



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 30 OF 2017

PATRICK SHIMOKA OKOTH.....PLAINTIFF

VERSUS

JUD DORICE AKINYI ONYURAH.....DEFENDANT

JUDGEMENT

The plaintiff's case is that, on or about the 22nd September, 2014, the plaintiff entered into an agreement with the defendant to sell to her a parcel of land better known as L.R. Butso/so/Shikoti/17207, but when they entered into an agreement they made a mistake by indicating that land was Butso/so/Shikoti/1702 measuring approximately 0.05 Ha and/or thereabouts. Both of them and their witnesses signed and agreed over the parcel of land L.R. Butso/so/Shikoti/1702 before M/s. Muleshe & Co. Advocates. On or about the 11th day of September, 2014 and prior to the agreement, the defendant secretly appeared before the Lurambi Control Board and obtained consent in respect to Butso/so/Shikoti/17207, belonging to the plaintiff. The plaintiff avers that he was not present and never participated at the aforesaid Land Control Board purportedly held on 8th day of September, 2014, which granted consent of transfer of parcel of land better known as L.R. NO. Butso/so/Shikoti/17207 to the defendant. The defendant went ahead and acquired registration of the plaintiff's parcel of land aforesaid without following the laid down procedures. The plaintiff's claim against the defendant is for an order for cancellation and/or nullification of land parcel better known as L.R. No. Butso/so/Shikoti/17207 and reverting it to the plaintiff. The plaintiff's further claim against the defendant is for compensation for both emotional and mental suffering. The plaintiff avers that there is another suit completed and that there have not been previous proceedings in any court between the plaintiff and defendant over the same subject matter save for Kakamega CMCCC No. 230 of 2015. The plaintiff prays for judgment against the defendant as follows:-

- (a) That an order for cancellation and/or nullification of land parcel better known as L.R. No. Butso/so/Shikoti/17207 reverting to the plaintiff.
- (b) Costs of this suit.
- (c) That compensation for both emotional and mental suffering.
- (d) Any other relief this honourable court may deem fit and expedient to grant.

The defendant admits that the parties herein entered into a land sale agreement made on 22nd September, 2014 in respect of land parcel known as Butso/so/Shikoti/17207. The defendant avers that she has never been personally served with the court documents in respect of the suit herein as she only became aware of the existence of this suit on 12th January, 2018 through a third party one Opwara Meshack Chuma. The defendant avers that she paid a deposit of a sum of Ksh. 350,000/= on 22nd September, 2014 which receipt thereof was acknowledged by the plaintiff herein leaving a balance of Ksh. 320,000/= when the plaintiff herein sued the defendant for recovery of the same in Kakamega CMCCC No. 230 of 2015 whereby the court entered judgment on 30th August, 2016 against the defendant herein thus ordering her to pay Ksh. 320,000/= being the outstanding balance plus costs assessed in the sum of Ksh. 101,026/= in addition to interest accrued thereon making a total sum Ksh. 421,026/=. The defendant further avers that indeed she complied with and obeyed the orders of this honourable court by paying the plaintiff the outstanding balance of the purchase price of Ksh. 320,000/= plus interest thereon in addition to the assessed costs in the sum of Ksh. 101,026/= through her then advocates on record M/s. Anziya & Co. Advocates who forwarded the said money vide their letters dated 24th September, 2016 and 30th September, 2016 enclosing two sets of bankers cheque for Ksh. 101,026/= and Ksh. 320,000/= respectively making a total sum of Ksh. 421,026/= which was duly and properly acknowledged by the plaintiff herein by signing on the said two letters by M/s. Anziya & Co. Advocates. The defendant further avers that she sent a sum of Ksh. 40,000/= via M-pesa to the plaintiff as part of the said land sale agreement. The defendant denies having obtained registration and title of land parcel known as Butso/so/Shikoti/17207 through fraud as she obtained the same legally and procedurally as admitted by the plaintiff in his evidence in Kakamega CMCCC No. 230 of 2015 that he duly signed and executed documents including the land control board and land transfer forms respectively and even personally attended the relevant land control board to obtain consent to transfer the suit land to as the bona fide registered proprietor and therefore the plaintiff is estopped by the law from negating on facts and truth. The defendant further avers that upon taking immediate vacant possession of the suit land proceeded to legally and procedurally procure title of the same and later on sold the suit land to third parties namely Opwara Meshack Chuma jointly with Mildred Gladys Balla Anyura and indeed effected transfer of the title in

respect of the suit land known as Butsotso/Shikoti/17207 way back on 20th March, 2017 and title deed issued to them on 4th April, 2017 and therefore the defendant has no registrable interest over the suit land and has been wrongly sued herein and raises a preliminary point of law and fact that the suit herein is bad in law, fundamentally defectively, incompetent, misjoinder, non-starter, does not disclose any reasonable cause of action and a gross abuse of the due process of the court and the same should be struck out and or dismissed with costs. In view of the foregoing the defendant raises a preliminary point of law and fact that the suit herein is res judicata in view of the same having been heard and determined in Kakamega CMCCC No. 230 of 2015 involving the same subject matter being land parcel known as Butsotso/Shikoti/17207 and parties herein. The defendant further avers that she does not owe the plaintiff any money having fully settled the agreed purchase price as agreed in the land sale agreement made on 22nd September, 2014.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that 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, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is a finding of fact that, Opwora Meshack Chuma jointly with Mildred Gladys Balla Anyura are the registered proprietors of Butsotso/Shikoti/17207. It is the plaintiff’s case that, on or about the 22nd September, 2014, the plaintiff entered into agreement with the defendant to sell to her a parcel of land better known as L.R. Butsotso/Shikoti/17207, but when they entered into an agreement they made a mistake by indicating that land was Butsotso/Shikoti/1702 measuring approximately 0.05 Ha and/or thereabouts. The plaintiff avers that he was not present and never participated at the aforesaid Land Control Board purportedly held on 8th day of September, 2014 which granted consent of transfer of parcel of land better known as L.R. NO. Butsotso/Shikoti/17207 to the defendant in his absence. However, in his oral evidence in court he stated that he signed all the documents for transfer and he has been paid the full purchase price. His claim now is that the wrong parcel number was indicated in the sale agreement and he wants it changed. The defendant raises a preliminary point of law and fact that the suit herein is res judicata in view of the same having been heard and determined in Kakamega CMCCC No. 230 of 2015 involving the same subject matter being land parcel known as Butsotso/Shikoti/17207 and parties herein. The defendant further avers that she does not owe the plaintiff any money having fully settled the agreed purchase price as agreed in the land sale agreement made on 22nd September, 2014. She has since transferred the land to third parties.

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has

been heard and finally decided by such court.”

I have perused the pleadings in Kakamega CMCCC No. 230 of 2015 and find that they involve the same subject matter being land parcel known as Butsotso/Shikoti/17207 and the same parties herein. I find from the foregoing that this suit is bad in law, fundamentally defective, res judicata, scandalous, vexatious, frivolous and an abuse of the due process of the court as the same does not disclose a reasonable cause of action and I strike it out with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE