

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 101 OF 2012

TERESIA KWAMBOKA ONSONGO

.....PLAINTIFF

VERSUS

ZACHARIA ONSONGO MOSETI1st

DEFENDANT

THE LAND REGISTRAR, KISII CENTRAL DISTRICT2nd

DEFENDANT

JUDGMENT

A. Introduction

1. The plaintiff filed a plaint dated **20th March 2012** in which she averred that she was the sole and absolute registered proprietor of land parcels **West Kitutu/Bogusero/3891** and **West Kitutu/Bogusero/3905**. She stated that she was registered as proprietor of the parcels in September 2002.
2. She further pleaded that in 2011 she discovered, upon conducting an official search, that the two parcels had in October and November 2005 been transferred into the name of the 1st defendant without her knowledge, consent or participation. She alleged that the transfers were fraudulent, carried out without Land Control

Board consent, and based on forged or irregular documents. She sought a declaration that the transfers were fraudulent, cancellation of the 1st defendant's registration, rectification of the register in her favour, and a permanent injunction restraining the 1st defendant from dealing with the properties.

3. In Response the 1st defendant filed a statement of defence dated 16th May 2012 denying the allegations of fraud. He averred that the parcels were purchased by him in 2002 using his retirement benefits and that the plaintiff fraudulently caused them to be registered in her own name. He pleaded that when the matter came to light, a family meeting was convened which resolved that the plaintiff transfer the parcels to him, which she did by signing the requisite forms. He therefore maintained that his registration as proprietor in 2005 was valid and lawful. He prayed for dismissal of the suit with costs.
4. The 2nd defendant, the Land Registrar, filed a defence, List of witness and list of documents with regard to the proceedings.
5. The Plaintiff subsequently filed a reply to defence dated 24th January 2013 in which she reiterated her ownership and denied all allegations of fraud on her part.

B. The Plaintiff's Case

6. At the hearing, the plaintiff testified that she married the 1st defendant in 1979 and that through farming, tea picking, and selling plastics she accumulated savings. Together with proceeds from the

sale of land at Raganga, she purchased the suit properties in 2002 and had them registered in her name. She stated that she built a twelve-roomed permanent house on parcel number 3905 and fenced parcel number 3891. She testified that she was later chased away from the matrimonial home after disagreements with the 1st defendant, and that in 2011 she discovered through official searches that the parcels had been transferred into the 1st defendant's name in 2005. She denied ever signing transfer forms or appearing before the Land Control Board, and insisted that the transfers were fraudulent.

7. Her son, Evans Ateka, testified as PW2. He confirmed that the parcels had been purchased by his mother and registered in her name. He recalled that after his parents' disagreements, his mother and children were forced out of the home. He further stated that his mother later discovered that the land had been transferred to his father, which he believed was fraudulent.

C. The Defendant's Case

8. The 1st defendant, Zacharia Onsongo Moseti, testified that he is a retired police officer who upon retirement received a lump sum of retirement benefits. He stated that he invested these benefits in the purchase of several properties including the suit parcels. He contended that he lawfully purchased parcel number 3891 from Peter Morira Ombati at a consideration of Kshs. 190,000 and parcel number 3905 from the late Fred Mariita through his father, Chrisantus Oreye Marita. According to him, the plaintiff was merely a witness to the transactions and did not contribute any money

towards the purchases. He stated that while he was away in Nairobi, the plaintiff fraudulently caused the parcels to be registered in her own name without his consent.

9. The 1st defendant further testified that upon discovering what had happened, he convened a family meeting at which clan members and relatives were present, including the plaintiff. He claimed that at the meeting it was resolved that the plaintiff had improperly registered the properties in her name and that she should transfer them back to him. He maintained that the plaintiff complied with this resolution and signed all necessary transfer forms. As a result, he was duly registered as proprietor in October and November 2005. He therefore insisted that the transfers were lawful and not fraudulent as alleged.
10. In support of his case, the 1st defendant called several witnesses. Peter Morira Ombati testified that he sold parcel 3891 to the 1st defendant and that the plaintiff did not pay him anything. He said he was surprised to learn that the parcel had initially been registered in the plaintiff's name. Chrisantus Oreye Marita testified that his late son sold parcel 3905 to the 1st defendant and that he personally executed transfer forms in favour of the 1st defendant. He too expressed surprise that the land had gone into the plaintiff's name.
11. The 1st defendant's brother, David Okari Mosei, confirmed that the 1st defendant bought the parcels using his retirement benefits and that the plaintiff had no income of her own to purchase such land. He stated that the family meeting had resolved that the plaintiff should re-transfer the land to the 1st defendant in order to safeguard

the interests of his other household. Other clan witnesses, including Ronald Arweyo Orori and Ombui Kebaso, also testified that the land was sold to the 1st defendant and not the plaintiff, and that the registration in her name was fraudulent.

12. The 1st defendant therefore maintained that he is the rightful owner of the suit parcels, that his registration in 2005 was valid, and that the plaintiff's suit is malicious and without merit. He urged the court to dismiss the case with costs.

D. Issues for Determination

13. It is established law that the issues for determination in a suit generally flow from either the parties' pleadings or as framed by them for the court's determination; see the Court of Appeal decision in the case of **Galaxy Paints Co. Ltd-vs-Falcon Grounds Ltd (2000) 2 EA 385.**

14. I have carefully and anxiously considered the parties' respective pleadings, evidence and the submissions including the issues framed therein. **Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010** (The Rules herein) provide for framing of issues and materials from which issues may be framed in a suit respectively.

15. In the foregone, I am of the considered view that the issues for determination in this suit boil down to

a) **Whether the plaintiff's initial registration as proprietor of parcels West Kitutu/Bogusero/3891**

and 3905 in 2002 vested her with valid and indefeasible ownership, or whether the subsequent transfer and registration in favour of the 1st defendant in 2005 lawfully displaced her title.

- b) **Whether the plaintiff is entitled to the declaratory and injunctive reliefs sought in the plaint, including rectification of the land register.**
- c) **Who should bear the costs of this suit.**

E. LEGAL ANALYSIS

Issue 1: Whether the plaintiff's initial registration as proprietor of parcels West Kitutu/Bogusero/3891 and 3905 in 2002 vested her with valid and indefeasible ownership, or whether the subsequent transfer and registration in favour of the 1st defendant in 2005 lawfully displaced her title.

16. The starting point is that the plaintiff, was registered as proprietor of the suit parcels on **10th and 12th September 2002**, respectively. She relied heavily on these entries in the register, arguing that under section 27 of the now repealed **Registered Land Act (Cap 300)**, registration conferred upon her absolute ownership together with all rights and privileges appurtenant thereto. According to her, the subsequent registration of the 1st defendant in 2005 was not the result of any lawful transfer but rather a fraudulent scheme carried out behind her back.

17. In support of this assertion, the plaintiff testified that she never signed any transfer forms, never attended the Land Control Board, and never consented to the change of ownership. She stated that she only discovered in 2011, upon conducting an official search, that the 1st defendant's name had been entered as proprietor in place of hers. She further explained that at the time of the alleged transfer in 2005, she had already been chased away from the matrimonial home by the defendant, who had become involved with the house help. According to her, she could not possibly have participated in a voluntary transfer in favour of a man who had turned her out.
18. The 1st defendant's case was materially different. He testified that he, and not the plaintiff, purchased the parent parcel **West Kitutu/Bogusero/2305** in 2002 from the vendors, **Justus Onkoba and Pacifica Nyaboke**. He produced the **written sale agreements** to this effect. He also called the vendors, who confirmed that he was the one who negotiated the purchase and paid the consideration. His account was that while he was away in Nairobi, the plaintiff by trickery caused herself to be registered as proprietor of two subdivisions, 3891 and 3905. On discovering this, he convened a family meeting at which it was resolved that the parcels revert to him, since he had been the one to pay for them. He then applied for consent of the Land Control Board, executed transfers, and was registered as proprietor on **13th May 2005**.
19. The law recognises the sanctity of registered title, but with qualifications. Section 27 of the repealed Registered Land Act conferred ownership upon registration. However, section 142 empowered the **Registrar** to rectify the register in certain circumstances, including where duly executed instruments of

transfer supported by consent of the Land Control Board were presented. In such cases, the Registrar acts administratively to give effect to transactions that meet statutory requirements.

20. Importantly, the evidence shows that the Registrar did not act *suo motu* in 2005. He acted on transfer instruments, Land Control Board applications, and letters of consent lodged by the 1st defendant. His role was purely administrative: to amend the register in line with instruments presented for registration. This was within his statutory mandate under section 142 of Cap 300, and cannot be faulted.

21. Jurisprudence has consistently held that where the root of a registered proprietor's title is challenged, that proprietor must do more than wave the title deed. In **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, the Court of Appeal held that:

“When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. One must go beyond the instrument and prove the legality of how the title was acquired.”

22. Applying this principle, the plaintiff relied solely on her initial registration in 2002. She did not produce a sale agreement in her name, nor any receipt or documentary proof that she paid the purchase price. Her testimony that she used her own savings was uncorroborated. By contrast, the 1st defendant produced agreements executed with the vendors, corroborated by their oral testimony. He further produced applications to the Land Control

Board, the resulting letters of consent, and the duly executed transfer instruments leading to his registration in 2005.

23. The plaintiff attempted to discredit these documents by alleging that her signature on the transfer forms had been forged. However, she provided no expert evidence from a handwriting analyst to substantiate the claim, nor did she call any official from the Land Control Board to cast doubt on the authenticity of the consents. Without such proof, her allegations remained mere assertions.
24. As consistently emphasised by the courts in **R.G. Patel v Lalji Makanji [1957] EA 314** and **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, allegations of fraud must be strictly proved, to a standard higher than on a balance of probabilities. Bare assertions, without forensic or official confirmation, do not suffice.
25. In my view, the evidentiary burden under sections 107 and 109 of the **Evidence Act** rested with the plaintiff, who alleged fraud. She did not discharge that burden. On the contrary, the 1st defendant went behind his title and demonstrated the legality of the process that culminated in his registration in 2005.
26. I therefore find that the plaintiff's registration in 2002 did not vest in her indefeasible ownership. It was not backed by a genuine transaction and could not withstand the evidential showing that the 1st defendant was the true purchaser. The 2005 transfer and

registration in favour of the 1st defendant, supported by consents and duly executed transfer documents, lawfully displaced her title.

Issue 2: Whether the plaintiff is entitled to the declaratory and injunctive reliefs sought in the plaint, including rectification of the land register.

27. The plaintiff sought three principal remedies: a declaration that the transfers of 2005 were fraudulent and void; rectification of the register by cancellation of the 1st defendant's titles and reinstatement of her name; and a permanent injunction restraining the 1st defendant from dealing with the parcels.
28. On the basis of the findings already made under Issue 1, the plaintiff has not proved that the 1st defendant's registration in 2005 was fraudulent, unlawful, or without basis. The Registrar acted within his mandate under section 142 of the **Registered Land Act (Cap 300)** in effecting transfers presented to him with Land Control Board consent. No forgery or fraud was proved to the standard required by authorities such as *R.G. Patel v Lalji Makanji* [1957] EA 314. The prayer for a **declaration of fraud** therefore fails.
29. Similarly, the prayer for **rectification** under section 143 of Cap 300 cannot succeed. Rectification is permitted only where registration was obtained by fraud or mistake. The 1st defendant's registration was supported by instruments and consents, and no sufficient proof of fraud was presented. His title cannot be cancelled through rectification.

30. As regards the **injunctive relief**, a permanent injunction restraining the 1st defendant from exercising rights over parcels in which he holds registered title cannot issue. A perpetual injunction presupposes that the plaintiff has established a legal right worth protecting. Having failed to establish ownership, the plaintiff cannot restrain the registered proprietor from using his land.
31. That said, the court cannot ignore the equitable dimensions of this dispute. The evidence disclosed that the suit parcels were acquired in the context of a marriage relationship between the parties, with the plaintiff asserting that she contributed her savings and that the properties were intended to settle her and her children following tensions with the 1st defendant's other household.
32. Although she did not prove fraud sufficient to cancel the 1st defendant's titles, equity recognises that a spouse may retain a **beneficial interest** in matrimonial property even where legal title vests in the other spouse. This principle has been affirmed in **Echaria v Echaria [2007] eKLR** and subsequently reflected in Article 45(3) of the **Constitution of Kenya, 2010** and section 14 of the **Matrimonial Property Act, 2013**.
33. Accordingly, while the plaintiff is not entitled to the declaratory, rectification or injunctive reliefs as framed in the plaint, this judgment does not extinguish her potential equitable or beneficial interest in the properties arising from the marital context. Such interest is not enforceable through cancellation of the register under Cap 300, but may be pursued under the constitutional and statutory framework governing matrimonial property.

Costs

34. The general rule under section 27(1) of the **Civil Procedure Act** is that costs follow the event. However, the court retains discretion to depart from that rule where the circumstances so demand, provided reasons are given.
35. This dispute arose between close family members, being husband and wife, over property acquired during their marriage. The record shows that although the legal and beneficial ownership has been determined in favour of the 1st defendant, the conflict was driven more by mistrust and breakdown of domestic relations than by commercial motives. In such circumstances, awarding costs to one party against the other would only deepen hostility within the family and hinder the possibility of reconciliation.
- 36.** The court in **Akram & another v Akram & 5 others (Family Appeal E004 of 2023) [2024] KEHC 4887 (KLR) (7 May 2024) (Ruling)** affirmed that the discretion on costs must be exercised judiciously and not whimsically. Similarly, in several family land disputes, courts have refrained from condemning any party to pay costs, emphasising that equity and reconciliation should guide the outcome.
37. In the circumstances of this case, I find that it is in the best interests of justice and of the family to order that **each party shall bear their own costs**. This approach balances the need for finality in litigation with the imperative of restoring family peace.

Final Disposition

38. In light of the foregoing analysis, and upon careful consideration of the pleadings, evidence, submissions and the law, the court reaches the following conclusions:

- a) The plaintiff's registration as proprietor in 2002 did not vest in her indefeasible ownership, as it was not supported by a genuine underlying transaction. The 1st defendant has demonstrated that he purchased the parcels, obtained Land Control Board consent, and lodged duly executed transfers upon which the Land Registrar properly acted in 2005.
- b) The plaintiff failed to strictly prove the allegations of fraud or forgery to the standard required in law. On the contrary, the 1st defendant established the legality of the process that culminated in his registration.
- c) Consequently, the declaratory, rectification and injunctive reliefs sought in the plaint cannot issue.
- d) However, given the marital context in which the properties were acquired, this judgment does not extinguish any equitable or beneficial interest the plaintiff may have under Article 45(3) of the Constitution of Kenya, 2010 and section 14 of the Matrimonial Property Act, 2013. Such claims are capable of being pursued in the appropriate forum, but cannot be enforced through cancellation of the register under the repealed Registered Land Act.

39. Accordingly, the plaintiff's suit is hereby **dismissed**.

40. Each party shall bear their own costs, in order to promote peace and reconciliation within the family.

It is so ordered!

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **9th** day of

October, 2025.

MOHAMMED N. KULLOW
JUDGE

Judgement delivered in the presence of: -

N/A..... for the Plaintiff

N/A..... for the Defendants

Philomena W..... Court Assistant