



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 77 of 2003

RISANILE ATIENO OCHUKA PLAINTIFF

VERSUS

MUSA DAMA ONOKA 1ST DEFENDANT

EVERLYNE ATIENO OTURI 2ND DEFENDANT

D.O. DULO (LAND REGISTRAR MIGORI/KURIA) 3RD DEFENDANT

JUDGMENT

1. The dispute in this suit revolves around a piece of land known as North Sakwa Kamasoga/1830 situate in North Sakwa Migori Nyanza province which the plaintiff claims to have bought from the 1st Defendant way back in the year 1985 after which she took possession thereof and built a semi permanent house thereon.

2. In or about the year 2002 she found out that the said parcel of land had been transferred fraudulently by the 1st Defendant to the 2nd Defendant with the assistance of the 3rd Defendant.

3. By the plaint dated 16th May 2003 and filed in court on the same day, the plaintiff herein seeks the following orders:-

(a) An order for injunction do issue as against the 2nd Defendant by herself, servants and / or agents from in any way interfering with a portion of the plaintiff piece of land measuring 0.40 ha pending the hearing and determination of this suit.

(b) This court be pleased to cancel and / or nullify title deed no NORTH SAKWA/KAMASOGA/1830 and the Defendant be ordered to transfer the land measuring 0.40ha to the plaintiff which had been in her possession since 1985 failure to which the Deputy Registrar and her executive officer be empowered to do the same.

(c) Costs of this suit be provided for and

(d) Any other alternative relief that this honourable court may deem fit to grant.

4. The 1st Defendant herein entered appearance and filed his defence on the 28th May 2003 although in

his oral testimony he has denied having prepared and signed the said defence. The 2nd Defendant also filed her memorandum of appearance and statement of defence on the 28th May 2003, although initially the case proceeded ex-parte in default of entry of appearance and filing of defence.

5. In her plaint, the plaintiff averred that in or around 1985, she bought from the 1st defendant a portion of his share of land known as North Sakwa/Kamasoga/1830 measuring 0.40 hectares after which she took possession of the same, built a semi-permanent house on it and started planting sugarcane and other crops on it. The plaintiff also averred that she attended the Land Control Board and was thereafter given a new title number being North Sakwa/Kamasoga/1918 while the 1st defendant's remaining portion became North Sakwa/Kamasoga/1917 measuring 0.32 hectares.

6. The plaintiff further averred that in or around the year 2002, the 1st defendant colluded with the 2nd and 3rd defendants and defrauded the plaintiff of the piece of land she had possessed for upwards of 15 years by transferring the whole of it to the 2nd defendant without the plaintiff's knowledge and/or consent. Particulars of fraud as set out in paragraph 7 of the plaint are that the plaintiff's land was sold to different buyers without disclosure, failure to disclose that the 0.40 hectares piece of land belonged to the plaintiff and illegally issuing title to the 2nd defendant and keeping secret the land registry documents. The plaintiff's claim is for cancellation of land parcel number North Sakwa/Kamasoga/1918 (the suit land) registered in the name of the 2nd defendant and transfer of the same to the plaintiff.

7. In his Statement of Defence dated 28th May 2003 and filed in court on 8th October 2003, the 1st defendant denies the plaintiff's allegation that she bought a piece of land from him; that he attended the Land Control Board as alleged by the plaintiff. The 1st defendant also denies the particulars of fraud alleged against him by the plaintiff and states that on or about 4th March 2002, he sold his portion of land measuring 0.72 hectares to the 2nd defendant and had since transferred the parcel to the said 2nd defendant. He also avers that at all material times, the whole parcel of land belonged to him exclusively and that any structures that may have been constructed by the plaintiff (an allegation which the 1st defendant denies) then such construction was done in contravention of the 1st defendant's proprietary rights. The 1st defendant also avers that the entire parcel of land measuring 0.72 hectares is the property of the 2nd defendant who bought the same from the 1st defendant on or about 4th March 2002. The 1st defendant prays that the plaintiff's suit be dismissed with costs.

8. In her statement of Defence filed on 28th May 2003, the 2nd defendant denies the allegations of fraud made against her and avers that by a written agreement, executed on 4th March 2003, she bought land parcel number North Sakwa/Kamasoga/1830 measuring 0.72 hectares and thereafter attended the Land Board for consent together with the 1st defendant; that the 1st defendant willingly and lawfully executed the transfer in her favour. The 2nd defendant also denies the plaintiff's claim as set out in paragraph 9 of the plaint as well as the jurisdiction of this court. The 2nd defendant asks the court to dismiss the plaintiff's suit with costs.

9. The 3rd defendant neither entered appearance nor filed defence.

10. The hearing of this case took place between 1st January 2011 and 28th January 2013 during which the plaintiff testified and called 5 witnesses. The 1st defendant also testified but called no witnesses. The 2nd defendant testified and called 2 witnesses. At the close of the hearing parties agreed to file and exchange written submissions. The submissions of the 1st and 2nd defendants are on the file.

11. In her testimony, the plaintiff, Risanile Atieno Ochuka stated that she bought the suit land from the 1st defendant in the year 1985 and paid a sum of Kshs.6000/= for the same. The sale agreement, written in Dholuo and translated into English was produced as **P. Exhibit 1 (a)** and **1(b)** respectively. The plaintiff also stated that she carried out a search on 9th February 1998 which revealed that the land known

as North Sakwa/Kamasoga/258 was registered in the joint names of Oluoch Onoka, Musa Dama Onoka and Charles Misewe Onoka. The certificate of official search dated 9th February 1998 was produced as **P. Exhibit 2**. Thereafter, the plaintiff placed a caution on the land as can be seen from **P. Exhibit 3**. Later, the Lands Office asked her to remove the caution by a letter dated 2nd June 1998. She carried out another search on 2nd June 1998 during which it was established that the land was still registered in the 3 names of Oluoch Onoka, Musa Dama Onoka and Charles Misewe Onoka. There was also indicated on the official search – **P. Exhibit 5** – that there was a caution in favour of the plaintiff. The later dated 5th March 1998 from the Ministry of Lands was produced as **P. Exhibit 10**.

12. The plaintiff also produced a bundle of letters dated 16th July 1999, 19th August 1999, 13th November 1999 and 27th March 1998 as exhibits. She also produced a money order No.0152804 dated 22nd August 1999 for Kshs.2500/= being payment for Land Control Board Consent. The application for consent (Form No.1) and the approval being No.556024 by the D.O. and the payment receipt being No.556024 were all produced as **P. Exhibit 7 (a) to (c)**.

13. The plaintiff stated that on 1st December 2000, she attended a second Land Control Board meeting at Rongo for which she paid. She also paid Kshs.5875/= for the transfer. The application for consent, the approval and payment receipt for this second consent were produced as **P. Exhibit 8 (a) – (c)**. She said she made payment for this second consent by money order. Prior to going for the second consent, she sent M/s Olweny & Associates Surveyors to survey the land Number 830 which later produced title numbers North Sakwa/Kamasoga/1917 and 1918. She paid the Surveyor Kshs.6800/=. The payment receipt for this amount was produced as **P. Exhibit 10**. That at the time of the survey, the caution was still in place. She paid Kshs.250/= vide money order on 20th March 1998 and another Kshs.500/= on 11th August 1999. According to the plaintiff the payments were to secure the caution until the land was transferred to her. The money order receipts were produced as **P. Exhibits 11 (a) and 11 (b)**.

14. The plaintiff also produced a letter dated 3rd September 1999 from the office of the District Officer Awendo Division – **P. Exhibit 12** – showing that she was to be registered for plot 1830 jointly with the 1st defendant. The caution was removed on 30th June 2000 by the plaintiff so as to facilitate subdivision of parcel number 1830 into 1917 and 1918 and eventual transfer of parcel number 1918 into her name by the 1st defendant.

15. The plaintiff further testified that though she bought and paid for land parcel 1830, the same is occupied by the 2nd defendant after the 1st defendant sold both parcels 1917 and 1918 to the said 2nd defendant. The plaintiff also testified that after the 2nd defendant illegally took possession of her parcel of land, she (2nd defendant) vandalized her semi-permanent structure.

16. During cross examination, the plaintiff stated that the land parcel she originally bought was number 258; that she and 1st defendant went to the land Board in connection with the same on 10th November 1999; that she did not enter into any fresh agreement for plot 1830; that when she carried out the second search in the year 2000, she discovered that the suit land was registered in the name of the 2nd defendant; that at no time was plot No.1830 registered in her name; that she had no evidence to confirm the existence of land parcel 1918. The plaintiff further testified that though she removed the caution on 30th June 2000, she did not do so for the 2nd defendant's sake; that the removal of the caution was to facilitate transfer of parcel number 1918 from the 1st defendant to herself.

17. On re-examination, the plaintiff stated that between 1985 and 1999, the suit land remained in the name of the 1st defendant's father and that transfer was only possible after subdivision.

18. PW2 was Hellen Oluoch who testified that the plaintiff bought a parcel of land from the 1st defendant sometime in 1985 and that the sale agreement between the 1st defendant and the plaintiff was done in her house. She also told the court that after the purchase, the plaintiff stayed on the land and also

developed it. She was the one working on the land before the land was taken over by the 2nd defendant in this case.

19. During cross examination, PW2 confirmed that the plaintiff bought land from the 1st defendant but she could not explain how the 2nd defendant ended up taking possession of the land and fencing it off. She was emphatic that the suit land is the property of the plaintiff and not the 2nd defendant.

20. PW3 was John Owuor Anindo a retired Assistant Chief of Awendo, and the father of the plaintiff. He corroborated the testimonies by the plaintiff and PW2 that the plaintiff bought land from the 1st defendant. He also said he went to the Land Control Board when the survey was being done; that the house which the plaintiff built on the suit land before she went to Mombasa still stands there. He identified **P. Exhibit 1 (a)** as the Sale Agreement executed between the plaintiff and the 1st defendant herein although he could not say whether or not, the plaintiff was issued with a title deed.

21. Solomon Nchoga testified as PW4. He told the court that he was contracted by the 1st defendant herein to survey the suit land on the 25th February 2001. That after the survey, the Oyugis District Land Surveyor gave new numbers 1917 and 1918 to what was originally parcel number 1830. PW4 produced the mutation form in respect of the suit land as **P. Exhibit 9**.

22. Upon cross examination, PW4 confirmed that the signature of the District Surveyor was not appended to the mutation form as expected and that the Land Registrar did not register the said instrument for purposes of effecting subdivision of plot 1830 and the opening of fresh green cards in respect of the said new numbers. This witness also confirmed to the court that land parcels North Sakwa/Kamasoga/1917 and 1918 did not exist in the relevant land registry though they exist at the District Surveyor's office. He also stated that if the requisite documents, namely the mutation forms, were not registered at Lands Office, then the Surveyor's work stopped at the Surveyor's office.

23. PW5 was John Lazarus Ochuka, the husband to the plaintiff. He stated that after the plaintiff bought the piece of land from the 1st defendant, he (PW5) put up a semi permanent house thereon and also dug a borehole. He said he buried his 4-year old son on the land although currently the land is occupied by the 2nd defendant herein.

24. In cross-examination by the 1st defendant, PW5 stated that when the 2nd defendant took possession of the land, the 1st defendant was said to be in Tanzania.

25. In answer to questions put to him by counsel for the 2nd defendant, PW5 stated that before he authorized the plaintiff to negotiate for the purchase of the suit land, he had viewed the land which was initially registered as number 258, which later became number 1830. PW5 stated that he was aware that the 2nd defendant currently occupies the suit land though he could not say how she had come into possession of the same. He also stated that at no time was land parcel 1830 registered in the name of the plaintiff. He denied that he had either sold, or leased the suit land to the 2nd defendant herein.

26. It is to be noted that apart from PW5, the 1st defendant did not cross-examine any of the other witnesses, stating simply that what they were telling he court was true.

27. The 1st defendant, Musa Dama Onoka testified and told the court that he sold land to the plaintiff herein in the year 1985. He said that the land he sold to the plaintiff was part of the family land which after the death of his father, had been registered in the name of his mother, Judith Atieno Onoka as parcel number 258. He said he sold part of his share in his mother's estate in order to pay dowry for his wife.

28. The 1st defendant also testified that after the plaintiff had established her home on the suit land, he himself went to look for employment in Tanzania and on his return he found that the plaintiff and her family had gone to Mombasa. He however, went to the Land Control Board with the plaintiff after which

he asked the surveyor (PW4) to do the survey. That thereafter, he leased out a small portion of the suit land to the 2nd defendant for a while but on coming back, he found that the 2nd defendant had even taken the plaintiff's land. That he had leased his portion of the suit land to the 2nd defendant for planting of sugar cane vide a lease agreement which was valid until 16th May 2012. He however could not produce the lease agreement on allegations that the 2nd defendant carried away all the copies of the agreement.

29. During cross-examination, the 1st defendant disowned the defence filed in court on 8th October 2003, alleging that at the material time he was not within the country. He also stated that the signature appearing on the statement of defence was not his; and that he never attended court to file the same nor did he send anyone to file the defence on his behalf. He reiterated his evidence in chief that he sold the suit land to the plaintiff, though at the time of the sale, the land was still registered in his late mother's name.

30. The 1st defendant also stated that at the time of the sale, the land was still registered as number 258 and added that the sale agreement with the plaintiff was infact not signed. He confirmed that he and the plaintiff went to the Land Control Board for consent to transfer. He testified further that he could not comprehend how the 2nd defendant had obtained title to the land because he only entered into a lease agreement with her. He however confirmed he had no papers to confirm existence of the lease agreement in respect of the 1.5 acres of land.

31. The 1st defendant was also cross-examined at length by counsel for the 2nd defendant. He stated that he goes to Tanzania often though in the year 2002, he was present in Kenya. He also disowned the memorandum of appearance and the statement of defence attributed to him. He also said he did not know how the 2nd defendant acquired the suit land though he stated he had leased the land to her for 10 years at a cost of Kshs.60,000/=.

32. The 1st defendant also stated that originally the land was registered as Number 258 out of which he sold 2 acres to the plaintiff and leased the balance of 1.5 acres to the 2nd defendant. He denied that he was a liar.

33. The 2nd defendant Everlyne Atieno Oturi testified as DW2. She testified that the suit land was transferred to her on 1st November 2002 after purchasing the same from the 1st defendant. She cultivates the same for sugar cane. She said she bought the land after she conducted a search which showed that the land parcel 1830 belonged to the 1st defendant. She bought the land for Kshs.170,000/= and after payment she and the 1st defendant went to the Land Control Board for consent. She also stated that after she paid the 1st defendant, PW2 informed her that the land belonged to the plaintiff, though from the time she took possession of the land, she has never been removed. She also testified that according to documents at the lands registry (documents were produced by her in evidence) the plaintiff had placed a caution on the suit land claiming purchaser's interest but the same was withdrawn by the plaintiff long before she met the 1st defendant. Referring to paragraph 8 of the 1st defendant's defence, she testified that it was true the 1st defendant sold the suit land to her and that there is no statement in the said defence to the effect that he leased the land to her. She denied all the allegation of fraud made against her.

34. During cross examination by counsel for plaintiff, DW2 stated that she did not personally attend the Land Control Board but was represented by one Joseph Okech Wasonga, DW3. She also stated that though she paid the full purchase price of Kshs.170,000/= to the 1st defendant the 1st defendant did not sign for any of the instalments. She also stated that though she paid Kshs.170,000/= for the purchase, the documents at the lands office reflected only Kshs.60,000/= and that it was her agent Mr. Wasonga who signed the transfer forms on her behalf.

35. DW2 was also cross examined by the 1st defendant. She conceded that the 1st defendant did not sign for the total sum of Kshs.170,000/= paid to him as consideration for the suit land; though the money was paid at the advocates' office, the first instalment of Kshs.20,000/= having been paid on 4th March

2002. The 2nd defendant also testified that the 1st defendant has sold the same piece of land to 2 other people though they had not sued the 1st defendant.

36. In re-examination, the 2nd defendant stated that the personal search she conducted at Lands Office showed that the suit land belonged to the 1st Defendant. She denied having faked the file documents that gave her proprietorship over the suit land. She also contended that if indeed it was true that she defrauded the 1st defendant of the suit land as alleged, he would have sued her and further that the suit land has never belonged to the plaintiff nor has she ever bought the same from 1st defendant.

37. DW3 was Joseph Okech Wasonga. He stated that in or about March 2002, the 1st defendant herein asked him to find a buyer for a piece of land. He eventually contacted the 2nd defendant who is a sister to his elder brother's wife. After conducting a search and establishing that the land belonged to the 1st defendant, the parties went to the offices of Sammy Onyango Advocate in Migori for sale agreement. The purchase price was agreed at Kshs.170,000/= and on 4th March 2002, the 1st defendant was paid Kshs.20,000/=. DW2 also testified he attended 2 Land Control Board meetings together with the 1st defendant at Rongo and also went together with the said 1st defendant to the DC's office where they were on the same day issued with the Title Deed. The witness stated that it took about 2 weeks to complete the whole sale transaction and to obtain a title deed. This witness was categorical that the transaction between the 1st and the 2nd defendants was a sale and not a lease as alleged by the 1st defendant. On further prodding by the court DW3 stated that he signed only one document at the Land Control Board on behalf of the 2nd defendant and that he did not sign any other document.

38. During cross-examination, DW3 testified that he signed a document at Rongo Land Control Board for consent and also signed the transfer documents on behalf of the 2nd defendant. He also testified that both the Land Control Board and the Lands office used only a photocopy of the 2nd Defendant's national identity card to process the application for consent and issuance of the Title Deed. He also testified that no one told him that it was wrong for him to sign documents on behalf of the 2nd defendant. It was also the testimony of DW3 that the 1st defendant told him the land he was selling to the 2nd defendant had been sold to somebody else, and that the structure standing on the land belonged to that other person. DW3 also testified that he witnessed payment of the whole purchase price of Kshs.170,000/= to the 1st defendant. He denied that the 2nd defendant still owes the 1st defendant Kshs.150,000/=. He denied a suggestion that the documents used to transfer the suit land to the 2nd defendant were manufactured specifically for that purpose. He also denied that he was the mastermind behind the plot to grab the plaintiff's land from her.

39. I have now carefully considered the evidence on record and the submissions made by all parties, namely the plaintiff, the 1st defendant and the 2nd defendant.

40. The 1st defendant denied the agreement produced by the 2nd defendant saying the same was not signed by him and that the National Identity Card reflected in the agreement did not belong to him. He submits that the issues raised by the plaintiff are correct and that the 2nd Defendant together with the 3rd defendant have taken away his land illegally together with that of the plaintiff. He prays that the title deed known as North Sakwa/Kamasoga/1830 registered in the name of the 2nd defendant should be cancelled and ordered to revert to the 1st defendant as the same was obtained through fraud. He wants to give the plaintiff a share of the suit land.

41. On her part and in her submissions filed on 15th March 2012 the 2nd defendant maintains that she bought the suit land from the 1st defendant and claims to have paid Kshs.170,000/= to the 1st defendant although what is seen from the documents she produced is that the purchase price paid was Kshs.60,000/=. The court has taken note of the fact that she did not produce any transfer forms to show the actual transfer.

42. In his submissions counsel for the 2nd Defendant framed the following 6 issues for determination:-

(a) *Whether there is a sale agreement entered into by the plaintiff in respect to the suit land.*

(b) *Whether the said sale agreement above was valid.*

(c) *Whether the plaintiff has any tenable claims over the suit land.*

(d) *Whether plaintiff can maintain a suit founded on fraud as against the 2nd Defendant.*

(e) *Who is the lawful and bonafide owner of the suit land and*

(f) *Whether the plaintiff is entitled to the orders sought, whatsoever.*

43. On the first issue it is counsel's argument that the plaintiff entered into an agreement with the 1st Defendant with respect to a portion of L.R No North Sakwa/Kamasoga/258 and not L.R North Sakwa/Kamasoga/1830 whatsoever, since the same was not in existence on the 26th day of August 1985. It is counsel's submissions that L.R NO North Sakwa/Kamasoga/1830 was created on the 30th day of June 2000 following the sub-division of L.R No. North Sakwa/Kamasoga/258.

44. Secondly it is counsel argument that it was incumbent upon the plaintiff and the 1st Defendant to obtain the relevant land control board consent within the statutory period of six (6) months from the date of entering into the sale agreement which they neither applied for nor obtained. This according to counsel, makes the land sale agreement relied on by plaintiff untenable in law. He submits that there is no reasonable cause of action in the suit as against the 2nd Defendant and same ought to be dismissed. In this regard, counsel relied on the provisions of **sections 6 and 22 of the Land Control Act, Chapter 22 of the Laws of Kenya.**

45. Counsel further submits that there was no agreement entered between the plaintiff and the 1st defendant as against the 2nd Defendant. Consequently the plaintiff herein was not privy to and/or party to the Agreement between 1st Defendant and 2nd defendant and therefore she cannot challenge the transfer and registration of the suit land in favour of the 2nd Defendant.

46. It is also contended on behalf of the 2nd defendant that the plaintiff has never ever been the registered proprietor of the suit land and her claim founded on fraud challenging the transfer and registration of the same is not maintainable and she has therefore no claim as against the 2nd Defendant.

47. It was further submitted that since the suit land was transferred and registered in the name of the 2nd Defendants on the 22nd day of October 2002 and title deed was issued to her, she is therefore the bonafide owner of the same. That the sale, transfer and registration of the suit land has not been challenged by the plaintiff and the 1st Defendant. That the denial by the 1st Defendant of having sold the suit land to the 2nd Defendant is a calculated move to defeat the 2nd Defendant right over the suit land. Reliance was placed on 2 authorities namely **Ibrahim Wakhayanga & 2 others –vs- Peter Mubatsi Nambiro - Court of Appeal at Kisumu – Civil Appeal NO.84 of 1998** and **Richard Oduol Opole –vs- The Commissioner of Lands & 2 others – Kisumu HCCC NO.112 of 2000**. It is worth noting that the latter decision is only of persuasive authority and is not binding on this court. The learned Judge however, set out a principle of law that because the plaintiff did not establish a nexus between the parties, insofar as the 3rd defendant therein had not purchased the land from the plaintiff, then the plaintiff's case could not stand.

48. In the **Wakhayanga case**, the Court of Appeal also said that the appellants had no right to make any claim against the respondent because there was no nexus between the appellants and the respondent since the land in question which originally belonged to the respondent's late father had been sold and

transferred by the respondent's father. I do entirely agree with the court's holdings in the above 2 cited authorities.

49. Counsel also submitted, concerning issue number 5 that the sale, transfer and registration of the suit land to the 2nd defendant has not been challenged, by way of counter-claim seeking to invalidate the 2nd defendant's title to the suit land whatsoever, especially in view of the 1st defendant's defence that he willingly sold the suit land to the 2nd defendant. In this regard, counsel cited the case of **Biliah Kemunto Omete –vs- Johnstone Nyaosi Orenge & 4 others – Kisii HCCC NO.18 of 2007** (unreported) in which the Court (Musinga, J as he then was) stated the following:-

“Can the defendants raise the issue of fraud as against the plaintiff as

far as acquisition of the suit land is concerned? I do not think so. The defendants have never been proprietors of the suit land. They are not related to the plaintiff. There was no privity of contract between them and the plaintiff. They have not made any counter claim as against the plaintiff. Their contention that the plaintiff acquired the suit land fraudulently is therefore misconceived. But even if they could have lawfully raised the issue of fraud against her, I would still have held there is no sufficient proof of the same. In Varani t/a Kisumu Beach Resort –VS- phoenix of East African Assurance Company Limited [2004] 2 KLR 269, it was held that allegations of fraud require proof to a standard higher than a balance of probabilities.”

50. Applying the above stated principles to the instant case, I do not think that the plaintiff has proved her case against the defendants on a balance of probabilities. Although the plaintiff produced documents showing sale between herself and the 1st defendant, the land described in that sale agreement was not the same as what was claimed in the plaint. The land referred to in the sale agreement was 258 as opposed to number 1830 claimed in the plaint. But even if the plaintiff had shown that she indeed bought parcel 1830 from the 1st defendant, the brutal and draconian provisions of the **Land Control Act, Chapter 302 Laws of Kenya** wrestled the land from her hands. The plaintiff stated that she bought the land from the 1st defendant in 1985, but it was not until 1998 or thereabouts, and later in 2000 that she and the 1st defendant went to the Land Control Board for consent. **Section 6 (1)** of the said **Act** provides that a controlled transaction “is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of the transaction in accordance with this Act.” Under **section 8 (1)** of the **Act**, the plaintiff was required to make her application for consent of the appropriate Land Control Board within six months of the making of the agreement for the sale by the 1st defendant to herself. She attempted to obtain such consent 13 years after the sale agreement was entered into.

51. It is also worth noting that the 2nd defendant's registration as proprietor of the suit land is under the now repealed **Registered Land Act, Cap 300** of the **Laws of Kenya**. Under **section 27** of the said **Act**, and subject only to the Act the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. By dint of the provisions of **section 28** of the same **Act**, the rights of the 2nd defendant in this case, are so protected that they shall not be liable to be defeated except as provided by the Act. The circumstances under which the 2nd defendant's proprietorship can be impeached are set out thereunder and also if there is proof of fraud. In the instant case the plaintiff failed to prove her allegations of fraud against the 2nd defendant and for these reasons, her suit against the said 2nd defendant must fail.

52. Secondly, the plaintiff's suit against the 2nd defendant must fail because she has not established privity of contract between herself and the 1st and 2nd defendants regarding the transaction that eventually saw the suit land transferred to the 2nd defendant. Though the plaintiff had placed a caution on the suit land, she removed the same and according to her, she removed the caution to pave way for subdivision and transfer of her portion of land to her. That may have been so, but the alleged transfer could not have materialized for failure by the plaintiff to comply with **sections 6, 8 and 22** of the **Land Control Act**. Further, I do find and hold that the plaintiff did not meet the required standard of proof for the

allegations of fraud she made against the 2nd defendant, which standard is higher than a balance of probabilities.

53. Before I pen off, I wish to observe here that the demeanor of the 1st defendant left a lot to be desired. He was evasive in answering questions and was very economical with the truth. In one breath and in black and white he said he had sold the land to the 2nd defendant and yet during his oral testimony, he stated that he had sold the land to the plaintiff. It is not lost to the court and as stated by both the 2nd defendant and DW3 Joseph Okech Wasonga that they learnt from PW2 that the 1st defendant had sold the land to another person before he entered into the sale agreement with the plaintiff. It appears to me therefore that the 2nd defendant who had both the knowledge and the means ran very fast to have the land transferred to her before the 1st defendant entertained second thoughts on selling the land to other parties. Infact the 2nd defendant stated that she knew the 1st defendant had sold the land to other parties although those parties did not sue the 1st defendant.

54. For the reasons given above, I find that the plaintiff's suit against the 2nd defendant has not been proved on the balance of probabilities and it is therefore dismissed. The plaintiff's case against the 1st defendant also fails on account of the plaintiff's failure to comply with the relevant provisions of the **Land Control Act, Cap 302 Laws of Kenya**.

55. There shall be no order as to costs.

DATED and DELIVERED at KISII this 09th day of May, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Anyona Mbunde (present) for Plaintiff

Musa Dama Onoka (PIP) for 1st defendant

Mr. Moracha for Oguttu-Mobyia for 2nd defendant

N/A for 3rd defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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HCCC (KISII) NO.77 OF 2003