



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 77 OF 2018**

**THE ESTATE OF JOSEPH RAMINYA**

**(Represented by**

**MARGARET AWUOR RAMINYA).....PLAINTIFF**

**VERSUS**

**TUWAN FARM LIMITED.....1<sup>ST</sup> DEFENDANT**

**WILSON JUMA OMOLLO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a plaint dated **9/8/2018** and filed on the even date, the plaintiff sought the following orders against the defendants:-

- (a) A declaration that the transfer of title number Kitale Municipality Block 2/Tuwan/2911 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was fraudulent.
- (b) An order cancelling the title for parcel No. Kitale Municipality Block 2/ Tuwan/ 2911 and further that the 2<sup>nd</sup> Defendant do surrender to the County Land Registrar the title for the said parcel and failing which the Land Registrar do gazette the cancellation.
- (c) An order that the 1<sup>st</sup> defendant do transfer the land parcel No. KITALE MUNICIPALITY BLOCK 2/TUWAN/2911.
- (d) A permanent and a temporary injunction.
- (e) Costs.
- (f) Interest.
- (g) Any other order or relief that this court may deem fit to grant.

**PLEADINGS**

**The Plaint**

2. In the plaint, the plaintiff, the estate of the late **Joseph Raminya** through **Margaret Awuor Raminya**, the deceased's widow, states that the 1<sup>st</sup> defendant owned the land comprised in **LR No. 8813** situate in Kitale Municipality and which land was subsequently shared out among the shareholders of the 1<sup>st</sup> defendant; that the late Joseph Raminya was at all material times a shareholder of the 1<sup>st</sup> Defendant ; that after the **LR No. 88134** got surveyed and subdivided and a survey map and area list prepared where the late Joseph Raminya was allocated plots **Nos. 2908, 2909, 2910 and 2911**; that the late Raminya took possession of the suit land and upon his death on **30/3/1997** his estate remained in possession thereof and that his name in the register was substituted with that of **Margaret Awuor Raminya**; that on **12/11/2001**, Margaret Raminya was issued with a share certificate **No. 1381** indicating that she was the proprietor of the four plots; that the share

certificate was signed and sealed by the officials of the 1<sup>st</sup> defendant; that the plaintiff has a permanent building constructed on plot **No. 2911**.

3. The plaintiff further averred that on the **14/6/2013**, the plaintiff paid the fees for the processing of her titles, the 1<sup>st</sup> respondent collected **Kshs. 15,000/=** and which was indicated to be for three plots and not for the four plots owned by the plaintiff; that the plaintiff was subsequently issued with the title for parcel **Nos. Kitale Municipality Block 2/Tuwan/2908, 2908 and 2910**; that the 1<sup>st</sup> defendant could not offer any explanation as to why the title processing fees for plot **No. 2911** could not be received; that it later transpired that the title for the said parcel had been issued to the 2<sup>nd</sup> defendant illegally and fraudulently.

#### **The 2<sup>nd</sup> Defendant's Defence**

4. The 2<sup>nd</sup> defendant filed a statement of defence on **24/1/2020**. He denied the claim and stated that his late wife **Risper Juma** was on the **14/1/2002** issued with a certificate **No. 1308** in respect to her membership **No. 3336** over plot **No. 2911** by the 1<sup>st</sup> defendant; that upon the demise of his aforesaid wife on **26/10/2007**, he was issued with the letter of administration of the estate of **Risper Sherry Juma** whereupon plot **No. 2911** was transferred to his name and a title subsequently issued on **5/11/2013**.

5. The defendant avers that the transfer of **KITALE MUNICIPALITY BLOCK 2/ TUWAN/2911** into his name was done legally and not through fraud.

#### **The Plaintiff's Evidence**

6. The plaintiff testified on **17/11/2020**. Her evidence accorded with the plaintiff. She stated that she is the wife to the late **Joseph Raminya** who died in **1997**; that the late Raminya had bought land from the 1<sup>st</sup> defendant sometime in **1978**; that after it was surveyed, his land yielded **4 plots** namely **2908, 2909, 2910 and 2911**; that the late Raminya met his demise on **30/3/1997**; that the share certificate **No. 1381** was later issued in her name; that plot **No. 2911** has a permanent building while the rest have semi-permanent houses; that the 2<sup>nd</sup> defendant has a plot across the road which separates their land; that it was after she wanted to process the title for the suit lands that she learnt that plot **No. 2911** had been irregularly and fraudulently transferred to the 2<sup>nd</sup> defendant; that plot **No. 2911** has a house which was built long ago and that there are tenants thereon; that the 2<sup>nd</sup> defendant has never taken possession of plot **No. 2911**; that she placed a caution on plot **No. 2911** after she discovered that the same had been transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. On cross-examination by Counsel Bisonga, **PW1** denied ever being summoned to return the certificate for rectification.

#### **The Defence Case**

7. The 2<sup>nd</sup> defendant, though represented by counsel in the suit, did not testify at the trial. His counsel who was present throughout the trial indicated that in the circumstances of the hearing he would not be calling any witness. The background was that the defendant's documents had been expunged from the record on the first morning of the trial since they were filed out of time without leave of court. It is quite unfortunate that the 2<sup>nd</sup> defendant had counsel on the record who waited till the last minute to comply with the rules by filing documents without as much as filing an application seeking that they be deemed as properly filed and served, omissions which this court considers not only unreasonably presumptuous but also great disservice to the case management process. To this I state that it is proper to leave matters to prayer and to God. However I add that the taking of earthly steps stipulated in compliance with the Civil Procedure Rules in fairness to one's adversary in a suit is an added mark of faith in the litigation process before court.

#### **SUBMISSIONS**

8. The parties were directed to file submissions on **17/11/2020**. The plaintiff's submissions were filed on **4/12/2020**. I have perused the court record and I have not found the defendants submissions.

#### **DETERMINATION**

9. I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are: -

*(a) Who is the proper allottee of the suit land?*

*(b) What Orders should issue?*

10. The issues are discussed as hereinbelow:-

*(a) Who is the proper allottee of the suit land?*

11. From the pleadings on record, both contesting parties claim to own the suit land namely **KITALE MUNICIPALITY BLOCK 2/ TUWAN/2911**. **PW1**, the plaintiff gave a chronology of how she came to know the alleged fraud and transfer of the suit land to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant.

12. **Section 25** of the **Land Registration Act** provides as follows:

**“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of 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, but subject-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

13. It is clear that the provisions that govern the cancellation of title on the basis of fraud illegality or existence of an illegal scheme are contained in **Section 26** of the **Land Registration Act** which reads as follows:

**“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

14. The plaintiff produced a share certificate which showed that she had been allocated the suit land. This evidence by the plaintiff was not challenged.

15. The evidence of the plaintiff is that the land purchased by her husband was subdivided upon survey to yield **4 plots** being Plots No. **2908, 2909 2910 and 2911**. These plot numbers were endorsed on her share certificate issued to her by the 1<sup>st</sup> defendant. Her evidence is that plot number **2911** has an old permanent building and that the 2<sup>nd</sup> defendant has a plot which is located across the road away from the plaintiff's plots. She also testified that the suit land has been in her continuous possession and the 2<sup>nd</sup> defendant has never been in possession thereof. This evidence was not challenged.

16. In this court's view there could be no probable reason for issuance of a share certificate having **plot No. 2911** to the plaintiff by the 1<sup>st</sup> defendant save that the plot was a subdivision of the land owned by her late husband. The 1<sup>st</sup> and 2<sup>nd</sup> defendants never called evidence to disown the said share certificate.

17. A share certificate issued to a shareholder by a company is an accountable document. It can not be wished away willy-nilly by anyone who desires to appropriate whatever material interests it represents. There could be no other explanation for the transfer of the plot and its registration in the 2<sup>nd</sup> defendant's name while that share certificate existed save some exercise of fraud on the part of the officers of the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant who clearly had an interest to appropriate the suit land. Where fraud has been proved against the holder of a title in the acquisition thereof, that impugned title deserves to be cancelled.

18. In this court's view the plaintiff has proved her case against both defendants in this suit on a balance of probabilities.

***(b) What Orders should issue?***

19. Having found that the plaintiff has proved her case against the two defendants on a balance of probabilities I enter judgment in her favour and I issue the following orders:-

**(a) A declaration that the transfer of parcel No. KITALE MUNICIPALITY BLOCK 2/TUWAN/2911 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent.**

**(b) An order cancelling the title for parcel No. KITALE MUNICIPALITY BLOCK 2/TUWAN/2911 issued in the 2<sup>nd</sup> defendant's name and further that the 2<sup>nd</sup> defendant do surrender to the County Land Registrar the title said document failing which the Land Registrar shall Gazette the cancellation.**

**(c) An order that the County Land Registrar shall register land parcel No. KITALE MUNICIPALITY BLOCK 2/TUWAN/2911 in the name of the plaintiff.**

**(d) An order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from in any manner interfering with title No.**

**KITALE MUNICIPALITY BLOCK 2/TUWAN/2911.**

**(e) The defendants shall bear the costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 17<sup>th</sup> day of December, 2020.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**