

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELC NO. 345 OF 2016

MARY OMURWA PLAINTIFF

VERSUS

EVANS ORUTA MORONYA 1ST DEFENDANT

JAMES OREKO 2ND DEFENDANT

COOPERATIVE BANK OF KENYA LIMITED 3RD DEFENDANT

THE LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint filed on 25 October 2016. The plaintiff respectively sued Evans Oruta Moronya, James Oreko, Cooperative Bank of Kenya Limited, the Land Registrar Kisii, and the Attorney General, as the 1st to 5th defendants. The plaintiff pleaded that she was the registered proprietor of the land parcel West Kitutu/Bomatara/4812 (the suit land) being a subdivision of the land parcel West Kitutu/Bomatara/1940. She pleaded that she purchased this land from one Mathew Osean Nyandika (Mr. Nyandika). She pleaded that upon acquisition, she started developing a three bedroom unit on it. She pleaded that the 1st defendant trespassed into the suit land contending to have purchased it from the 2nd defendant. She pleaded that the 2nd defendant was her caretaker and could not have had capacity to sell the suit land. She further pleaded that the 1st defendant colluded with the Land Registrar, Kisii and the 1st defendant got registered as proprietor on 5 May 2015. The 1st defendant then charged the title to the 3rd defendant (Cooperative Bank of Kenya) for a facility of Kshs. 600,000/=. She pleaded that the registration of the suit land in name of the 1st defendant was through fraud inter alia that the documents of transfer were forged; that no stamp duty was paid; that she still held the original title deed; that there was no consent of the Land Control Board; and that no consideration was paid to the plaintiff. In her suit, the plaintiff seeks the following orders :

- (a) A declaration that she is the lawful proprietor of the land parcel West Kitutu/Bomatara/4812.
 - (b) That the name of the 1st defendant and the charge be expunged from the register of the suit land and the name of the plaintiff be restored in the register as proprietor.
 - (c) A permanent injunction to restrain the defendants from the suit land.
 - (d) Mandatory injunction to compel the defendants to remove any fence or structures since erected on the suit land.
 - (e) Eviction against the defendants.
 - (f) Costs of the suit and interest.
 - (g) Any further relief deemed fit to grant.
2. The 1st and 2nd defendants filed a joint statement of defence. It was pleaded that the 1st defendant is the current proprietor of the suit land having purchased it from the 2nd defendant when the land was still bearing the number West Kitutu/Bomatara/1940. It was pleaded that it is the 1st defendant who has constructed the house on the suit land being supervised by the 2nd defendant. The 2nd defendant denied that he was caretaker of the plaintiff. They denied colluding with the Land Registrar to have the suit land registered in name of the 1st defendant. The 1st defendant filed a counterclaim where he asked for a declaration that he is the lawful registered owner of the suit land; a permanent injunction to restrain the plaintiff from the suit land; and costs.
 3. The 3rd defendant, (Cooperative Bank of Kenya Limited) filed a defence and a claim against the 1st defendant. She pleaded to be a stranger to the averments of the plaintiff. She pleaded that in December 2015, the 1st defendant approached her for a loan facility of Kshs. 600,000/= and offered the title to the suit land as security. She averred that she exercised due diligence and conducted a search which confirmed that the suit land was owned by the 1st defendant. On that basis she accepted the title as security and charged the suit land. She denied any knowledge of fraud or collusion with the 1st defendant. In her claim against co-defendant, she pleaded that the loan offered to the 1st defendant remained unpaid and was standing at Kshs. 523,650.08/= as at 5 April 2017, which she claimed, plus interest at 14% from the date thereof till payment in full.
 4. In the course of the case, the plaintiff withdrew the suit against the 4th & 5th defendants. Also in the course of the case, the 2nd defendant died; he was not substituted and the case against him abated.

5. The matter first proceeded before Mutungi J on 12 February 2018, when Michael Osean Nyandika (Mr. Nyandika), testified as PW-1. There was no appearance on that day on the part of the 1st defendant and he was only cross-examined by counsel for the 3rd defendant and the State Counsel for the 4th & 5th defendants. His evidence on that day was that he never sold land to either the 1st or 2nd defendants and that he sold the suit land to the plaintiff. The next hearing of the case was on 4 November 2021 when Linet Omurwa testified. She stated that she is a daughter of the plaintiff and that the plaintiff lives in the United States of America (USA) though she intermittently comes to the country. She holds a power of attorney donated by the plaintiff. She described the 2nd defendant as her uncle. She testified that her mother purchased the suit land from Mr. Nyandika and obtained title on 21 February 2013. She had the original title deed in court. She also produced as exhibits the transfer form, application for Land Control Board (LCB) consent, and the consent thereof. She testified that her mother had commenced construction of the house on the suit land. She denied that her mother transferred the suit land to the 1st defendant. Cross-examined by Mr. Ochwangi, who was then on record for the 1st defendant, she testified that her mother was in Kenya in 2015. She stated that the 1st defendant moved into the suit land in 2013. She conceded that the transfer form she exhibited was not signed by the Land Registrar (to indicate registration). She stated that her mother bought the suit land from PW-1 though she had no sale agreement. The witness did not finish her cross-examination and she was stood down. Onyango J was transferred from the station and I took up the matter at this juncture.
6. PW-2 was cross-examined by counsel for the 3rd defendant and she maintained her evidence that the suit land was purchased by her mother who never sold it. She reiterated that the 2nd defendant acted as caretaker for her mother. Cross-examined by counsel for the 1st defendant, she denied that Mr. Nyandika had signed a transfer for the parcel No. 1940 to the 1st defendant. She was not present when her mother was buying the land and she did not have the sale agreement. She testified that she was not aware that Mr. Nyandika and James Oreko were arrested in 2014/2015 and that her mother signed a transfer to the 1st defendant to avoid criminal charges against the two. The transfer from her mother to the 1st defendant dated 4 May 2015 was put to her. She acknowledged that it has her mother's photo and ID but she refuted the signature therein. She denied that James Oreko owned the suit land in 2010. She had no knowledge of Mr. Nyandika taking the 1st defendant to the Land Control Board (LCB) for consent to transfer the whole of the

parcel No. 1940 and signed transfer to him. Re-examined, she stated that it was her mother who constructed the house through James Oreko.

7. PW-3 was Steve Mokaya. He testified that the suit land was first registered in name of Mr. Nyandika on 21 February 2013 and on the same day he transferred title to the plaintiff. On 5 May 2015, an entry of transfer was made transferring the land from the plaintiff to the 1st defendant and he was issued with a title deed. He then charged the property on 1 February 2016. Subsequently his office received a complaint from the plaintiff and when he went through the documents, his view was that the documents that purported to transfer the land to the 1st defendant were forgeries. He testified that the plaintiff still held the original title deed and that the consent to transfer was forged. Cross-examined by counsel for the 3rd defendant he testified that he is not the one who registered the transfer or the charge. On the LCB consent he testified that it was purportedly issued by the Deputy County Commissioner, Kisii Central, yet the suit land is in Kitutu Central Sub-County. Cross-examined by counsel for the 1st defendant he acknowledged that the transfer instrument exhibited by the plaintiff does not have the Land Registrar's signature nor the Presentation Book and it is not their practice that such document be registered.
8. The 3rd defendant presented Nelson Machunga as her witness. His evidence was to effect that the 1st defendant approached the bank and the bank registered a charge over the suit land on 1 February 2016.
9. DW – 2 was Cecilia Oswera Harriet, also a Land Registrar, Kisii. She produced the documents in the parcel file of the land parcel No. 1940 and the suit land. She testified that the land parcel No. 1940 first belonged to one Teresia Kwamboka Nyachoti who got registered as proprietor on 20 February 1991. She transferred the said parcel No. 1940 to Mr. Nyandika on 20 February 1991. On 20 February 2013, Mr. Nyandika subdivided this parcel No. 1940 to produce the land parcels No. 4809-4812. He then transferred the title of the parcel No. 4812 to the plaintiff on 21 February 2013 and the plaintiff was subsequently issued with a title deed. She testified that on 5 May 2015 there was transfer to the 1st defendant. She had in her file the transfer form and an LCB consent. She stated that all documents required for transfer were presented save for the original title deed. She testified that in the parcel file of land parcel No. 1940, there was an instrument of transfer from Mr. Nyandika to the 1st defendant, an application for consent, an application for transfer, and a search dated 11 June 2012. These documents were however not registered but bore an attestation stamp of 15 May 2015. Cross-examined, she affirmed

that transfer to the 1st defendant needed surrender of the original title deed and if the same was lost it first needed to be gazetted. She did not have the PIN Certificate for the plaintiff though she had that of the 1st defendant in her file. She could not see any receipt for registration of this transfer. Re – examined, she testified that she did not have the original transfer instrument from Mr. Nyandika to the plaintiff.

10. I allowed a recall of PW-1 (Mr. Nyandika) as there was fresh evidence from the 1st defendant not earlier disclosed when he first testified before Mutungi J. He elaborated that he purchased part of the Plot No. 1940 from Teresia Nyachoti (now deceased). Though the whole of the title was transferred to him it was on the understanding that half of it would be held in trust for her child. Later he proposed to buy this portion but he was informed by Teresia that she has already sold it to her cousin the plaintiff. He testified that when he subdivided the land, he transferred this portion to the plaintiff. He categorically denied ever dealing with the 1st defendant. He refuted the claim that he had offered to transfer the whole of the parcel No. 1940 to the 1st defendant and denied signing instruments of transfer to the 1st defendant for the parcel No. 1940. Cross-examined by counsel for the 1st defendant, he refuted that the land in dispute had been given to James Oreko and not the plaintiff. He refuted being given some money by the 1st defendant in order to facilitate transfer of the parcel No. 1940 to him. He refuted that despite knowing that the land belonged to James Oreko, he transferred it to the plaintiff. He denied any knowledge of James Oreko being arrested after a complaint was lodged by the husband of the plaintiff over the suit land, so that no charges were preferred against him, and denied that the plaintiff agreed to transfer the suit land to the 1st defendant.
11. On his part, the 1st defendant testified that he indeed entered into a sale agreement with James Oreko on 7 December 2010. He testified that it was Mr. Nyandika who informed him that the land belongs to James Oreko and they can enter into an agreement with him. He then entered into the sale agreement with Mr. Oreko. He stated that he bought the land with the house which was not however complete and he is the one who completed it around February 2011. He stated that he talked with Mr. Nyandika who agreed to facilitate transfer to him and that is how he sent the sum of Kshs. 3,025/= to him by mpesa. He testified that Mr. Nyandika travelled from Nairobi to Kisii and they signed the LCB forms for the parcel No. 1940. Mr. Nyandika proposed to transfer the whole of the parcel to him then he can subdivide but he was uncomfortable because he only purchased a bit of the land. It is after his refusal to have the land transferred to him that differences started and Mr. Nyandika became uncooperative and refused to pick his calls. He stated

that on a later day he was called to the DCI and found Mr. Oreko arrested, allegedly on a complaint made by the plaintiff, and he was informed that he is occupying somebody else's land. He stated that at the police station, Mr. Oreko confirmed having sold the land to him, and the larger family of Mr. Oreko, including the plaintiff, and her siblings, requested that the issue be resolved outside the police as they were one family. They discussed and it was agreed that since Mr. Oreko has already sold the land to him, the land be transferred to him (1st defendant), and that is how the plaintiff effected transfer to him. He stated that it was Mr. Oreko who processed the title deed in his name and called him to pick it after it was ready. He testified that earlier the DCI had been to his house on a complaint by the plaintiff but they saw no issue. He was aware that he had been sued by the husband of the plaintiff in the case Kisii ELC No. 411 of 2013. He denied that he came into the land in 2013 and asserted that he took possession in 2010.

12. Cross-examined by counsel for the 2nd defendant, he testified that he has paid off the loan save for some legal fee that was put into his account of Kshs. 80,000/=. He however did not have proof that he has cleared the loan.
13. Cross-examined by counsel for the plaintiff, he could see that the sale agreement he had made no reference to a house being on the land. He had no OB record to prove that indeed Mr. Oreko had been arrested. He stated that he is not the one who reported to the police so he wouldn't have the OB. He testified that transfer documents were signed before an advocate of the plaintiff and that the plaintiff and Mr. Oreko were present. Before the Land Control Board, it was Mr. Oreko and Mr. Nyandika who were present and he affirmed that the plaintiff was not present. He never signed any agreement with the plaintiff nor did he give her any money for purchase. He stated that he did not know that it was the plaintiff who was the registered proprietor at the time of transfer. He testified that he is not the one who prepared the transfer; that he signed his part and left it with the plaintiff and her family. He acknowledged that he never signed any document with Mr. Nyandika despite him being the proprietor of the parcel No. 1940. He stated that he was not aware that the plaintiff still had the original title deed and testified that it is the plaintiff and Mr. Oreko who processed his title deed. He claimed to have given Mr. Oreko the money for stamp duty.
14. With the above evidence the defence closed their case.
15. I directed counsel to file their submissions and I have taken note of the submissions filed.
16. The plaintiff of course asserts to be the owner of the suit land and claims that the 1st defendant fraudulently caused transfer into his name. She denies ever signing any transfer

instrument or going to the Land Control Board to give consent for the transfer to the 1st defendant. The 1st defendant on the other hand claims that his title is good. He states that he purchased the land from James Oreko who he believed to be the owner of the suit land. He gave a narration of how he got transfer, alleging that the plaintiff signed the transfer to him so that Mr. Oreko, who was her brother, could be released from facing criminal charges.

17. It is common ground that the original parcel of land was parcel No. 1940 which was initially in the name of Teresia. She transferred her interest in this land to Mr. Nyandika. Mr. Nyandika testified that part of this land was to be held in trust for the daughter of Teresia and when he wanted to buy this portion, Teresia informed her that she has already sold it to the plaintiff. Thus, when he subdivided the land, he transferred this portion directly to the plaintiff and the plaintiff obtained title on 21 February 2013. I think this explains why there is no sale agreement that was produced. Although an issue was raised when taking evidence regarding the instrument of transfer to the plaintiff, nothing turns on it, because that transfer to the plaintiff is not disputed by any party. I have even not seen an attempt to refute the transfer to the plaintiff in the submissions of counsel for the 1st defendant. I will take that the issue of the transfer of the suit land to the plaintiff is not disputed.
18. The 1st defendant lays claim to the suit land on a purported purchase from Mr. Oreko and a later transfer by the plaintiff. He indeed produced the sale agreement dated 7 October 2010 which was between him and Mr. Oreko. Now, Mr. Oreko had no capacity to enter into that purported sale agreement as he was not the registered proprietor of the suit land. In as much as the 1st defendant alleged that this land was actually assigned to James Oreko by Teresia, he availed no iota of evidence to support that allegation. He mentioned that this history is known to a son of Teresia, one Monari, but he did not call Monari as his witness. There is absolutely nothing to suggest that Mr. Oreko owned the suit land, and the contention that he did, is completely devoid of any substance. The 1st defendant cannot therefore claim to have gotten any right to the suit land pursuant to this purchase by Mr. Oreko because Mr. Oreko had nothing to sell to him.
19. In his evidence, the 1st defendant tried his best to rope in Mr. Nyandika and referred to an mpesa transfer to Mr. Nyandika of Kshs. 3,025/= made on 8 July 2011. He of course claimed that Mr. Nyandika proceeded to sign documents of transfer for the parcel No. 1904 in his favour. This evidence again does not add up, for the documents that the 1st defendant availed, concerning transfer documents for the parcel No. 1904, were

documents dated 5 July 2015 which is nowhere near the year 2011. In any event as at 2015, the parcel No. 1904 did not exist as it had already been subdivided to produce various titles including the suit land which was now already in the name of the plaintiff.

20. The other bit about the 1st defendant's case is the allegation that the plaintiff signed to him the transfer so that Mr. Oreko, who sold to him the land, may be discharged from criminal liability. I do not believe the story of the 1st defendant. He claimed that he found Mr. Oreko arrested on the complaint of the plaintiff. Now, if it is the plaintiff who lodged the complaint, how does she then relieve Mr. Oreko of criminal liability by agreeing to transfer the suit land to the 1st defendant ? I don't see how. If she was the complainant, and she had a soft spot for her brother, all she needed to do was withdraw the criminal complaint. How does transferring the land to the 1st defendant remove the same criminal complaint that she herself has lodged ? It simply does not add up. It would probably be a different matter if Mr. Oreko was arrested on the complaint of the 1st defendant then a deal is struck that the plaintiff transfers the land to the 1st defendant to have the issue resolved. As far as I am concerned, this allegation of Mr. Oreko being arrested, then it was agreed for the plaintiff to transfer the suit land to the 1st defendant to have him released, is just a cock and bull story that I do not buy. Moreover, there is no document to support the allegation of arrest and a subsequent agreement pursuant to that arrest. There is no OB number and none of the persons said to have been present at the police station were called as witnesses by the 1st defendant. You would also expect there to be some sort of agreement by the plaintiff confirming that she is willing to agree to transfer the land to the 1st defendant but we have no agreement displayed, and no assertion of any agreement between the plaintiff and the 1st defendant being signed.

21. The above aside, what I find most critical, is the doubt regarding the transfer of the suit land to the 1st defendant. The 1st defendant himself confirmed that the plaintiff was never with him at the Land Control Board meeting. How then can he allege to have obtained a consent from the Land Control Board without the presence of the plaintiff ? That confession casts serious doubt on the alleged Land Control Board consent that he produced. Apart from this, the signature in the transfer form was disputed by the plaintiff. The 1st defendant brought nothing to prove that this purported transfer instrument was actually signed by the plaintiff. He neither brought the person who allegedly attested her signature as his witness, nor did he bring an expert witness to testify that the signature was actually one of the plaintiff. Once it was denied by the plaintiff that she never signed the transfer instrument, the burden shifted to the 1st defendant to prove her signature. This

is provided for in Sections 70 and 71 of the Evidence Act, Cap 80, Laws of Kenya, which provide as follows :

70. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

71. If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

22. It was denied by the plaintiff that she signed the alleged transfer instrument. A transfer instrument is a document that requires attesting. It was necessary, pursuant to Section 71 above, for the 1st defendant to call the attesting witness to prove execution of the transfer instrument, but he failed to do so. It cannot therefore be said that he demonstrated that the transfer instrument was signed by the plaintiff and the only conclusion that any reasonable person can reach is that the plaintiff never executed the purported transfer to the 1st defendant.
23. Apart from the foregoing, there is nothing else to support the transfer instrument. There is no stamp duty receipt, no registration receipt, simply nothing. There is absolutely nothing to support the purported registration of the transfer instrument showing transfer of the suit land from the plaintiff to the 1st defendant. The 1st defendant testified that he worked for the Kenya Revenue Authority. It means he knows the importance of a stamp duty receipt. The fact that he has none speaks volumes as to whether there was any genuine registration of a transfer instrument to himself. I do not see how, given the institution that he works for, he could not be able to exhibit at least the stamp duty receipt.
24. In addition, the plaintiff's witness displayed the original title deed in the name of the plaintiff. The Land Registrars testified that one cannot effect a transfer without surrendering the title deed. I have seen in the submissions of counsel for the 1st defendant an allegation that the plaintiff only produced photocopies of the title deed. That is not

true. When she testified, the plaintiff's attorney had the original title deed in court which she displayed. No proper transfer could be done without the original title deed being available.

25. I am fully persuaded that the plaintiff has proved that the 1st defendant obtained registration through fraud. Any title obtained through fraud is liable for cancellation as provided by Section 26 of the Land Registration Act, which is drawn 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.

c) 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.

26. From the above, it will be seen that a title obtained through fraud or misrepresentation which the title holder is proved to be a party is impeachable under Section 26 (2) (a) of the Land Registration Act. I am fully persuaded that it is the 1st defendant who perpetrated the fraud so as to have the title of the plaintiff transferred to him. Whatever the case, it cannot be said that the title was procured procedurally since there was no deposit of the original title deed and the title is still impeachable under Section 26 (2) (b) above. My hypothesis, which may be correct or wrong, is that it is probable that the 1st defendant dealt with Mr. Oreko, but Mr. Oreko had no title. So that he does not lose his money, he connived and came up with a corrupt scheme whose end result would be to have the title of the plaintiff transferred to him. My hypothesis does not matter. What we cannot escape from is that it is as clear as day that the plaintiff never transferred her title to the 1st defendant and the 1st defendant could only have obtained it through fraud, misrepresentation, unprocedurally, and/or through a corrupt scheme.

27. I proceed to nullify the title of the 1st defendant. With that nullification, the charge registered must also be nullified. I proceed to order the Land Registrar, Kisii, to nullify and cancel the entries No. 4, 5, and 6 in the register and have the register reflect only entries No. 1, 2, and 3 i.e registration in name of Mr. Nyandika, then the plaintiff, and issue of title deed to the plaintiff. I also order the Land Registrar, Kisii, to cancel the entry of the charge in the encumbrance section of the register. The title is restored back to the plaintiff.
28. Having no title, the 1st defendant must give immediate vacant possession of the suit land. There is also issued an order of permanent injunction restraining the 1st defendant from entering, being upon, or in any other way interfering with the plaintiff's use and possession of the suit land. The 1st defendant found the house partly developed and it is his loss to have continued with development. He should vacate the house as it is or if the plaintiff wants any part removed, act on that direction at his own cost, and in default any costs incurred by the plaintiff will be passed to him.
29. Where does that leave the 3rd defendant ? I see that she has a claim for the money. I will order her to file a separate suit for that claim against the 1st defendant if her money has not been settled.
30. The only issue left is costs. I will order the 1st defendant to pay the costs of the suit to the plaintiff. The 1st defendant's counterclaim is also dismissed with costs to the plaintiff. The 1st defendant will also pay the costs that the 3rd defendant has incurred in defending this suit.
31. Judgment accordingly.

DATED AND DELIVERED THIS 25 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. O.M Otieno for the plaintiff

Ms. Bosire for the 1st defendant

Ms. Anuro for the 3rd defendant

Court Assistant – Michael Oyuko