



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 488 OF 2013

TABITHA KABERE

MUTALI.....PLAINTIFF/APPLICANT

VERSUS

EVANS MUREFU MUTALI.....DEFENDANT/RESPONDENT

JUDGMENT

Tabitha Kabere Mutari, (hereinafter referred to as the plaintiff) has sued **Evans Murefu Mutali (hereinafter referred to as the defendant)** claiming that she is the biological mother to the defendant and that the plaintiff is the sole beneficial owner of that land parcel No. **KAKAMEGA/SOY/1590** after being bought the property by her daughter who is based in Germany namely Hellen Aligula through the defendant herein. The plaintiff states that the said Hellen Aligula is a biological sister to the defendant and there was a mutual trust between them and the beneficiary was the plaintiff being their mother.

The plaintiff avers that when her said daughter visited back home (Kenya) in September, 2008, she entrusted the defendant with the purchase price to of Kshs.100,000/= in the presence of the plaintiff and her other two brothers to purchase a Commercial Plot for the plaintiff of which the defendant purchased land parcel No. KAKAMEGA/SOY/1590. The plaintiff states that upon her said daughter returning to Germany, she continued to send money through the defendant, the plaintiff and her other brother namely Wycliffe Lukelembe Mutali and George Wanjala Mutali for purposes of developing the said parcel of land by constructing rental units thereon in furtherance of her agenda. The developments on the suit property were single handedly funded by the plaintiff's Germany based daughter in her favour.

The plaintiff states that between 9th and 10th January, 2013, the defendant in breach of trust and with impunity or unlawfully and/or without any lawful justification requested for statutory transfer charges from her said sister making her believe that he was to pursue title in favour of the plaintiff which was sent to him in good faith but he mischievously, maliciously and fraudulently transferred and obtained title over the suit property in his names and the plaintiff particularizes s of breach of trust by the defendant as follows thus:-

- (i) Fraudulently acquiring title over land parcel No. KAKAMEGA/SOY/1590.**
- (ii) Fraudulently having the suit land transferred to him.**
- (iii) Misrepresenting information and facts to relevant authorities.**
- (iv) Misrepresenting information to the plaintiff.**
- (v) Seeking to benefit from corrupt dealings.**

(vii) Maliciously and forcefully taking over plaintiff's property.

(vii) Maliciously subjecting the plaintiff to untold suffering.

(viii) Fraudulently obtaining money from the sister and plaintiff.

(ix) Unjust enrichment.

(x) Fraudulently controlling, managing and collecting rental income from the suit property.

The plaintiff further avers that they had all reasons to entrust the defendant with the transactions as his said sister held him in good faith purchased him a parcel of land to measure one (1) acre in the same area and assisted him to build a residential house where he stays with his family. The plaintiff claims against the defendant for a declaration of the existent of trust between the plaintiff, defendant and her daughter over KAKAMEGA/SOY/1590 and that the plaintiff is the rightful owner of the suit property. Cancellation of defendant's title over land parcel No. KAKAMEGA/SOY/1590 and same do revert to plaintiff. A permanent injunction restraining the defendant, his agents and/or servants from trespassing into, collecting rent, occupying, alienating, selling, wasting and/or otherwise interfering with the plaintiff's quiet possession, use and/or enjoyment of all that parcel of land known as KAKAMEGA/SOY/1590. An order requiring the defendant to remit all the rents collected by him to the plaintiff.

The defendant in his statement of defence entirely denies the contents of the Complaint and avers that he is the absolute proprietor of the parcel of land described as; KAKAMEGA/SOY/1590, (hereinafter referred to as the "Suit Property") to the exclusion of all others and/or encumbrances whatsoever, and further denies that the plaintiff is the sole beneficial owner in respect of the suit property as alleged or at all and calls the plaintiff to strict proof thereof. The defendant further avers that he individually purchased the suit property and obtained an indefeasible title under the Registered Land Act for his personal benefit and therefore calls the plaintiff to strict proof to the contrary.

The defendant denies the contents of the Complaint that there existed a mutual trust whatsoever between the defendant and the plaintiff or any other third party in respect of the suit property or at all as alleged by the plaintiff and calls the plaintiff to strict proof thereof. The defendant states that the relationship between himself and the said Hellen Aligula was fraternal and any monies received from the said Hellen Aligula was solely for his personal livelihood and subsistence and not in any way connected to and/or related to the purchase and/or development of the suit property as alleged by the plaintiff and invites the plaintiff to strict proof to the contrary.

The defendant entirely denies the contents of paragraph (9) of the Complaint and in particular, the particulars of breach of trust enumerated therein and further the creation and/or existence of a trust between the defendant and the plaintiff or at all or that his title and/or proprietary rights in and over the suit property was obtained fraudulently and/or maliciously or otherwise as alleged by the plaintiff and calls the plaintiff to strict proof thereof and avers that the plaintiff's suit is therefore defective, misconceived, and/or lacking in any legal foundation and as such, the prayers and/or orders and the entire suit ought to be dismissed with costs to the defendant.

That in further response to paragraph 11 of the Complaint, the defendant avers that this suit is incompetent in law as the defendant lacks the requisite *locus standi* or the capacity to sue and shall at the hearing, seek to have this suit dismissed on these grounds. The defendant avers that the plaintiff's suit is ambiguous and therefore, calls for further and better particulars of the claim from the plaintiff. In the reply to defence, the plaintiff states that the title is not indefeasible and that the defendant has admitted that there was in a fraternal relationship with his sister Hellen Aligula.

When the matter came for hearing, the plaintiff called Hellen Aligula Namchanja as **PW1** who testified that she lives in Germany where she is engaged as a hospital worker. She is assigned the duties of taking care of old patients at Francisca Hospital in Flashbulb. She knows the plaintiff as her mother. She knows

the defendant as her brother whom she trusted and used to send money from the year 2008 which money was meant to buy for her mother a plot and to develop it. She handed to the defendant the money to purchase the plot in the year 2008 in the presence of her mother. This money was handed over in the house of the defendant at Soy in October, 2008. She cannot recall the precise date but recalls that she gave out Kshs.100,000/=. When she gave out this money, she was aware that plot had been found. The plot is Kakamega/Soy/1590. She gave the money to her brother as she did not have much time in Kenya. She went back in September, 2008. She gave out the money about 2 days before leaving for Germany. The plot was meant for her mother.

She then started sending money for developing of the plot. She would send to the defendant or her other two brothers named Wycliffe Mutali and George Mutali. She would send the money by Western Union between 2008 and 2013. She has some of the documents. These are not all the money transfer forms. She did not bother with keeping the documents well as she trusted her brother. She has 21 transfer forms for money sent to Evans (the defendant). She produced the documents being 21 money transfer forms (Western Union) marked as exhibits 1-21 respectively.

She also used to send to both Wycliffe and George by Western Union and MoneyGram. She had 28 money transfer forms to Wycliffe which she produced as Exhibits 22-49. The purpose of this money was for developing the plot. She used to follow the development of the plot. The ones in charge of developing it were Evans (defendant), Wycliffe, Tabitha (the plaintiff) and George. These were her brothers and mother. The plot was developed and building completed in 2012. It was developed as a commercial building with rental units. When mother went to take the title deed, she found that the same was in the name of the defendant. Evans informed her that the title was in his name. He only told her this after he got the title. She intended that the plot be registered in the name of her mother. She asked Evans to transfer the title to her mother but he refused. Her mother does not derive any benefit from the plot. It is the defendant who collects and keeps the rent from the premises. Evans is not employed. He could not be able to buy or develop the plot. It is not true that Evans developed the plot or bought it. It was PW1 who was sending the money. She asks the court to have the title deed registered in the name of her mother.

On cross examination, she states that the decision to buy the plot was her own and asked the defendant to look for a plot which he did. She went to see the plot with her brothers. She gave Evans Murefu the defendant Kshs.100,000/= in Euros. Though she supports the entire family, she never bought them land. She sent money to develop the land but never sent any e-mails to her brothers. Evans, George and her mother were in charge of the developments. She does not know the exact figure of money sent. She realized that Evans Murefu (defendant) bought the land and caused it to be registered in his name because his mother was not nearby. She admits that she was not involved in the land transaction and none of the family members other than Murefu was involved. She denies that Evans contributed the money to buy and develop the land in dispute.

On re-examination, she states that they used to communicate through telephone as Evans had no e-mail address. They did not put anything in writing as she trusted the defendant. She came to learn in May, 2013 that the property had been registered in the defendant's name. The defendant promised to transfer the property to his mother (plaintiff) but did not.

PW2, Tabitha Khabere Mutali, the plaintiff herein states that she lives in Soysambu in Matunda. She is a farmer and has a family of 7 children. She knows the defendant, he is the third born. She has filed this case because she wants title to the plot in Imbinga from the defendant. She wants the title because it was purchased for her by her daughter Hellen. She wanted her to have the property so that she can benefit from the proceeds. She cannot recall when she decided to buy for her the plot as at that time, she was unwell. Hellen told her that she would buy for her a plot near where Evans lived. Wycliffe, George, Evans and herself were to be in charge of developing it. It was Hellen who was to buy the plot because it is near where he lives. He did not involve his siblings in the purchase but Hellen gave out the money in her presence. She saw the plot before it was bought. It is on the way to Likuyani. She was not informed when the plot was bought because she was sick at home. Later, Evans told her that he had bought the plot but in his name. She was not worried about this because she trusted him. He told her that he would

change to her names. She knew of the development of the plot. She would visit the site weekly. They were liaising well with Evans. The development was supervised by Evans, Wycliffe and George. She would communicate with Hellen (PW1) on the progress and even tell her when materials are needed.

She came to know that title was in the name of Evans when Hellen told her that she had sent money to the title to be changed in her name. Evans refused to change title into her name despite her requests. She reported to the police but she was not assisted. The building has tenants and it is Evans who collects the rent. They have had a good relationship with Evans and she trusted him. She has no enmity to him and she is not jealous because he is her son. Evans lives in land that Hellen bought but she does not know what arrangement the two have on that land. Hellen would send to Evans money to buy materials. For her own upkeep, Hellen sends money directly to the plaintiff. She was to have title in her name.

On cross examination by the defendant's counsel, Mr. Ombima, she states that the defendant is a hardworking person but not employed. He must help her with upkeep and he is not more successful than his other siblings. They live in Matunda but the defendant lives in Soy where Hellen bought the land in dispute. She witnessed the money to purchase land being given amounting to Kshs.100,000/=. She did not see the agreement but learnt later that the defendant had registered the land in his name. She reported to the police but did not have anything in writing that the land was to be bought on her behalf. She states that the money to buy the plot and develop the same was given by PW1.

PW3, Wycliffe Mukelembe Mutali states that he is a businessman and runs a shop. The plaintiff is the mother whilst the defendant is his brother. The defendant received money from Hellen to buy a plot for the plaintiff. PW3 was present when the money was given. Hellen used the defendant because the plaintiff was illiterate. The plot was bought and developed using money sent by Hellen. He used the money to buy materials. He was not present when the sale agreement was signed. On cross-examination, he states that he was present when money was given to buy the plot. He was in the company of Evans, George, Hellen and their mother. The money was in Euros. He came to learn later that there was an agreement and that the land was registered in the defendant's name. the property was developed using money sent by Hellen for the benefit of the mother.

PW4, George Wanjala Mutali states that he lives in Soy Sambu, Likuyani, and that he is a *boda boda* operator. The plaintiff is his mother and the defendant his brother. His sister Hellen bought a plot for his mother she gave his mother money in Euros which was equivalent to Kshs.100,000/=. His mother then gave the money to Evans. He was present when the money was given. Evans bought the plot. He did not see the plot before it was bought. He saw it later. The money was given to Evans because he was trusted and they also had other duties. The plot was developed. Some money was sent to him. They would oversee the development, himself, Evans and Wycliffe. Evans was overall in charge. He knew that it was his Mother's plot. His mother was aware that the plot is in the name of Evans which was later to be transferred to her. Money was sent to them because their mother is old, and illiterate. His brother refused to transfer title to their mother and claimed that the land was his. They sought help from the village elders and District Officer. The land should revert to their mother. The rent is collected by Evans. They know as a family that land belongs to their mother. That was the close of the plaintiff's case.

The defendant gave evidence and called two witnesses. He states that he is a businessman at Soy B. He bought the land in dispute from Kariuki Mwaura Karanja. He produces the agreement as P.Ex1. He has the title deed that shows that the land is registered in his name as Kakamega/Soy/1590. He produced the title deed as P.Ex2 as evidence that the land is registered in his name. The Assistant Chief and his neighbors were there when he bought the land but his brothers wanted the land from him. He prays that they be restrained from trespass. He is in possession of the land.

DW2, Esau Odida Kamadi a farmer at Imbinga Soy testified that the land in dispute was sold by one Kariuki Mwaura to the defendant and that he was one of the witnesses. On cross-examination by the plaintiff he admits that he does not know the sons of the plaintiff and that he does not know how the plot was developed.

DW3, Flora Muhanji a farmer and village elder testifies that on the 14th November 2008, the defendant

bought the land from one Kariuki Mwaura and that she was a witness as the village elder. On cross – examination she states that she came to know the plaintiff when the matter was in court.

I have considered the plaintiff’s case and the defence case. At the conclusion of this matter, parties were acting in person although initially the defendant was represented by an advocate. It is not in dispute that the plaintiff is the mother of the defendant and that PW1, PW3, PW4 and the defendant are siblings and that PW2 is their mother. The plaintiff and PW1, PW3, PW4 claim that the land in dispute was bought by the defendant for the benefit of the plaintiff but was illegally registered in the defendant’s name as he was a trustee. The defendant on his part claims that he bought the land using his own money as a businessman who also operated as a lorry driver.

There is no evidence on record that the defendant was a lorry driver and/or operated business in Soy as he claims, however, there is evidence that the defendant bought plot No. 464 (Lugari) from B. W. Kariuki at a price of Kshs.95,000. It is important to state that the agreement does not refer to the suit property thus Kakamega/Soy/1590 but it appears that plot no 464 in Lugari was later registered as Kakamega/Soy/1590. However, the title deed shows that the defendant is the registered owner of the parcel of land.

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

“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.”

The registration of the plaintiff as proprietors of the suit land, gives the plaintiff absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) **“The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;**

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The plaintiff has produced the title deed duly registered as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The question is, did the defendant acquire the title fraudulently or illegally or through a corrupt scheme or through misrepresentation. PW1 states that she wanted to buy her mother land and gave the defendant Kshs.100,000/= in Euros to enable him buy the land for their mother. This fact is corroborated by PW2,

PW3, PW4. DW2 and DW3 only witnessed the signing of the agreement and admitted on cross-examination that they did not know the background information. I do find that the plaintiff has proved on a balance of probabilities that PW1 gave the defendant Kshs.100,000/= to buy a plot which he did but registered the same in his name and refused to transfer it to the plaintiff as agreed by the family. I do further find that the act of registering the plot in his name was in itself fraudulent, illegal and a misrepresentation as the defendant was an agent who had no authority to register the land in his name. Having found that the defendant was an agent to the plaintiff but went ahead to register the property in his name instead of the plaintiffs name, I do make a declaration of the existent of trust between the plaintiff, defendant and her daughter over Land Parcel No. KAKAMEGA/SOY/1590 and do dissolve the said trust and ultimately do make a cancellation of defendant's registration in respect of the said title and that the said land parcel number KAKAMEGA/SOY/1590 to be registered in the names of the plaintiff. Further I do issue a permanent injunction restraining the defendant, his agents and/or servants from trespassing into, collecting rent, occupying, alienating, selling, wasting and/or otherwise interfering with the plaintiff's quiet possession, use and/or enjoyment of all that parcel of land known as KAKAMEGA/SOY/1590 and an order requiring the defendant to remit all the rents collected by him to the plaintiff. No order as to costs, this being a family dispute.

Dated, signed and delivered this 26th day of January, 2018.

A. OMBWAYO

JUDGE