



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 363 OF 2014

HUDSON ISAJI.....PLAINTIFF

VERSUS

MOSES HILLARY ALUMANDE

SAMSON MWASHI ALUMWAJI

EDWARD MUSALAGANI ALUMWAJI (DECEASED).....DEFENDANTS

SUBSTITUTED BY BRIAN LUMWANJI LILECHI

JUDGEMENT

The plaintiff avers that on or about 10/2/1989 and by way of a written agreement the plaintiff herein bought a portion of land measuring 20 ft by 85 ft(square feet) at Kshs 10,000/= paid in full and final settlement out of land parcel No. Tiriki/Jeptulu/266 from the late Lumwaji Lime the father of the 3 defendants herein who died on 25/1/1994.The plaintiff avers that the late Lumwaji Lime duly executed the requisite forms for consents and transfer and that registration of titles could not be effected as the 1st defendant lodged a caution on 11/10/85 claiming interest as beneficiary.The plaintiff states that he has been in occupation of this aforesaid portion from the date of the agreement herein to date and wherein he has built and cultivates the said portion.The plaintiff's claim against the defendants is that on or about 25/1/1994, the defendants herein jointly and or severally fraudulently obtained registration of the entire land parcel No. Tiriki/Jeptulu/266 exclusively and jointly unto themselves and thereby leaving out the plaintiff and or without the plaintiff's knowledge and or consent.The plaintiff's claim against the defendants jointly and or severally is for an order of cancellation and a or annulment of the registration of the above title in their joint names for want of procedure in failing to apply for and obtain letters of administration. The plaintiff prays for judgment against the defendants jointly and or severally for;

- (a) An order of annulment and or cancellation of registration in joint names of the defendants title No. Tiriki/Jeptulu/266 and further order compelling the defendants to apply for letters of administration failing which the plaintiff to be allowed to do it.
- (b) Costs of the suit.
- (c) Any other relief this honourable court may deem fit to grant.

PW1 the plaintiff submitted that vide written agreement dated 10th February 1989 he purchased a portion of land measuring 20ft by 85 ft out of the parcel of land known as Tiriki/Jeptulu/266 from the late Lumwaji Lime father to the defendants (PEx 1).That he actually paid the purchase price in full and final settlement to the late Lumwaji Lime. He took immediate possession of the purchased portion and have extensively developed same which he utilizes to-date. The late Lumwaji Lime executed all the relevant transfer documents in respect of the purchased portion in his favour. The relevant Land Control Board consent to sub divide the parcel of land known as Tiriki/Jeptulu/266 and subsequent transfer the purchase portion was sought for and obtained from the relevant Land Control Board PEx 2 to 7).The duly executed transfer documents could not be registered at the land's office because of the caution registered on the parcel of land known as Tiriki/Jeptulu/266 at the instance of the 1st defendant Moses Hillary Alumande and also the mother to the defendants had filed suit against him.The defendants later secretly caused the whole of the parcel of land known as Tiriki/Jeptulu/266 transferred and registered in their joint names on the same date their late father had died.The transfer of the suit parcel of land was done unprocedurally and unlawful. His claim against the defendants jointly and severally is for sub division of the parcel of land known as Tiriki/Jeptulu/266 and subsequent transfer of the purchased portion in his favour. In the alternative he seeks for the cancellation of transfer of the suit parcel of land in the names of the defendants to revert to the name of the late Lumwaji Lime for the process to start afresh.

PW2 Cyrus Lidwaji, testified that on 10/2/1989 he was the secretary when the plaintiff entered into sale of a portion of land measuring 85 ft by 20 ft from the late Lime Lumwaji and he witnessed the agreement.The plaintiff did pay to the late Lumwaji the purchase price in full and final settlement in the sum of Kshs.10,000/=The plaintiff actually took immediate possession of the purchased portion and has extensively developed same which the plaintiff utilizes up to date. The late Lumwaji Lime did execute all the relevant transfer documents in respect of the

purchased portion in favour of the plaintiff. The relevant Land Control Board consent to subdivide the suit parcel of land and subsequent transfer of the purchased portion of land was sought for and obtained. The plaintiff could not have the executed transfer documents registered at the lands office because the 1st defendant Moses Hillary Alumande had caused a caution lodged on the suit parcel of land also because the mother to the defendants had sued the plaintiff. The defendants later secretly caused the suit parcel of land to be transferred and registered in their joint names. The transfer and registration of the suit parcel of land in the joint names of the defendant was unprocedural and unlawful.

The plaintiff submitted that In this case the Plaintiff sued the defendants claiming a portion of land measuring 20ft by 85 ft out of the parcel of land known as Tiriki/Cheptulu/266. The plaintiff further prays for an order that this Honourable Court be pleased to cancel the registration of the defendants as proprietors of the suit parcel of land so that the plaintiff is enabled to get title to a portion thereof measuring 20ft by 85 ft. The plaintiff, in essence seeks for an order that a portion measuring 20ft by 85 ft out of the suit parcel of land be transferred to the plaintiff. The defendants jointly would then remain as proprietor of the balance of land out of the suit land after the plaintiff has got the 20ft x 85ft aforementioned.

The plaintiff vide an agreement entered into on 10/2/1989 between the plaintiff and one Lumwaji Lime, the father of the defendants, whereby the father of the defendants agreed to sell to the plaintiff a portion of land measuring 20ft x 85ft out of the parcel of land known as Kakamega/Cheptulu/266. The agreed purchase price was a sum of Kshs.10,000/= which the plaintiff paid in full. It is the plaintiff's case that the late Lumwaji Lime executed all the relevant transfer documents which included application to the relevant land control board, mutation forms and transfer forms. Indeed, the consent of the land control board for both sub-division and transfer were executed. The plaintiff then presented the transfer documents for registration purposes but the same could not be registered since a caution had been registered against the title by the defendants. The plaintiff, meanwhile, had taken possession of the purchased portion immediately upon the execution of the sale agreement on 10/2/1989 and developed it by building structures thereon. Under circumstances that the plaintiff does not understand parallel documents were presented to the lands office by the defendants and the whole of the parcel of land known as Tiriki/Cheptulu/266 was transferred in the names of the defendants. The transfer was effected on the day the defendants' father had died after the defendants had also caused the removal of the caution they had placed against this title that had prevented the transfer of a portion measuring 20ft x 85 ft in favour of the plaintiff as stated above. The plaintiff testified in support of his case and called witnesses who corroborated the evidence of the plaintiff.

The defendants in their defence stated that they were not aware of this transaction at the time it was done and that once they learned of it, they deposited the Kshs.10,000/= the plaintiff had paid to the defendant's father as the agreed purchase price, in the office of the defendant's lawyers Ms Mukele & Co. Advocates, as a refund to the plaintiff. The defendants stated that they do not know whether the plaintiffs collected the money from the office of the defendants' lawyer.

From the evidence adduced in this case there is no dispute that the plaintiff actually purchased a portion of land measuring 20 ft x 85 ft out of the parcel of land known as Tiriki/Cheptulu/266 from the defendant's father. It is also not in dispute that the plaintiff took possession of this land on 10/2/1989 and has developed it and uses it to-date. It is also not in dispute that the defendant's father executed all the documents of transfer of the purchased portion of land in favour of the plaintiff. The same was not effective on the basis, only that a caution had been placed against this title by the defendants. This means that for all intent and purposes the defendant's father had always wanted the purchased land transferred to the plaintiff.

Indeed, that this is the reason why the defendants wished to make a refund to the plaintiff. The problem with this purported refund is that the money was deposited with the lawyer for the defendant and the money did not reach the plaintiff. The position could have been different if the money had been deposited with the plaintiff lawyer. This was not the case. What is most important here however, is that in attempting to make this refund, the defendants were/are admitting that the plaintiff paid for this land. It is in light of the foregoing it is fair and just that the plaintiff be given title to the portion measuring 20ft by 85 ft out of the parcel of land known as Tiriki/Cheptulu/266 which the plaintiff has actually been occupying since 10/2/1989.

The defendants have raised a counter claim. This counter claim be dismissed because the defendants cannot be holding the money paid to them by the plaintiff and sustain a claim for mesne profits at the same time. The occupation of the said portion of land by the plaintiff cannot be deemed to be unlawful either.

DW1, the 1st defendant testified that the 2nd defendant is his brother while the 3rd defendant who is also his brother is deceased. The plaintiff is his neighbour. He is the registered owner of land parcel L.R. No. Tiriki/Cheptulu/652. Land parcel L.R. Tiriki/Cheptulu/652 shares a common boundary with land parcel L.R. No. Tiriki/Cheptulu/266 registered in the joint names of the 2nd defendant, the 3rd defendant and himself. He has no knowledge that the plaintiff has any claim or interest in land parcel L.R. No. Tiriki/Cheptulu/266 registered in the joint names of the 2nd defendant, the 3rd defendant and himself. Land parcel No. Tiriki/Cheptulu/266 originally belonged to his deceased father, Lumwaji Lime, who prior to his demise voluntarily transferred it to himself and the 2nd and 3rd defendants. He knows that as absolute proprietors, they are entitled to peaceful and exclusive enjoyment and use of L.R. No. Tiriki/Cheptulu/266 and the plaintiff has no claim against us at all as he has no right or claim or entitlement to the said parcel of land.

There was a purported transaction between the plaintiff and his deceased father which failed and or was cancelled. However, as an interested party his deceased mother, Perez Lumwaji, sued the plaintiff herein and his deceased father Lumwaji Lime, vide Kakamega PMCC No. 254 of 1989 seeking the cancellation of the said agreement. It was agreed that Perez Lumwaji refunds the sum of Ksh.10,000/= to the plaintiff herein for the consideration that failed. That his mother deposited the sum of Ksh.10,000/= with the plaintiff's advocate then M/s Mukele & Co. Advocates to which firm the plaintiff had instructed payment to be made and she was issued with a receipt dated 14th January, 1991. The plaintiff was an unsuccessful purchaser of the said parcel of land.

When his father transferred the parcel L.R. Tiriki/Cheptulu/266 to them, the plaintiff herein, without any justifiable ground lodged a complaint with the police whereafter they were charged with the offence of obtaining registration by false pretences contrary to Section 320 as read with Section 36 of the Penal Code Cap 63 Laws of Kenya. The decision of subordinate court was however reversed on appeal vide Kakamega HC Criminal Appeal No. 241 of 1997 where the appeal was allowed and conviction and sentence set aside and the court was categorical that the plaintiff had no capacity to sue or complain against them. The court found that since the three of them were sons of

Lumwaji Lime they were entitled to the land and the said transfer was proper and lawful and the sub-ordinate court should not have accepted or tried them in the first place.

It is not true that the plaintiff is in occupation of the suit parcel of land. The plaintiff has put up commercial premises on his land parcel L.R. No. Tiriki/Cheptulu/652 but he does not stay there. However, in the process of putting up the said commercial premises the plaintiff without any colour of right, unlawfully and wrongfully erected thereon a temporary structure on a portion measuring about 0.05 acre. He filed a boundary dispute against him and though he was issued with a notice he failed to attend hence the dispute was not resolved. The plaintiff's acts of trespass deprived him and the other defendants of quiet use and enjoyment of the suit parcel of land and they have suffered loss of user for which they hold the plaintiff liable.

The particulars of fraud raised against him and the 2nd defendant were determined in the criminal appeal No. 241 of 1997 and the court found that the same had no merit and cannot stand. The fact that registration and transfer of the suit parcel of land was effected on the same day Lumwaji Lime died is not fraud. The documents were lawfully and properly procured, executed, presented and paid for before the demise of Lumwaji Lime. The consents were duly obtained and he properly and lawfully removed the caution which he had lodged and he needed no notice to remove the caution. The defendants needed no letters of administration to effect the transfer. It is not them who transferred but Lumwaji Lime himself. Land parcel L.R. No. Tiriki/Cheptulu/266 did not constitute the estate of Lumwaji Lime since at the time Lumwaji Lime died he had already effected the transfer. He asks the court to dismiss the plaintiff's suit with costs and grant THEM judgment against the plaintiff as prayed for in their counter-claim as follows;

- a) An injunction to restrain the plaintiff by himself his servants or agents or otherwise howsoever from remaining or continuing in occupation of the said piece of land.
- b) Damages or mesne profits at the rate of Kshs 2,000/= per month from the said 25th January, 1994 until possession is delivered up.
- c) Costs of this suit.
- d) Interest on 2 and 3 above at court rates.
- e) Further or other relief.

The defendant submitted that the brief facts of the case are that vide an agreement made on 10/2/1989, the plaintiff purported to purchase a portion of land out of land parcel No. Tiriki/Cheptulu/266 from Lumwaji Lime who died in 1994 who at the time of his death had not subdivided the land or transferred the portion of land purportedly purchased to the plaintiff. The said Lumwaji Lime then transferred title to the whole of land parcel No. Tiriki/Cheptulu/266 to the defendants who are his sons on 25/1/1994. Following this transfer, the plaintiff lodged a complaint to the police and the defendants were jointly charged vide Kakamega CM Criminal Case No. 662 of 1996 with the offence of obtaining registration of title No. Tiriki/Cheptulu/266 by false pretences. The lower court convicted the defendants but their position was that their father Lumwaji Lime executed documents of transfer which he presented and paid for at the Lands office when he was alive prior to 25/1/1994 when he died and if the lands office effected the transfer at a later date (25/1/1994) which coincided with the date of his death, the defendants could not be faulted for that.

The defendants appealed against the conviction in the above said case vide Kakamega HC Criminal Appeal No. 241 of 1997. In allowing the appeal and quashing the conviction and sentence of the subordinate court, the High Court held inter alia. "It is common ground that the three appellants are the sons of the late Lumwaji Lime who was the original owner of the land parcel No. Tiriki/Cheptulu/266.

The plaintiff's cause of action arises out of the agreement made on 10/2/1989 between himself and one Lumwaji Lime, now deceased. The defendants were not parties to the agreement. The said cause of action can or could only be enforced against the deceased Lumwaji Lime or the administrator(s) of his estate, not third parties. The defendants are not administrators of the estate of the deceased Lumwaji Lime. Neither is the plaintiff. To institute or maintain a cause of action, the plaintiff ought to have cited the defendants and caused them to obtain letters of administration in respect of the estate of the deceased Lumwaji Lime in order to be sued or he ought himself to have obtained letters of administration in respect of the estate of the deceased Lumwaji Lime in order to sue in respect of the agreement of 10/2/1989 or seek to have the suit title revert into the name of the deceased.

That was not done. By suing before that was done the plaintiff waded in a legal vacuum. He neither had the locus standi to sue nor did the defendants have locus standi to be sued in respect of the reliefs sought in the plaint – that is - cancellation of the transfer or registration of the suit title into the names of the defendants and reversion thereof into the name of the deceased. No wonder the plaintiff sought this prayer, which purports to convert this suit into a citation, so that the parties can gain locus standi. Unfortunately, it is too late and amounts to putting the cart before the horse. The plaintiff did not have capacity to bring his cause of action and the defendants did not have capacity to be sued in respect thereof, the plaintiff's suit has no legs to stand on.

The plaintiff's suit is statute barred as it was instituted outside the time stipulated in law and without leave of court. According to paragraph 3 of the plaint, the plaintiff's cause of action arose on 10/2/1989. He filed this suit on 28/1/1999, about 10 years thereafter. Section 4(1) of the Limitation of Actions Act, cap 22 Laws of Kenya stipulates that an action founded on contract ought to be instituted within six(6) years from the date on which the cause of action accrued. The plaintiff's cause of action having arisen on 10/2/1989 he ought to have filed this suit on or before 9/2/1995. His cause of action expired thereafter and he could only lodge it with leave of the court. He did not seek or obtain such leave and his suit was time of statute barred a non-starter and incompetent on that ground.

The plaintiff has not established any claim against the defendants. He did not enter into any agreement with them. No fraud was established against the defendants in regard to their registration on the suit title. The High Court held that the deceased Lumwaji Lime lawfully, procedurally and properly transferred title No. Tiriki/Cheptulu/266 to the defendants. This finding has not been challenged, reversed or set aside and it still stands. This Honourable court which is of concurrent jurisdiction cannot make a contrary finding or now hold the said

transfer of title irregular or fraudulent as that will amount to sitting on appeal against the judgment in Kakamega HC Criminal Appeal No. 241 of 1997.

The defendants filed a counterclaim against the plaintiff which they proved and should be allowed. The defendants obtained registration as the absolute proprietors of the suit land parcel No. Tiriki/Cheptulu/266 on 25/1/1994. Their counter-claim was filed on 15/3/1999, within the legally stipulated period of six years. The defendants' claim is that the plaintiff illegally trespassed and constructed a temporary structure on about 0.05Ha of the suit land. The plaintiff has not established any or any legal claim to the portion of the suit land he has encroached on.

Section 24(a) of the Land Registration Act, No. 3 of 2012(the equivalent of Section 27(a) of the Registered Land Act, Cap 300 Laws of Kenya) 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".

This court has carefully considered both the plaintiff's and the defendants' evidence and submissions herein. It is not in dispute that, The plaintiff vide an agreement entered into on 10/2/1989 between the plaintiff and one Lumwaji Lime, the father of the defendants, whereby the father of the defendants agreed to sell to the plaintiff a portion of land measuring 20ft x 85ft out of the parcel of land known as Kakamega/Cheptulu/266. The agreed purchase price was a sum of Kshs.10,000/= which the plaintiff paid in full. It is the plaintiff's case that the late Lumwaji Lime executed all the relevant transfer documents which included application to the relevant land control board, mutation forms and transfer forms. Indeed, the consent of the land control board for both sub-division and transfer were executed. The plaintiff then presented the transfer documents for registration purposes but the same could not be registered since a caution had been registered against the title by the defendants. The plaintiff, meanwhile, had taken possession of the purchased portion immediately upon the execution of the sale agreement on 10/2/1989 and developed it by building structures thereon. That the plaintiff does not understand parallel documents were presented to the lands office by the defendants and the whole of the parcel of land known as Tiriki/Cheptulu/266 was transferred in the names of the defendants. The transfer was effected on the day the defendants' father had died after the defendants had also caused the removal of the caution they had placed against this title that had prevented the transfer of a portion measuring 20ft x 85 ft in favour of the plaintiff as stated above. The plaintiff testified in support of his case and called witnesses who corroborated the evidence of the plaintiff.

The defendants in their defence stated that they were not aware of this transaction at the time it was done and that once they learned of it, they deposited the Kshs.10,000/= the plaintiff had paid to the defendant's father as the agreed purchase price, in the office of the defendant's lawyers Ms Mukele & Co. Advocates, as a refund to the plaintiff (DEx4). The defendants stated that they do not know whether the plaintiffs collected the money from the office of the defendants' lawyer. I believe the defence. I find that this was a case of a sale agreement which was unsuccessful and the money was paid back to the lawyer.

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 defendants' evidence is that their deceased father Lumwaji Lime lawfully executed, presented and paid for documents of transfer of the suit title from himself to the defendant prior to his death. In the absence of proof of any fraud or irregularities or illegalities, as against the defendants, their title to the suit land is proper and lawful. 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. Hon Justice Munyao Sila 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.

The registration of the defendants on 25/1/1994 as the proprietors of land parcel No. Tiriki/Cheptulu/266 vested in them absolute ownership of the said parcel of land together with all rights and privileges belonging thereto. They have no contract with the plaintiff who has not established an overriding or any interest therein. The defendants are in law entitled to occupy and use the whole of the suit land as they desire without any encumbrance or any hindrance or interference from the plaintiff or any other person. In Kakamega HC Criminal Appeal No. 241 of 1997 where the appeal was allowed and conviction and sentence set aside and the court was categorical that the plaintiff had no

capacity to sue or complain against them. The court found that since the three of them were sons of Lumwaji Lime they were entitled to the land and the said transfer was proper and lawful and the sub-ordinate court should not have accepted or tried them in the first place.

I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss the same. The defendants have proved their counterclaim on a balance of probabilities and I grant the following orders;

1. An injunction to restrain the plaintiff by himself his servants or agents or otherwise howsoever from remaining or continuing in occupation of the said piece of land.
2. Costs of this suit.

Damages or mesne profits at the rate of Kshs 2,000/= per month from the said 25th January, 1994 until possession is delivered up have not been proved and will not be granted.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 30TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE