



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 161 of 2009**

**EVA MUKHWANA JOMO ..... PLAINTIFF**

**V E R S U S**

**KHAVAKALI MAINA ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LANDS REGISTRAR KAKAMEGA..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

In her plaint dated 4.11.2009 the plaintiff is seeking prayers that the registration of the 1<sup>st</sup> defendant as the proprietor of plot number **N.KABRAS/KIVAYWA/1507** be cancelled and the suit property revert to the plaintiff. The plaintiff is also seeking an order of injunction restraining the 1<sup>st</sup> defendant from interfering with the suit land. The plaintiff testified that she bought the suit land from one **JAPHETH SHIKUKU** on 18.10.2002 but the land was registered in the name of her husband. She bought the land using proceeds from her fish business. Her husband became sick in 2008 and he took her to the District officer's office whereby the land was transferred to her. This was on 3.3.2008. She got a title deed on 24.10.2008. On 7.11.2008 she was arrested by police officers from Kakamega police station on the allegation that her title deed was not genuine. However, she was later released and she has never been charged in court with any offence.

The plaintiff's further evidence is that she later realized that the 1<sup>st</sup> defendant was issued with a title deed on 30.1.2009. She contends that the transfer to the 1<sup>st</sup> defendant was fraudulent and would like it to be cancelled. She has five children with her husband having been married in 1985. She contends that she lives on the suit land. They moved to the suit land in 2005. She was not aware that her husband had sold the land to the 1<sup>st</sup> defendant as she was not involved. On the 8.3.2009 the 1<sup>st</sup> defendant went to her home together with other people and demolished her windows and she reported the indent to the police. The seller of the suit land died in 2006. When her husband gave her the land it was a gift and not a sale.

**DW1, KHAVAKALI MAINA**, testified that she bought the suit land from **JOMO JUMA LUSWETI** on 4.7.2008. The seller was sick and had been released from Eldoret Referral Hospital. He wanted money to pay the hospital bills. The agreed price was KShs.500,000/=. She was buying 1 ¼ acres of land together with a semi developed house. The seller paid the hospital bills and used part of the money to buy another plot elsewhere. She knew the seller and they went to the Land Control Board where a consent was issued. When they went to effect the transfer at the lands registry they found that the plaintiff had obtained a title deed. The seller had reported the loss of the title deed and his identity card to

the police and the Land Registrar had advertised the loss of the title. Subsequently she was registered as the owner of the suit land and was issued with a title deed. She took possession of the land and is living thereon. When she bought the land the plaintiff and her children were not living there. The entire land was transferred to her and she was to retransfer a ¼ of an acre to other purchasers who had bought that portion. She denied that she demolished the plaintiff's house. Before she bought the land she conducted a search and the land was registered in the names of the seller. She paid the purchase price of KShs.500,000/= in two installments.

**DW2, JOMO JUMA LUSWETI**, testified that he was the registered owner of the suit land having bought it in 2002. At one time he became sick and was taken to Eldoret Referral Hospital where he was admitted for one month. He got healed but had a hospital bill which he had to pay. He consulted his family and it was resolved that the suit land be sold. He sold the land to the 1<sup>st</sup> defendant for KShs.500,000/=. He paid the hospital bill which was about KShs.250,000/=. He used the balance of the money to purchase plot number **N. KABRAS/KIVAYWA/1658** measuring 1 ½ acres. Before selling the land to the 1<sup>st</sup> defendant he had sold two plots measuring 50x100 to two different purchasers. DW2 further testified that the plaintiff is his wife who deserted him when he became sick and left with the children. While hospitalized he identity card and title deed got lost and he reported the matter at the Lumakanda police station. He later realized that it was his wife who had taken the items. When he sold the land to the 1<sup>st</sup> defendant he noted that it had been transferred to the plaintiff and he reported the matter to the police. He paid KShs.2,910/= to the Land Registrar so that his lost title deed could be advertised in the Kenya Gazette. The advertisement was done and a transfer was made to the 1<sup>st</sup> defendant. DW2 denied that he took the plaintiff to the Land Control Board or signed any transfer in favour of the plaintiff. He had built a house on the land but it was not complete. He was living at his ancestral home when he sold the land. The plot he bought is located near his ancestral home and he would like the plaintiff to return to his home so that they can build another house and live together. According to him the plaintiff is living at a rented house with the children. He denied that the plaintiff lives on the suit land. He denied that he gave the plaintiff the land. The plaintiff left him in 2006. The purchaser paid all the purchase price and took possession.

**DW3, NYONGESA KANULI SIMON ELIS**, testified that DW2 is his brother's son. DW2 became sick and was hospitalized. The hospital bill was KShs.250,000/= and DW2 could not pay. The clan members agreed that the suit land be sold to the 1<sup>st</sup> defendant. DW2 was given KShs.250,000/= as a down payment and he went to clear the hospital bill. The balance of KShs.250,000/= was paid on the 4.7.2008. DW2 was selling 1 ¼ acres of plot number **N.KABRAS/KIVAYWA/1507** together with an incomplete house on the land. The balance of the purchase price was used to buy 1 ½ acres elsewhere. This being plot number **N.KABRAS/KIVAYWA/1658**. The 1<sup>st</sup> defendant took possession of the land and completed the house. The plaintiff is living at Matete since 2006. The clan has asked her to return home but she has not. When the plot was being sold DW2 had recovered from his illness.

**DW4, MACHORA MOGARE**, testified that he is the Kakamega District Land Registrar. The records on the suit land shows that it was a subdivision of plot number **N.KABRAS/KIVAYWA/1441**. The initial owner was **JAPHETH SHIKUKU WAMALWA**. The subdivision was done on the 11.11.2003 and plot number **N.KABRAS/KIVAYWA/1505** was transferred to DW2 on 23.1.2004. On 22.7.2008 the plaintiff registered a caution claiming a licensee's interest but the caution was removed by the Land registrar on the 2.9.2008. On the 24.10.2008 the land was registered in the names of the plaintiff and she was issued with a title deed. That entry was later cancelled by the Land Registrar as it was found to have been an error since the 60 days gazette period had not expired. On 30.1.2009 the land was registered in the names of **KHAVAKALI MAINA** and a title deed was issued to her on the 5.2.2009. He further testified that there was a gazette notice number 7866 dated 29.8.2008 whereby DW2 had reported the loss of the title deed. Since the 60 day period had not lapsed the Land Registrar found that the title deed to the plaintiff had been issued erroneously.

Parties filed written submissions. The plaintiff has listed 13 issues to be determined. She contends that she was issued with a valid title and she never transferred the suit land to the 1<sup>st</sup> defendant. Under Section 8 of the Registered Land Act the Land Registrar has no powers to cancel a registered title. The

2<sup>nd</sup> defendant act of cancelling the plaintiff's title was ultra vires. DW2 did not raise any counter claim and there is no evidence to show that the plaintiff had stolen the title deed from DW2. The plaintiff's counsel relied on the case of **MARGARET KAREMA V JAMES MUTHURI M'MUNGANIA Meru HCCC No. 45 of 2003** and that of **FAHIM YASSIN TWAHA & ANOTHER V DISTRICT LAND REGISTRAR LAMU Malindi Misc. Application No.17 of 2010**.

Counsel for the 1<sup>st</sup> defendant submitted that there are only two issues for determination namely whether the plaintiff has proved her case and whether the 1<sup>st</sup> defendant has proved her counter claim. Counsel contend that there is no proof that the plaintiff bought the suit land. Further that no consent from the Land Control Board was issued in favour of the plaintiff contrary to the provisions of Section 6 and 7 of the Land Control Act. There is no proof that the transfer of the suit land to the 1<sup>st</sup> defendant was fraudulent. The 1<sup>st</sup> defendant proved her counter claim and she should be declared to be the lawful owner of the suit land. Counsel relied on the case of **MWANGI V MWANJATHI Mombasa HCCC No. 589 of 1997** and that of **KARURI V GITURO Nairobi Civil Appeal No. 25 of 1980 (CA)**.

The plaintiff's submissions raise 13 issues for determination. The 1<sup>st</sup> issue is whether the plaintiff was ever registered as the proprietor of the suit land. It is clear from the evidence and the exhibits produced that the plaintiff was registered as the proprietor of the suit land on the 28.10.2008. She was issued with a title deed on the same date and that answers the 2<sup>nd</sup> issue raised by the plaintiff. The 3<sup>rd</sup> issue is whether the plaintiff's title has been cancelled. According to the Land Registrar DW4 the plaintiff's title deed was cancelled by the Land Registrar after having realized that it had been erroneously issued. Issue number 7 by the plaintiff is whether the plaintiff executed any transfer forms in favour of the 1<sup>st</sup> defendant. It is clear from the evidence on record that the plaintiff did not execute any transfer in favour of the 1<sup>st</sup> defendant. The 10<sup>th</sup> issue is whether **DW2 JOMO LUSWETI** has any counter claim before the court challenging the validity of the plaintiff's title issued on 24.10.2008. It is clear from the plaint that DW2 is not a party to the suit. He however, testified that he did not transfer the suit land to the plaintiff neither did he take the plaintiff to the Land Control Board. Having transferred the land to the 1<sup>st</sup> defendant it is clear that he has capacity to challenge the plaintiff's title deed and he testified that according to him the land now belonged to the 1<sup>st</sup> defendant. That answers issue number 11.

The issues raised by the 1<sup>st</sup> defendant and the remaining issues raised by the plaintiff, that issues number 4, 5, 6, 8, 9, 12 and 13 involve the entire suit and the evidence on record. It is the plaintiff's case that she bought the suit land using proceeds from her fish business. Although the land was registered in the names of her husband, he was only holding the land in trust for her and their children. The husband transferred the land to her as a gift and she never transferred the land to the 1<sup>st</sup> defendant. On her part the 1<sup>st</sup> defendant maintains that she bought the land from the registered owner for KShs.500,000/=. She paid the entire purchase price and took possession of the land. She was issued with a title deed and produced photographs showing the property. DW2 was the original registered owner of the property. He produced a sale agreement dated 18.10.2002 as proof of his purchase of the suit land from **JAPHETH SHIKUKU WAMALWA**. It is the evidence of DW2 that he has never lived on the suit land as he was developing a house before he could move in. He became sick and had a hospital bill of KShs.250,000/= to pay. DW2 produced several receipts for the payment of the bill. According to DW2 he did not transfer the land to the plaintiff neither did he take the plaintiff to the Land Control Board.

It is the plaintiff's evidence that DW2 took her to the District officer for consent. No application form was produced. No minutes to prove that there was an application for a consent was produced. According to the plaintiff the consent was left at the Lands office. From the evidence on record I do find that DW2 did not effect any transfer in favour of the plaintiff. Section 6 of the Land Control Act Cap 302 requires that transactions affecting agricultural land should obtain a consent from the relevant Land Control Board. Although the plaintiff maintains that the transfer to her was a gift, I do find that if there was any such transaction it was necessary for the consent of the relevant Land Control Board to have been obtained. Indeed DW2 testified that there was no such transaction. According to DW2 he lost his title deed and reported the matter to the police. He was issued with a police abstract on the 4.6.2008 indicating that he had lost his title documents. It is DW2's position that he bought the land using his own

money and he has purchased another land where he can stay with his children.

From the evidence on record, I do find that there was no valid transfer of the suit land to the plaintiff. The plaintiff's contentions that she was given the land as a gift are not proved. DW2 sold the land as a matter of necessity so that he could settle hospital bills. It would have been unwise for him to have sold the same land to the 1<sup>st</sup> defendant yet he knew he had given it to his wife as a gift. DW2 knew that the land was his and the title deed had been lost. The gazette notice dated 29.8.2008 indicate that the then Kakamega Land Registrar advertised the loss of the title deed through gazette notice number 7866. The notice indicated that after the expiry of 60 days the Registrar was to issue a new title deed if there were no any objections. The plaintiff was issued with a title deed on the 24.10.2008. The title deed was issued to the plaintiff before the expiry of the 60 days period from the 29.8.2008. It is clear that no transaction could have been effected before the expiry of the 60 day period. There is no evidence that DW2 informed the Land Registrar that his lost title deed had been found. The plaintiff did not produce the transfer forms that were purportedly signed in her favour. I do find that the Land Registrar erroneously registered the suit land in favour of the plaintiff. There was no valid transfer form or consent by the original owner in favour of the plaintiff. Even if Section 8 of the now repealed Registered Land Act did not give powers to the Land Registrar to cancel a title deed, I do find that the plaintiff cannot claim in court that she had a valid title and therefore her constitutional rights were violated. Any right has to emanate from a lawful transaction. It is established from the evidence on record that the plaintiff took the original title deed when she realized that her husband was hospitalized and had herself registered as the proprietor. There is no evidence that DW2 appeared before the Land Control Board or an advocate who witnessed his execution of a transfer in favour of the plaintiff.

The plaintiff's position is that she was at one time the registered owner of the suit land and that she did not effect a transfer in favour of the 1<sup>st</sup> defendant. That being the case therefore the 1<sup>st</sup> defendant's title should be cancelled. It should dawn upon the plaintiff that her own transaction was purely fraudulent. There is no evidence that she had bought the suit land from the original seller. Her contention that she is the one who gave the money for the purchase of the suit land is not proved. The 1<sup>st</sup> defendant produced minutes of the Land Control Board and it is established that the Board met on the 4.9.2008 and a consent was approved vide minute number 128/2008. The Land Registrar was right in cancelling the plaintiff's title deed as it was a document that had been issued erroneously. The way the plaintiff obtained her title deed borders on criminality and the fact that she was not charged in a criminal court does not make her title lawful. I do therefore find that the 1<sup>st</sup> defendant has the capacity to challenge the plaintiff's title since the 1<sup>st</sup> defendant is the current registered owner. From the evidence on record and specifically the evidence of DW2 it is established that the plaintiff committed fraud in having herself registered as the owner of the suit land. Allowing the plaintiff to benefit from her unlawful act would be tantamount to abetting a crime. Although counsel for the plaintiff contend that the Land Registrar ought not to have cancelled the plaintiff's title, I do find that any title obtained fraudulently cannot be protected by the court. I will not fault the action of the Land Registrar to cancel the plaintiff's title as the same ought not to have been issued at the first place.

In the end, I do find that the plaintiff has not proved her case on a balance of probabilities. She perpetrated fraud that led to her registration as the owner of the suit land. The Land Registrar realized his mistake and cancelled the title deed. Since the original title deed had been lost, it was only logical that a fresh one was to be issued to the owner who had reported the loss. The plaintiff lodged transfer documents in between the 60 day period which documents had not been signed by the original owner. DW2 confirmed that he did not give the land to the plaintiff. I do find that the land was validly sold to the 1<sup>st</sup> defendant **KHAVAKALI MAINA** and she should enjoy the rights accruing from her proprietorship. I do order that the plaintiff's title deed be cancelled and expunged from any records held at the Kakamega Land Registry. The plaintiff's suit is hereby dismissed with no orders as to costs. The 1<sup>st</sup> defendant's counter claim is granted and she is declared as the lawful registered proprietor of plot number **N.KABRAS/KIVAYWA/1507**. Each party shall meet his/her own costs.

*Delivered, dated and signed at Kakamega this 9<sup>th</sup> day of May 2013*

**SAID J. CHITEMBWE**  
**J U D G E**