



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 149 OF 2007**

**AGNES NAFULA CHEBOSI.....PLAINTIFF**

**VERSUS**

**JOSEPH CHEBOSI KILWAKE..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaint dated 15/10/2007 in this matter seeks the following prayers:-

- a. An order for eviction and vacant possession of LR. No. Kitale Municipality Block 13/Gatua/23 measuring 0.2023 Hectares against the defendant.**
- b. Costs.**
- c. Any other relief.**

**The Plaintiff's Case**

2. The plaintiff's case is that she is the sole registered owner of all that plot known as **Kitale Municipality Block 13/Gatua/23** situated within Trans-Nzoia District measuring **0.2023 Hectares**. She avers that she accommodated the defendant who is her brother on the said land out of sympathy, kindness and generosity but she has since withdrawn the licence of the defendant to stay on the suit land. She therefore avers that the defendant's continued stay on the suit land is illegal and contrary to her rights to ownership thereof.

**The Defendant's Defence**

3. The plaintiff's claim is opposed; the defendant filed a defence and counterclaim dated 15/11/2007 on the same day. The defendant denies the allegations in the plaint save that the plaintiff is his sister. He further avers that in 1996, the plaintiff bought 3 plots of 50 feet by 100 feet while the defendant bought an adjacent plot of the same size which he identifies as the disputed plot.

4. It is defendant's case that he bought the plot jointly with his wife one **Mary Cherotich Odiema** on 21/12/1996 and that he has been staying on the said plot since then, and that he was caring for the plaintiff's 3 plots upto year 2004 when differences between him and the plaintiff began to emerge.

5. The defendant avers that he has erected a 6 room semi-permanent house on the plot. He pleads fraud against the plaintiff and he has pleaded a counterclaim against her. He prays for an order that out of the plaintiff's land parcel, he is entitled to 0.2023 Hectares which the plaintiff holds in his trust, and that parcel should be carved out and he be issued with his own title deed in respect thereof.

**The Plaintiff's Reply**

6. The plaintiff's reply to the defence and defence to counterclaim is that she bought the suit land from the defendant's wife who she terms as the former owner thereof. She insists that she acquired the plot without use of any fraud. The suit came up for hearing on 27/9/2017. The plaintiff testified and produced documents.

**The Plaintiff's Evidence**

7. The plaintiff averred that she bought the suit land in 1996 and exhibited a copy of the title deed to the land. The agreement for sale

between the plaintiff and the seller was produced as “**P. Exhibit 2**”. She testified that the defendant later bought a plot measuring 50 feet by 100 feet next to the plots she bought. However she states that the defendant occupied her plot before buying his.

8. The agreement produced by the plaintiff as “**P. Exhibit 3**” shows that it was made between the plaintiff and his wife on the one hand and the same vendors who had sold the plaintiff 3 plots. The plaintiff stated that she bought the suit land from the defendant’s wife.

9. It is the plaintiff’s evidence that by year 2004 when she bought the suit land, her brother and Mary Cherotich were separated and Mary had moved out of the plot. The plaintiff’s further evidence was that Mary Cherotich sold the land to her to raise money to pay for school fees and food for her five children whom she left with. The plaintiff averred that she followed all the proper steps to acquire title to the suit land.

**10. PW2 Mary Cherutich Odiema** testified that she was the defendant’s wife between 1986 to 2003 and that she produced the money for the purchase of the suit land which money she obtained by way of a loan from an undisclosed source. She confirmed having sold the suit land to the plaintiff in order to cater for the needs of her children whom she had had with the defendant. The witness acknowledged the veracity of the agreement between her and the plaintiff which was produced as “**P. Exhibit 4**”. She owned up to receiving Kshs.50,000/= from the plaintiff which she says she spent on her children’s needs, and that she sold the suit land without involving the defendant. However, she testified that she informed the defendant of the sale after it had occurred.

### **The Defendant’s Evidence**

11. The defendant confirmed that PW2 was his wife whom he married in 1986. He testified that they bought the suit land as a couple through instalments. He stated that by that time he was selling clothes for a living. He denied that PW2 took out a loan to pay for the land.

12. The plaintiff filed her written submissions on 18/2/2017 and the defendant filed his on 16/1/2018. I have considered those submissions.

### **Issues for Determination**

13. In my view the issue for determination in this suit are as follows:- **(1) Was the registration of the suit land in the name of the plaintiff procured by way of fraud and misrepresentation?**

**(2) What orders should issue?**

#### **1. Whether title was procured by way of fraud and misrepresentation?**

**14. Section 143(1) of Registered Land Act** (now repealed) under which the land was registered provided that:

**“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

15. It is clear that if title is to be cancelled under that Act, the person claiming fraud has to prove it. Black’s Law Dictionary describes fraud thus:

**“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.”**

16. It is common ground that the land is now registered in the name of the plaintiff. The defendant is alleged not to be in possession of the land at the moment. The defendant never denied the plot had been sold to the plaintiff by the defendant’s wife. The defendant never joined the person who sold the land to the defendant as a party in his counterclaim.

17. Though the agreement dated 21/12/1996 vide which the land was bought bears the names of both the defendant and his wife, no evidence was led by the defendant to the effect that after purchase of the land from Margaret W. Gatua and James Ng’ang’a Githiari the title deed was first processed in the name of either the defendant or his wife or both.

18. Contrary to what the defendant states regarding the purchase, it appears from the agreement produced as “**Exhibit 3**” that it was a one-off transaction in which the value of Kshs.25,000/= was paid in form of cash (Kshs.17,500/=) and Kshs. 7500/= was paid in kind (iron sheets.)

19. There is no evidence that the defendant paid for the land in instalments using money from his business of sale of clothes. I therefore dismiss the claim that the land was bought by way of instalments by the defendant. If the defendant purchased the land alone by way of instalments, there would have been little probability that he would have involved his wife in the transaction.

20. There is nothing to show that the purchase price money was produced by the defendant. I also note a peculiar thing in the agreement

produced as “**P. Exhibit 3**” in that the defendant’s wife’s name came ahead of the defendant’s name both in the descriptive parts of the agreement as well as the signatures part. It may be concluded that she led the process. This may be a pointer to the fact that the defendant’s wife is speaking the truth when she states that she obtained the moneys used in the purchase of the plot through her own means even though her husband’s name featured in the agreement.

21. That being the case, it is a valid finding that the defendant’s wife had an interest in the land borne of the value she paid for it. In the light of the above it is difficult to see any truth in the defendant’s allegations of fraud in the plaint as the defendant’s wife merely disposed of what she had bought.

22. The question arises as to how a court would treat a situation where a spouse disposes of property and the other spouse claims fraud without enjoining him or her. The true state of the familial affairs of the defendant and his wife may only be known to them and not to all strangers or third parties. I find that the spousal relationship between the defendant and Mary Cherutich Odiema renders it a tall order for the defendant to prove the allegations of fraud without her being enjoined in this suit as a party. Her name featured in the agreement vide which the land was purchased and also the agreement vide which the land was sold. A potential buyer may believe that out of her relationship with the defendant, she was in a position to dispose of the suit land either wholly or partially. The defendant has not pleaded that his wife had no mandate to dispose of the plot at all or that he did not instruct the action of selling.

23. The defendant, despite having all opportunity, failed to enjoin March Cherutich Odiema as a defendant in his counterclaim yet she has finally acknowledged in her evidence to having sold the land and to having used the proceeds thereof on the needs of the children of their marriage. No fraud was therefore pleaded against her.

24. In the case of **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**, the Court Of Appeal stated as follows:

**“The appellant was well aware of the need to join ICDC in the suit but failed to do so.**

**It is a cardinal rule of evidence that where a party fails to call a critical witness, the court is free to draw an inference that the witness if called would have given adverse evidence against the party who failed to call the witness.**

**This matter being so much about a residential property, the only inference that can be drawn from the appellant’s reluctance or failure to join ICDC or the auctioneer is that the evidence that would have been presented to the court as a result of such joinder would not have been favourable to the appellant. From the moment the respondent visited the suit land and the subsequent exchange of letters between his advocates and the appellant’s advocates, if indeed the appellant was aggrieved, he ought to have been the first party to institute an action against ICDC and all those involved in the sale of the suit property.”**

25. I stated that the defendant had ample opportunity to enjoin Mary Cherutich Odiema as a co-defendant to the counterclaim for this reason: - on **5<sup>th</sup> December, 2007**, more than **10 years** ago, the plaintiff filed a reply to defence and counterclaim. In **paragraph 2** thereof the plaintiff disclosed that she purchased the suit land from the defendant’s wife.

26. Allegations of fraud against the plaintiff *alone* cannot in my view stand in the light of the confession by the defendant’s wife, who was party to the purchase agreement dated 21/6/1996 which fact the defendant does not dispute, that she sold the land.

27. Whereas it appears that the land was not first registered in the names of the defendant or his wife, the sellers of the land were also not enjoined as parties. This would have been a crucial step in the suit as it is possible that they had a hand in the final transfer of the land to the plaintiff.

28. Finally, no evidence was called from the Land Registry on any aspect of the transaction that led to issuance of the title in the plaintiff’s name. This is also a serious omission on the defendant’s part.

29. In the absence of these joinders there could be no proof of the allegation of fraud and the particulars of fraud in **paragraph 8** of the defence and counterclaim were therefore not proved by evidence. By the provisions of **Sections 108 & 109** of the **Evidence Act (Cap 80)**, the burden of proof of the allegations of fraud squarely fell on the defendant who failed to discharge it. As stated in the case of **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**, a court of law in adversarial system as ours cannot venture into the arena of litigation on behalf of the parties and the presumption is that the parties understand their claims, their cause of action and those whose actions have aggrieved them. This court can therefore only issue judgment based on the pleadings of the parties.

30. I therefore find that it has not been proved that the registration of the plaintiff as the proprietor of the suit land was procured by way of fraud.

## **(2) What orders should issue?**

31. The plaintiff has proved her claim on a balance of probabilities against the defendant. The upshot of the foregoing is that the plaintiff remains the lawful owner of the suit land. I therefore enter judgment in favour of the plaintiff against the defendant as prayed in **prayer No. 1** of the suit.

32. The defendant’s counterclaim is however dismissed. Each party shall bear their own costs of the suit and the counterclaim respectively.

**Dated, signed and delivered at Kitale on this 15<sup>th</sup> day of March, 2018.**

**MWANGI NJOROGI**

**JUDGE**

**15/3/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for the plaintiff present

Mr. Barongo for defendant absent

**COURT**

Judgment read in open court in the presence of counsel for the plaintiff.

**MWANGI NJOROGI**

**JUDGE**

**15/3/2018**