sued as personal rep.

of the estate of GEORGE E. WEKESA – Deceased] 1ST DEFENDANT

SARAH CHAHAYO2ND DEFENDANT

PROTUS MAKENZI 3RD DEFENDANT

JARED WANJALA MMASABA 4TH DEFENDANT

RICHARD OCHIENG [sued as chairman and/or official

of the Church of Christ in Africa] 5TH DEFENDANT

SHIKANGA BENJAMIN WAMBUYA 6TH DEFENDANT

LAND REGISTRAR BUNGOMA DISTRICT 7TH DEFENDANT

ATTORNEY GENERAL sued on behalf of the

LAND REGISTRAR BUNGOMA DISTRICT8TH DEFENDANT

JUDGMENT

1. The Plaintiff SELINA MECCA WEKESA commenced this suit by way of plaint dated 18th September 2006 and filed in court on the same date. Before the case proceeded, the Plaintiff amended her plaint twice. First amendment was done on 13th October 2006 and the further amendment on 13th July 2007. In the further amended plaint, the Plaintiff sought for judgment against the Defendants jointly and severally for;-

(i). A declaration that the subdivision for L.R. No. Ndivisi.Muchi/1086 into L.R. Nos. Ndivisi/Muchi/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462, 6463 plus their subsequent transfers to the Defendants is null and void.

(ii). Nullification or cancellation of the subdivision of L.R. No. Ndivisi/Muchi/1086 into Ndivisi/Muchi/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462, 6463 and the subsequent

transfers plus title deeds thereto and restoration of the original L.R. Ndivisi/Muchi/1086.

(iii). Eviction orders to remove the 4th Defendant's structure from land parcel No. Ndivisi/Muchi/6457, 6458 and 6459

2. The Plaintiff sued seven (7) Defendants although they are listed as eight (8). The seventh and the eighth Defendant are one and the same. The Defendants filed their defences in opposing the claim. The 2nd Defendant entered into a consent between her and the Plaintiff on 16th July 2007. That consent was adopted as an order of the court. The 2nd Defendant admitted the Plaintiff's claim as against her. Subsequently, a second consent was entered into between the Plaintiff and the 5th Defendant. In that consent dated 6th June 2012, the 5th Defendant also conceded the Plaintiff's claim. The 2nd defendant was registered as owner of L.R. No. Ndivisi/Muchi/6455 while the 5th Defendant was registered as owner of Ndivisi/Muchi/6456. I will therefore in this judgment not refer to the case as against the 2nd and 5th Defendants.

3. The first Defendant is sued as the administrator of the estate of GEORGE ELLAN WEKESA-deceased (herein after referred to as the deceased). He filed his defence to the claim on 7th November 2006 in which he denied the plaintiff's claim in entirety and prayed the suit as against him be dismissed. The deceased was the registered owner of L.R. No. Ndivisi/Muchi/1086 (hereinafter referred to as the suit title) which upon subdivision created the new numbers from 6454 – 6463 all inclusive. The deceased sold 8 of these numbers to the 2nd – 6th Defendants. The 7th Defendant is the Land Registrar Bungoma sued in his official capacity as the custodian of the documents for the suit title in question.

4. The record does not reveal if the 1st Defendant although filed a defence testified to oppose the Plaintiff's suit. It shows that the suit proceeded to full hearing between the Plaintiff and the 3rd, 4th, 6th and 7th Defendants. The Plaintiff in her further amended plaint pleaded in paragraph 11 and 11 (a) the particulars of fraud that was committed jointly and severally by the Defendants in regard to the subdivision of the suit title and the subsequent transfers. The particulars of fraud as listed are;

- Removing the inhibitory prohibitory court order from the register of L.R. No. Ndivisi/Muchi/1086 before determination of Mombasa HCCC NO. 454 of 2002.
- Making entries in the register of L.R No Ndivisi/Muchi/1086 when the same had encumbrances.
- Subdividing L.R. Ndivisi/Muchi/1086 into 10 parcels and transferring them to the 2nd – 6th Defendants while the charge had not been discharged.

5. The 3rd Defendant in his defence filed in court on 5th December 2006 denied the Plaintiff's claim, denied the existence of a prohibitory order, denied the existence of Mombasa HCCC no. 454 of 2002 (O.S) and put the Plaintiff to strict proof. In paragraph 8 of his defence, he said the orders sought by the Plaintiff are not available to her. The 4th defendant did file a defence to the further amended plaint on 22nd August 2007. In his defence, he denied the Plaintiff is the widow of George Ellan Wekesa-deceased, denied knowledge of HCCC No. 454 of 2002 and that he fraudulently and corruptly caused the inhibitory orders to be removed. He pleaded that he acquired L.R. Ndivisi/Muchi/6456, 6457 and 6458 legally having purchased them from deceased.

6. The 6th Defendant also filed a defence to the claim on 8th November 2006. He denied all the allegations of facts put forth in the plaint. He did not deny the subdivision of the suit title but denied the particulars of fraud pleaded. He said he is innocent of the acts of fraud alleged against him and put the Plaintiff to strict proof. Finally the 7th Defendant also filed his

defence on 9th October 2007. In paragraph 6 of the defence, the particulars of fraud in the plaint are denied. In paragraph 14 (a), the 7th Defendant pleaded that the Plaintiff is not entitled to the orders sought and concluded by saying the suit is bad in law for failing to comply with the Government Proceedings Act.

7. When the hearing commenced, the Plaintiff gave evidence through her representative whom she had donated to a power of attorney. The Plaintiff's evidence and that of her witness was taken by F.N. Muchemi J. on 1st December 2010. **PW1 Catherine Namali Wekesa** (Donee) told court that she is the daughter of the Plaintiff. She produced a registered general power of attorney as **Pex. 1** donating to her authority to testify in this matter. She continued that L.R. no. Ndivisi/Muchi/1086 was registered in name of George Ellam Wekesa – deceased who is her father. In 2002, the Plaintiff filed a suit in Mombasa HCCC no. 454/02 to protect all the properties acquired during their marriage. In the Mombasa suit, she obtained injunctive orders restricting the transactions of titles mentioned therein. The suit title L.R. no Ndivisi/Muchi/ 1086 was one of those titles and a restriction was registered on 8th January 2003. This order was produced as **Pex. 2**. She said there was also a charge to Transnational bank for a loan borrowed by her parents. She produced the search dated 18th March 2005 as **Pex. 3**. She also produced as **Pex4** a search dated 7th August 2006 which showed the suit title was closed on subdivision and there was no restriction on it.

8. She continued that on 25th Nov 2005, the land was subdivided into ten (10) plots from 6454 – 6463. She had certificates of official searches which she produced as **Pex. 5** that revealed the new numbers and names contained therein. She also showed copy of the register (**MFI-P6**) dated 4th October 2006 which showed there was no inhibition on the title as at that date. She also produced a copy of the notice to 7th Defendant and response thereto as **Pex. 7 & 8**. She asked the court to grant the prayers sought in the plaint.

9. Cross-examined by Mr. Wanyama for the 3rd Defendant, PW1 said she is 2nd born while 1st Defendant is 1st born of the deceased. That the Mombasa case is still pending. She did not know whether her father had been substituted in that case. She had no further documents in regard to the Mombasa case. PW1 did not know whether her father repaid the loan to Transnational bank. She denied collusion between the family members in bringing this case. In cross-examination by Kakoi for the 6th Defendant, she said her parents were not separated at the time the subdivision was done. She did not know how the prohibitory order was removed. She did not know whether the 1st Defendant obtained the grant. In 2005, the land was free from any encumbrance when the 6th Defendant bought his land. The same applied to the 4th Defendant. She denied this case is based on the outcome of the Mombasa case.

10. **PW2 George Obondo Onguto** is the District Land Registrar Bungoma. He said from their records, the land was subdivided on 25th November 2005. He was shown a green card for the suit title prepared on 2nd October 1970. He confirmed **PMFI-6** as true copy of the register but did not produce it as Pex. 6 due to objections from the defence counsel and therefore it remained marked for identification. PW2 continued that the application for subdivision was lodged with them. He said the subdivision should not have been allowed where there is an existing prohibitory order in the register. He said it is their office which is suspected of fraud because of the existence of two green cards.

11. In cross examination by Wanyama advocate for the 3rd defendant, he said Mr. Bosire was the Land Registrar when subdivision was done and he is still a registrar within the Republic of Kenya. The witness did not know why there were two parallel green cards. He doubted the searches and consents of land Control Board obtained by the Defendants. He said the transactions relating to the 10 parcels were fraudulent. On cross examination by Mr. Kakoi for the 4th defendant, PW2 said the green card is the ultimate record of a parcel of land. That the

official searches obtained by the defendants were extracted from a forged green card. He admitted that members of the public cannot access green cards without help of land registry staff. He was working in Bungoma lands office at the time but could not tell exactly what happened. Lastly on cross examination by Mr. Gumber for the 7th defendant, he said George Ellan Wekesa-deceased subdivided his land and the Defendants may have obtained searches from the wrong records. On re-examination, PW2 said the mess came as a result of the parallel green cards. The collusion must have been between the transferor and transferees. He doubted entries in the register.

12. On 15th October 2012 when parties appeared before Muchelule J., There was no indication given by the 1st Defendant whether he intended to present his evidence. What is recorded in the proceedings of that day is Mr. Wanyama for 3rd Defendant submitting that the 3rd Defendant shall rely on his pleadings filed. It would appear therefore that the 1st Defendant did not testify in court. The 4th Defendant therefore began his testimony as the first witness on the defence side. The 4th Defendant is **Jafred Wanjala Mmasaba**. He said he did not know the Plaintiff but knew the deceased George E. Wekesa. While he was looking for a plot to buy, he found a sign post with the words "**plots for sale.**" He went and talked to George Omurando and Dr. Alfred Manyonje who were staying on a plot near this post. The two persons named accompanied him to the home of the deceased who confirmed he was selling the plots.

13. The 4th Defendant continued that he asked for particulars of that parcel of land which no. 1086 he took to lands office Bungoma and did carry an official search. The search revealed the land was free of any encumbrances and confirmed the deceased as the owner. On 10th February 2006 the three (Omurando, Dr Alfred and Jafred) of them went back to the deceased and paid Kshs. 300,000/= out of the agreed purchase price of Kshs. 345,000/= for three plots Ndivisi/Muchi/6457, 6458 and 6459. The balance was paid on 25th February 2006 in presence of two witnesses and the deceased wife referred to as Bibian N. Wekesa. He produced the sale agreement as **Dex. 1**

14. Later he took the seller and the Professor to the District officer Webuye for Land Control Board consent. He paid Kshs. 750/= on 3th March 2006 and got consents for each of the plots on 16th March 2006. He produced as exhibits receipts, application for consent and letter of consent as **Dex. 2 & 3(a-e)** respectively. The deceased thereafter executed transfer forms which original he said got lost at the lands office. He got title deeds for his three parcels on 6th June 2006 and produced copies thereof as **Dex. 4 a, b & c**. The deceased allowed him to build after he got approval from the local authority which letter of approval he produced as **Dex. 5**. George E. Wekesa died later and 4th defendant went to his home and informed his eldest son about his plots. He did not know about the Mombasa case or the inhibitions. The deceased had told him of purchasing this land in 1974 while the deceased ancestral land was at Muserwa.

15. He was cross-examined by Mrs. Mumalasi advocate for the plaintiff. He admitted he did not produce the search he carried out before buying the land. The plots came from the suit title. He was served with an order of injunction after part of the house he was building was complete. At paragraph 10 of his replying affidavit, he deponed that the deceased had asked him for money to pay a bank loan. He was unaware George died on 26th July 2006. The deceased did not give him the name of his first wife and did not know if he was married to the Plaintiff by 1974. He concluded by saying his transactions were done above board. He was building rental houses on the plot. Under cross examination by Mr. Wanyama and Mr. Ngumbi, he said the title was clean when he did the search although that search was lost at the lands office. He has built on plot no. 6457 but not yet on plot no's 6458 and 6459.

16. The file then reached me to complete the hearing. Mr. Ngumbi chose to adopt evidence of PW2 for his defence in respect of 7th and 8th Defendants. The 6th Defendant took the witness stand on 16th September 2014. He is known as **Shikanga Benjamin Wambuya**, he was unrepresented. The summary of his case is, in 2006 he bought two plots in Webuye town L.R no Ndivisi/Muchi/6462 and 6463. He comes from Malaba and is a teacher. They had a sale agreement between him and

the deceased drawn by Omukunda & co. Advocates and he produced it as **Dex. 6**. He followed the other procedures of land like appearing before the Land Control Board and produced the documents as **MFI D7 (a), (b), (c)**.

He also produced the copies of his two title deeds as **Dex. 8 (a) & (b)**. He said his title deeds came from the lands office and he purchased the land from the registered owner.

17. On cross-examination, he admitted not producing searches for the two plots. He said he had copies of Land Control Board consent while the original is held at the lands office. He also did not produce receipts evidencing payment. He said he appeared before the Land Control Board and documents presented to the land registrar were satisfactory hence his being issued with the title deeds. He also did not encounter any problem while processing his titles. There was no restriction on the register. The Defendants cases were therefore at this point marked as closed.

18. The parties filed written submissions which I have had occasion to read and consider. I have also considered the evidence adduced alongside the pleadings as filed. I find the following questions as arising for determination by this court:

(a). Was there fraud committed in the register of title Ndivisi/Muchi/1086 and by who?

(b). If there is fraud alleged, was it proved and who is to be held accountable?

(c). Are the remedies sought by the Plaintiff available to her?

19. To begin with, I will define the word fraud. Black's Law Dictionary 7th edition defines it as;

“A knowing misrepresentation of the truth or concealment of material fact to induce another to act to his detriment. Unconscionable dealing; especially in contract law, the unconscious use of the power arising out of the parties' relative position and resulting in an unconscionable bargain- fraudulent.”

The Plaintiff in her pleadings gave out particulars of fraudulent acts of the Defendants jointly and severally as;

- Removing the inhibition being the order from Mombasa HCCC 454 of 2002.
- Making entries in the register of L.R. Ndivisi/Muchi/1086 when the same had encumbrances.
- Sub-dividing land into 10 parcels.

20. In answering my first question visa vi the definition and the particulars of fraud pleaded, I will consider if the first item on the particulars of fraud has been proved. According to this pleading, all the Defendants undertook these activities jointly and severally. The 3rd, 4th & 6th Defendants evidence and pleadings demonstrate they bought portions of the suit title from the deceased in the year 2006. The Plaintiff produced a **Pex3** a search showing the restriction was lodged on 8th March 2003. It is not in dispute that the deceased did cause the subdivision of the suit title into ten (10) plots in November 2005 (**Pex5a-j**). The 7th Defendant has confirmed this vide their documents filed in their list of documents which included a mutation form duly registered on 25th Nov 2005. The list also included a letter of consent dated 13th November 2005 and application for consent dated 14th November 2005 seeking permission to subdivide the plot into 10 parcels. PW2 said the consent was not properly obtained as the application was dated later than the letter of Consent. The green card in respect of the suit title L.R. no. 1086 was marked but was not produced. Until this stage, there is nothing tangible to show the inhibition was fraudulently removed either by the deceased or the 3rd, 4th and 6th Defendants.

21. The Plaintiff produced two searches, one dated 18.3.05 (**Pex. 3**) which showed the inhibition is registered and one dated 7th August 2006 without an inhibition. They were all signed by the 7th Defendant. PW2 the current District Land Registrar said the entries in the searches even if entered by a clerk, the search must be signed by a land registrar before being released to a member of the public. PW2 also admitted they were the custodian of all documents relating to land. If the inhibition was removed, then it was done with collusion of their staff. According to him, there must have been in existence two parallel green cards. Although PW2 talked of the possibility of two green cards, upon perusal of the file, I have only seen one (which was not produced) and which did not disclose that the prohibitory order was registered. Neither PW1 nor PW2 evidence was able to establish the existence of the two green cards where one had the prohibitory order and the other without. Searches are extracted from green cards and it is my view that it was incumbent upon the Plaintiff to have demonstrated that there was an order entered in the register of the suit title. He has failed to discharge that burden.

22. In the alternative, if the entry of the prohibitory order was made in the register of the suit title as alleged by the plaintiff, it must have been removed before the land was subdivided. The subdivision was undertaken by the deceased who then presented documents for registration to the representatives of the 7th Defendant. The evidence does not reveal however what role the 3rd, 4th and 6th defendants played in removing this inhibition. I say so because

(i). Prohibitory order if registered on 8th January 2003, nothing shows when it was removed but obviously before the subdivision was registered on 25th November 2005.

(ii). Sale between the 4th Defendant and the deceased was entered into on 10th February 2006.

(iii). Sale agreement between 6th Defendant and deceased was entered into on 3.4.06 (Dex. 7). Consent and transfer in favour of the 6th Defendant are dated 13.4.06 and 27.4.01 respectively (see 7th defendants documents).

23. The 6th Defendant also produced copies of certificate of official searches dated 30th March 2006 which showed L.R. NDIVISI/MUCHI/6462 and 6463 as at 25.11.2005 was registered in the name of George Ellam Wekesa- deceased. There was no entry on the encumbrance section in the searches. The title deeds in respect of the 3rd, 4th and 6th Defendants titles were all issued in 2006 (see **pex5a, b, c, e, f & g**). According to the rules of evidence, he who asserts must prove. Order 18 (2) (i) of the Civil Procedure Rules states;

“On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues he is bound to prove.”

24. In the case of **Koinange and 13 others vs. Koinange [1968] KLR 23 or [2008] KLR (Gender & family) 649**, Amin J. held that;

“(i). It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the Plaintiffs had the burden of proving it and they had to discharge that burden.”

Similarly in the case of **R.G. Patel vs Lalji Makanji (1957) E.A 314 at 317**, the court of appeal stated thus; ***“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..”***

In our instance, the Plaintiff was under an obligation to prove that all or specifically the 3rd, 4th,

6th and 7th the Defendants were involved in the alleged fraudulent transaction of removing the prohibitory order by itemizing the specific role played by each. The Plaintiff was further obligated to prove that the 3rd, 4th and 6th Defendants had prior notice of the registration of the inhibitory order on the suit title before they purchased the titles.

25. **PW2 said** the official search (**pex 4**) did not reflect the prohibitory order and according to him, the explanation was a possible existence of two green cards in their office. He could also not tell which of the two searches was the genuine. He could not conclusively state who carried out the act of fraud. He concluded his testimony by saying two titles were not transferred because the fraud was discovered. He failed to disclose who had committed the fraud and when the fraud was discovered. There was nothing difficult stating which of the defendants between Defendant 3, 4 and 6 colluded with his staff to commit the fraud. This witness also failed to show the two green cards that were in existence as per his evidence. Except for blaming his staff for colluding with the Defendants, he failed to isolate the specifics of fraudulent activities done by the deceased 3rd, 4th and/or 6th Defendants in acquiring their titles. Yet the Plaintiff relied on his evidence to establish these Defendants had committed an act of fraud.

26. I am not satisfied the Plaintiff discharged the burden of proof on fraud committed by the 3rd 4th and 6th Defendants. The standard of proof required for fraud is also enunciated in the Koinange case supra, in holding no. 2,

“Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities.”

27. Much of the evidence adduced by the Plaintiff was based on probabilities, circumstantial and not conclusive. For example, probably any of the Defendants colluded with land officers or circumstantial that by virtue of having bought of a portion of the suit title, either of the Defendants participated in having the caution removed. There is nothing that directly links the 3rd, 4th and 6th Defendants to any of the allegations of fraud as leveled against them. Other than saying transfer of the land ought not to have been done, the authenticity of their documents to wit sale agreement, copies of letter of consent and executed transfer forms have not been put to question. They acquired their titles in 2006 after the prohibition had been removed.

28. It is my finding that if at all there was any fraud, the same was committed by George Ellam Wekesa – deceased and the lands office (7th Defendant). In which event the estate of the deceased and the 7th Defendant are the ones to bear any liability if any. Subsequently, such liability on part of the deceased is to be borne by the administrator of his estate (1st Defendant) and the 7th Defendant. I have dealt with the act of fraud as relates to the removal of the inhibitory order only. This is because I hold the view that as regards the charge registered in favour of Transnational bank, the contract was between the deceased and the bank. The Plaintiff is not a representative of this bank to lodge a complaint on their behalf. If the charge was irregularly discharged, that would be a matter to be dealt with in a scenario where the bank is made a party. Without prejudice to this view, the Plaintiff did also not adduce any evidence to the manner in which this property was discharged and she did not know whether the loan was settled or not.

29. The Plaintiff in her plaint sought for nullification of the sub-division and canceling of the new numbers as well as the title deeds. The 3rd, 4th and 6th Defendants were purchasers for value without notice having their rights protected under Section 24 and 25 of the Land Registration Act. These rights are limited only by the provisions of section 26 and 28 of the said Act. The Plaintiff's claim is not covered under the provisions of section 28 but falls under the provisions of Section 26 (a) which allows the Defendants titles to be canceled on **ground of fraud or misrepresentation to which the person is proved to be a party to**. In the body of this judgment, I have found that the Plaintiff has failed to prove that the 3rd, 4th and 6th Defendants were party to

or participated in the fraudulent removal of the prohibition registered on the suit title L.R. 1086. The orders prayed for in the plaint if issued will only affect the 3rd, 4th and 6th Defendants whom I have found as not guilty of any fraud. Consequently, the Plaintiff's claim as against 3rd, 4th and 6th must fail and I so find.

30. The Plaintiff did not seek any alternative remedies in the event the orders seeking cancellation of the titles were not granted. The law provides that parties are bound by their pleadings and the court cannot grant what is not prayed for (**see Ole Nganai vs. Arap Bor [1983] 233) at holding no. 2** when the court said it was wrong for the judge to grant an order to the Defendant which had not been asked for by that party. Although the Plaintiff's claim as against the 7th Defendant succeeded (PW2's evidence that the mess could have been from their office), there was no specific prayer to be made as against the 7th Defendant. The result is I have dismissed the claim as against the 3rd, 4th and 6th Defendants with costs to them. I can only find as against the 7th Defendant issue on liability to pay the Plaintiff the cost of the suit. I so find that the 7th Defendant shall meet the Plaintiff's costs.

DATED, SIGNED and DELIVERED in Bungoma this 6th day of June 2014

A. OMOLLO

JUDGE.