



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 11 OF 2012**

**PROF. FRANCIS EPHRAIM ONYANGO.....PLAINTIFF**

**VERSUS**

**GEORGES AERTSSEN.....1<sup>ST</sup> DEFENDANT**

**CHRISTINE ANYANGO OKALLO.....2<sup>ND</sup> DEFENDANT**

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

**DISTRICT LAND REGISTRAR KISUMU.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed this suit through the plaint dated 8<sup>th</sup> June 2012 against the Defendants seeking for the following prayers;

- a) “That pending the hearing and determination of this suit there be a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent their agents, representatives, assigns or any other person acting through their direction transferring, charging, trespassing or in any way interfering with the Plaintiff’s parcel of land KISUMU/KANYAKWAR ‘B’ 313.
- b) An order of permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent, their agents, representatives, assigns or other person acting through their direction transferring, charging, trespassing or in any way interfering with plaintiff’s parcel of land KISUMU/KANYAKWAR ‘B’ 313.
- c) An order of prohibition to be placed against any dealing whatsoever the parcel number KISUMU/KANYAKWAR ‘B’ 313 until this suit is heard and determined.
- d) An order directing the 4<sup>th</sup> defendant to cancel titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendant and to rectify the register and the have the parcel number KISUMU/KANYAKWAR ‘B’ 313 back into the names of the plaintiff.
- e) General damages for trespass
- f) Costs and interests at courts rate of this and interests.”

The Plaintiff avers that he is the registered proprietor of Kisumu/Kanyakwar ‘B’ 313, suit land, having bought it in 1984. That he then went to work out of the country and returned after retirement. That when in 2012 he went to the suit land, he found it had been fenced with concrete stones with gate erected. That he engaged his advocates who carried out a search at the Land Registry that revealed the land was registered with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That a request to be issued with copies of the green card and transfer was declined by the 4<sup>th</sup> Defendant even after he presented his original title document as requested. The Plaintiff concluded that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants had unlawfully and fraudulently transferred his land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without his consent and hence this suit. The Plaintiff has set out the particulars of trespass and fraud at paragraphs 9 and 14 of the plaint.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their statement of defence and counterclaim dated the 15<sup>th</sup> August 2012. They aver that they obtained valid proprietary interest over the suit land and their entry onto the land was pursuant to a purchase of the same upon a sale effected after all due diligence was completed as required by the law and asked Plaintiff’s case to be dismissed with costs. Their counterclaim is against the Plaintiff, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as the 1<sup>st</sup> to 3<sup>rd</sup> Respondents/Defendants. They pray for the following prayers in their counterclaim;

a) “A declaration that they the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the sole and legal and absolute proprietors of Kisumu/Kanyakwar “B”/313.

b) An order setting aside the injunctive orders granted by the Honourable court in favour of the plaintiff and against them.

c) A declaration that the proprietorship of the 1<sup>st</sup> and 2<sup>nd</sup> defendants/counterclaimants over the suit property is indefeasible, legitimate and absolute.

d) Costs of the suit and counterclaim.”

The Plaintiff filed his reply to the defence and defence to the counterclaim on the 26<sup>th</sup> November 2012 among others denying signing transfer forms disposing the suit land to anyone.

3. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their statement of defence dated the 2<sup>nd</sup> July 2013 denying any fraud in the way the transactions were carried out in their offices.

4. The hearing of the Plaintiff’s case commenced on the 10<sup>th</sup> December 2013, when the Plaintiff testified as PW1 and was cross-examined on the 17<sup>th</sup> December 2013. The Plaintiff then called Patrick Opiyo, a surveyor in private practice, who testified as PW2 on the 3<sup>rd</sup> October 2018 before closing his case. The 1<sup>st</sup> Defendant testified on the 6<sup>th</sup> December 2018 and was cross-examined before the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Counterclaimants was closed. The Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not call any evidence.

5. The learned Counsel for the Plaintiff and 1<sup>st</sup> & 2<sup>nd</sup> Defendants subsequently filed their written submissions dated the 1<sup>st</sup> February 2019 and 1<sup>st</sup> March 2019 respectively.

6. The Plaintiff’s case is that he still has his original title document for the suit land. That he had not met the 1<sup>st</sup> and 2<sup>nd</sup> Defendant at the time they alleged that they bought the suit land. That the sale agreement and transfer document the 1<sup>st</sup> and 2<sup>nd</sup> Defendants allege they obtained title for the suit land though do not contain his signature, and that he never appeared before Aboge Advocate, and the Land Control Board. That when he learnt that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had obtained registration with his land, he reported to the Directorate of Criminal Investigations and recorded a statement on the 21<sup>st</sup> September 2012. That the signature on the acknowledgment of full payment of the purchase price was not his and the photograph on the transfer form was also not his. That the surveyor (PW2) that he asked to check the ground position of the suit land confirmed it was where the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had fenced off. The learned Counsel for the Plaintiff submitted that the Defendants must have dealt with an imposter and not the Plaintiff. That the Defendants took too long to report to the police, unlike the Plaintiff and that if the transaction through which they obtained the suit land’s title was legal, they would have availed the vendor in court as a witness. That as the Plaintiff still had the original title for the suit land, no proper transfer could have been effected. That the transaction through which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired registration with the suit land was riddled with forgery of the Plaintiff’s signature, and use of fake documents hence null and void. The learned counsel cited the case of **John G. Kamuyu & Another vs Safari “M” Mark Motors [2013] eKLR**.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ case as told by DW1, is that they had properly acquired the suit land. DW1 testified that he had met the vendor, called Francis only ones and that vendor was not the Plaintiff in this case, who he met first on the 6<sup>th</sup> December 2018, when he (DW1) testified. That he did not personally attend the Land Control Board for the consent, and could not tell when the application was made, as the application for consent presented was undated and the consent did not have details of the minute under which it was approved. That he had only reported to the police about three (3) to four (4) weeks before he testified in court for assistance to have Francis the vendor, traced. DW1 agreed that the photograph on the transfer form attributed to the vendor named Francis was not of the Plaintiff who was in court, and that the bank statement did not show to whom he paid the Kshs. 250,000/= cheque. The Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that his clients bought the suit land from the person who they believed had capacity to enter into such a contract. That the documents the vendor used were that of the Plaintiff, and could not have obtained them without the consent of Plaintiff. The learned Counsel referred to the case of **Kinyanjui Kamau vs Geroge Kamau Njoroge [2015] eKLR** where a party had denied knowledge of the sell and transfer and the court found he had. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants were issued with their certificate of title to the suit land after complying with all the statutory requirements, and therefore acquired absolute and indefeasible proprietary rights under **Section 25 of the Land Registration Act** as the Certificate is conclusive evidence of proprietorship under **Section 26 of said Act**.

The learned Counsel cited the case of **Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR** and submitted that the Plaintiff has not proved fraud on the part of his clients. The Counsel also cited the case of **Dr. Joseph Arap Ngok vs Justice Ole Koivua & 5 Others [1997] eKLR** and **Mike Maina Kamau vs Attorney General [2017] eKLR** among others and submitted that it was never the duty of the Defendants to follow the trial of owners of the land, but only to establish that the vendor had good title to the land subject matter of the transaction.

8. The learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file any submissions in addition to not calling any evidence.

9. The following are the issues for the Court’s determinations;

a) Whether the Plaintiff has proved that he was the one registered as proprietor of the suit land before the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

b) Whether the Plaintiff is the vendor who sold and transferred the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

c) Whether the registration of the suit land in the names of 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant conferred upon them good title to the suit land.

d) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have proved their counterclaim against the Plaintiff.

e) Whether any of the prayers sought in the Plaintiff's suit and 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counterclaim should be granted and in favour of whom.

f) Who pays the costs of in the suit and counterclaim.

10. The Court has after considering the pleadings filed by the Plaintiff and all the Defendants; oral and documentary evidence by PW1, PW2 and DW1; the written submissions by the learned counsel for the Plaintiff, 1<sup>st</sup> & 2<sup>nd</sup> Defendants come to the following findings;

a) That the Plaintiff presented a Land Certificate over the suit land in his names, issued on the 19<sup>th</sup> September 1984 by the 4<sup>th</sup> Defendant, whose contents was confirmed by the certificate of official search carried out by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants on the 28<sup>th</sup> June 2011. That Land Certificate has never been cancelled and or revoked, and the fact that the 4<sup>th</sup> Defendant had asked the Plaintiff to produce it does not without more mean that it was not authentic. That had it not been a genuine Land Certificate, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants would have presented expert witness from the Land registry to testify on that fact. That the provision of **Section 26 (1) of the Land Registration Act No. 3 of 2012**, which provides for such a Certificate to be taken as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained in the Certificate, and the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. That the upshot of the foregoing is that the Defendants have failed to successfully challenge the certificate of title in respect of the suit land held by the Plaintiff evincing him as the proprietor from the 19<sup>th</sup> September 1984.

b) That it follows that for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to have obtained good title to the suit land when they alleged they did in 2011, then they should have acquired it from the Plaintiff in this suit. That however the evidence tendered by the Plaintiff and confirmed by DW1, (1<sup>st</sup> Defendant), is that the vendor called Francis with who they entered into the sale agreement in 2011, was not the Plaintiff in this case. That the Plaintiff has denied the signature attributed to him in the sale agreement, transfer form, acknowledgment for payment, and the photograph in the transfer form. That the Defendants have not availed evidence to show otherwise. That it could have been very easy for the Defendants to enlist the services of the police to take the sample handwritings and signatures of the Plaintiff and compare them with those used to transfer the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and which are presumed to be under the custody of the 4<sup>th</sup> Defendant, had they disputed the Plaintiff's contention. That the submissions by the learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the Plaintiff had been seen with Ephraim during the first hearing is insufficient to challenge the Plaintiff's evidence that he was not the vendor, especially when 1<sup>st</sup> Defendant (DW1) confirmed he had not met the Plaintiff before the day he testified in court, which is a confirmation that he is not the vendor he dealt with over the suit land.

c) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not tender evidence in support of their counterclaim, and there is no evidence presented to show that the Plaintiff had in any way worked in cohorts with the vendor, who allegedly sold and transferred the suit land to them, or that he benefited from the purchase price paid thereof. That in the case of **John Kiguro Karume vs Kenya Institute of Administration & 4 Others [2017] eKLR**, Kemei J, had the following to say about **Section 26 (1) of the Land Registration Act**;

*"19. It will be noted that the new Act has expanded the grounds under which a title may be challenged to include illegality, un-procedural methods or corrupt scheme....."*

**20. In the case of Milankumar Shah and 2 Others vs City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (QS) the court held:**

*"We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law, and secondly where it is demonstrated to a higher degree than the balance of probability that such registration was procured through persons or a body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."*

**21. The concept of absolute and indefeasible ownership of land cannot be (to) clothe with legal and Constitutional protections if the interest was acquired through fraud, misrepresentation, illegality, un-procedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such a manner. In the case of Champaklal Ramji Shah & 3 Others vs AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required."**

That to add to the foregoing **Article 40 (6) of the Constitution 2010** clearly shows that the protection of right to property do not extend to any property that has been found to have been unlawfully acquired, which would not also confer absolute and indefeasible ownership under **Section 26 (1) of the Land registration Act**. That such a title would be liable to be cancelled through an order to rectify the register under **Section 80 of the Land Registration Act**.

d) That though the Plaintiff had set out the particulars of fraud he attributed to the Defendants in the plaint, he did not sufficiently prove that the Defendants, especially the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, colluded with the person who sold and transferred the suit land to

them. That what the evidence availed, especially by DW1, show is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were victims of the person who had impersonated to be the registered owner of the suit land. That person has not been traced by DW1 since the Plaintiff lodged his claim over the suit land. That even though the 1<sup>st</sup> and 2<sup>nd</sup> Defendants may have been innocent purchasers of the suit land without notice, the spirit of **Section 26 (1) of the Land Registration Act** is to protect the real title holders from being deprived of their title as was held by Munyao J in the case of **Elijah Makori Nyangwara vs Stephen Mungai Njuguna & Another [2013] eKLR** where he stated;

*“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from the innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”*

That in view of the foregoing, it is only fair, proper and just for the suit land’s register to be rectified to restore proprietorship of the land to the Plaintiff’s name.

e) That the Plaintiff has pleaded for general damages for trespass but he has not tendered evidence to support that prayer. That further, and considering that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stands to lose the suit land through machinations of persons who are not parties in this suit, the court is of the view that this is not an appropriate case to award damages under the circumstances.

f) That as the Plaintiff has largely succeeded in his claim, he is entitled to costs of the suit and the counterclaim pursuant to **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** as costs follow the events.

11. That flowing from the findings above, the court enters judgment for the Plaintiff against the Defendants and order as follows;

**a) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Counterclaimants claim in the counterclaim is dismissed with costs to the Plaintiff.**

**b) That prayers (b), (d), and (f) of the plaint dated 8<sup>th</sup> June 2012 and filed on the 11<sup>th</sup> June 2012 are granted.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JULY 2019**

**In the presence of:**

Plaintiff                      Absent

Defendants                    1<sup>st</sup> Present

Counsel                      Mr. Oriero for the Plaintiff

Ms. Oroni for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**