



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 287 OF 2017

SAMSON GOGO.....PLAINTIFF

VERSUS

INVIOLATA ITIEBA KUPALO.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the absolute registered proprietor of all that parcel of land Butso/Indangalasia/6646 hereinafter referred to as the suit property measuring approximately 0.40 Ha which he bought from one Rodgers Amunga Tindi. The plaintiff avers that on or about 16th June 2014, he was informed by one Juma Musikoye that Rodgers Amunga Tindi was willing to sell his parcel of land Butso/Indangalasia/6646 within Butso/Indangalasia area. That on the very day of 16th June 2014, the plaintiff met Rodgers Amunga Tindi who agreed to sell the aforementioned parcel of land to him. That consequently the plaintiff purchased the parcel of land vide a sale of land agreement dated 16th June 2014 for a total consideration of Kshs.870,000/=. The plaintiff avers that the consideration was fully paid by cash through KCB Account No. 110xxxxxxx to the vendors Co-operative bank account No. 01100xxxxxxx. The plaintiff avers that on the same day, the vendor, Rodgers Amunga Tindi, signed the transfer forms and surrendered his title deed to enable smooth transaction and change of ownership of the suit property to the plaintiff's name. The plaintiff further avers that he left for Nairobi as he had other duties to attend to and opted for a special board for purposes of transfer, in which regard he left one by the name Inviolata Itieba Kupalo the defendant herein, to oversee the same and instructed her to collect the title deed on behalf of the plaintiff. Further to the above, the plaintiff avers that when the title deed was issued, the defendant never surrendered it to him as earlier agreed despite numerous requests by the plaintiff for the title deed. That astonishingly, the plaintiff later came to learn that the defendant's name was included in the title deed without his consent and knowledge. The defendant has notoriously neglected, failed and or refused to surrender the original title deed of the suit property to the plaintiff despite various demands to do so, both formal and informal. The plaintiff avers that the defendant does not hold good title to the parcel of land Butso/Indangalasia/6646 since she attained the said title secretly, illegally, fraudulently and unprocedurally without any legal authorization whatsoever. The plaintiff avers that owing to the foregoing, the defendant's title to the suit property is not good and as such is not entitled to any use, occupation or enjoyment of the suit property. That as a result of the matters aforesaid, the plaintiff has suffered loss and damage and continue to suffer such loss and damage. The plaintiff prays for judgement against the defendant for orders that:

- a) The defendant forthwith surrenders the original title deed of the suit property land parcel No. Butso/Indangalasia/6646 to the plaintiff herein.
- b) A declaration that the acquisition of title by the defendant the suit property land parcel No. Butso/Indangalasia/6646 was improper, fraudulent, irregular and unlawful and should thus be cancelled
- c) That title to the said suit property be revoked and the plaintiff herein be registered as the proprietor of all of land parcel No. Butso/Indangalasia/ 6646 as the purported transfer of title to both the plaintiff and the defendant was improper, fraudulent, irregular, unlawful and unprocedural.
- d) The defendant be ordered to execute all the necessary documents to effect transfer to title No. Butso/Indangalasia/6646 and vest the whole of suit land in favour of the plaintiff in default whereof the Deputy Registrar of this Honourable Court be empowered to execute all such documents on behalf of the defendant.
- e) The defendant be condemned to bear the costs hereof.
- f) Any other further relief this Honourable court deems fit and just to grant.

The defendant avers that the plaintiff and the defendant are husband and wife having solemnized their marriage under Luhya Customary Laws on or about 2013 and payment of dowry done on or about 2014 . The defendant denies that the plaintiff is the absolute registered proprietor of all that parcel of land Butso/Indangalasia/6646 hereinafter referred to as the suit property measuring approximately 0.4 Ha which was bought from on Rodgers Amunga Tindi. The defendant avers that land parcel number Butso/Indangalasia/6646 was jointly bought and registered in the names of Samson Gogo and Inviolata Itieba Kupalo as a result of equal contributions towards its purchase by

both parties, the plaintiff and the defendant, and as a result of the existing marriage thereof. The defendant avers that all efforts and purchase of land parcel number Butso/Indangalasia/6646 were jointly done and undertaken by both parties as husband and wife and in the premises of the existing marriage. The defendant avers that as a result of the said joint efforts, the plaintiff and the defendant met Rodgers Amunga Tindi and entered into a written sale agreement jointly as husband and wife on 16th June, 2014 and consideration of Kshs.870,000/= was paid jointly. The defendant avers that the said sale agreement dated 16th June, 2014 and all relevant papers for transfer were signed in the presence of all parties to the said agreement and the surveyor who had instructions to complete the transaction of transfer on behalf of the parties. The defendant avers that, the plaintiff entrusted the defendant with all instructions to follow up the matter with the surveyor due to the plaintiff's official engagement in Nairobi. The defendant avers that, the title deed of the land parcel number Butso/Indangalasia/6646 was collected from the offices of Jooyoto Surveyors by the plaintiff in person and upon reaching home, the plaintiff handed it to the defendant for safe keeping and the defendant's capacity as a wife being a matrimonial property. The defendant avers that thereafter both the plaintiff and the defendant agreed to establish a matrimonial home thereon on land parcel number Butso/Indangalasia/6646, which agreement was done jointly as a couple of a marriage. The defendant avers that as a result of the said marriage and trust, the defendant has extensively developed the said property being a matrimonial home for the family with little input from the plaintiff herein. The defendant further avers that the defendant's moveable properties therein have been extensively destroyed by the plaintiff and the plaintiff's accomplices while drunk and with the aim of disinheriting the defendant and child.

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 Nyang'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 the plaintiff and the defendant are the joint registered proprietors of Land Parcel No. Butso/Indangalasia/6646. The plaintiff testified that on or about 16th June 2014, he was informed by one Juma Musikoye that Rodgers Amunga Tindi was willing to sell his parcel of land Butso/Indangalasia/6646 within Butso/Indangalasia area. That on the same day, the plaintiff met Rodgers Amunga Tindi who agreed to sell the aforementioned parcel of land to him. That consequently the plaintiff purchased the parcel of land vide a sale of land agreement dated 16th June 2014 for a total consideration of Kshs.870,000/=. The plaintiff avers that the consideration was fully paid by cash through KCB Account No. 110xxxxxxx to the vendors Co-operative bank account No. 011000xxxxxxx. The plaintiff stated that on the same day, the vendor, Rodgers Amunga Tindi, signed the transfer forms and surrendered his title deed to enable smooth transaction and change of ownership of the suit property to the plaintiff's name. The plaintiff further stated that he left for Nairobi as he had other duties to attend to and opted for a special board for purposes of transfer, in which regard he left one by the name Inviolata Itieba Kupalo the defendant herein, to oversee the same and instructed her to collect the title deed on behalf of the plaintiff. That when the title deed was issued, the defendant never surrendered it to him as earlier agreed despite numerous requests by the plaintiff for the title deed. That the he later came to learn that the defendant's name was included in the title deed without his consent and knowledge. PW2 the said Rodgers Amunga Tindi testified that he sold the land to the plaintiff and that the defendant was there but did not sign the sale agreement. He was paid the full purchase price and gave the plaintiff all the transfer documents. PW3 a neighbour testified that the plaintiff bought the land and he helped him fence the land. He does not know the defendant.

The defendant testified that as a result of the said joint efforts, the plaintiff and the defendant met Rodgers Amunga Tindi and entered into a written sale agreement (DEx3) jointly as husband and wife on 16th June, 2014 and consideration of Kshs.870,000/= was paid jointly. The defendant avers that the said sale agreement dated 16th June, 2014 and all relevant papers for transfer were signed in the presence of all parties to the said agreement and the surveyor who had instructions to complete the transaction of transfer on behalf of the parties. DW2 the defendant's brother confirmed that the plaintiff had visited their home and paid dowry. DW3 the said surveyor testified that the plaintiff and the defendant instructed him jointly to prepare the sale agreement PEx1 and process the title for them which he did and was paid his fees. The plaintiff personally collected the title (PEx5) from his office on the 1st December 2014 and signed in the dispatch book (DEx5). His

instructions was that the title was to come out in their joint names. Both the plaintiff and the defendant signed the transfer documents and he witnessed the payment of the purchase price. It is not in dispute that DW3 prepared the sale agreement and processed the title for the suit land. I have perused the sale agreement and indeed the buyers are the defendant and the plaintiff jointly. The sale agreement is signed by both the plaintiff and the defendant as buyers. It is also a finding of fact the plaintiff collected the original title from DW3 in 2014 and had no complaint until 2017 when he filed this case. If he had the original title than how did the defendant get it if he did not willingly give it to her? I find that this is a relationship gone sour between the litigants. The story that the defendant was merely managing his business is a fabrication and not acceptable. The plaintiff pleaded fraud in his plaint and he did not prove the same. The joint title is indefeasible and can only be challenged if it is obtained by a fraudulent scheme which the plaintiff has failed to prove. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE