



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 4 OF 2018**

**SAMSON K. AMUSIBWA ..... PLAINTIFF**

**VERSUS**

**ALPHONSE M. AMBAHI )**

**ROBERT MULOGOSI ) ..... DEFENDANTS**

**THE DISTRICT LAND REGISTRAR )**

**JUDGEMENT**

At all material times relevant to this suit the 1<sup>st</sup> defendant was the registered owner of L.R. No. Kakamega/Shiru/818. On or about 3<sup>rd</sup> June, 1996 the plaintiff entered into an agreement with the 1<sup>st</sup> defendant to purchase 0.5 of an acre. The Land Control Board of Tiriki West gave its consent to transfer the land on 21<sup>st</sup> July, 1997. The plaintiff took possession of the said land and has been cultivating it while awaiting for the surveyor to draw the mutation to enable him effect the transfer. On or about 22<sup>nd</sup> November, 2000 the 1<sup>st</sup> defendant unlawfully and fraudulently transferred the said land to the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant fraudulently, wrongfully, unlawfully and without any reasonable excuse registered the 2<sup>nd</sup> defendant as the sole proprietor of Land Reference No. Kakamega/Shiru/818 without regard to the plaintiff's share of 0.5 acre. It is the plaintiff's claim that the said registration is illegal and fraudulent and negligent in that it includes the plaintiff's land.

The plaintiff's claim against the defendants jointly and severally is for the cancellation of the register to enable the plaintiff be registered as proprietor of 0.5 acre of L.R. No. Kakamega/Shiru/818. Despite demand and notice of intention to sue having been given the defendants have refused, failed and/or neglected to settle the plaintiff's claim. The plaintiff states other than miscellaneous Application No. 73 of 2001 at Vihiga Senior Resident Magistrate's Court which was struck out there is no other suit pending between him and the defendants and that there has been no previous suit pending between him and the defendants and that there has been no previous proceedings between him and the defendants in respect of the subject matter herein. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) A declaration that the title held by the 2<sup>nd</sup> defendant is illegal and should be cancelled and the 1<sup>st</sup> defendant be ordered to transfer 0.5 acre to the plaintiff.
- (b) That the land register be rectified and title No. L.R. Kakamega/Shiru/818 be subdivided into two so as the plaintiff to hold his 0.5 acre and the balance to the 1<sup>st</sup> defendant.
- (c) Any further orders that the court deems fit.
- (d) Costs of this suit.

The plaintiff submitted that the 2<sup>nd</sup> defendant fraudulently transferred the whole parcel of land into his name with assistance of the 1<sup>st</sup> Defendant when they had knowledge that the Plaintiff was legally entitled to have a share out of the said land particularly measuring 0.5 acres which he bought from the original owner, ALPHONCE MUSOTSI AMBALI (deceased).

The Plaintiff in his testimony avers that he purchased a portion of land on 3/6/96 measuring 0.5 acres from the 1<sup>st</sup> Defendant and produced an agreement as Exhibit PEx1. The Plaintiff took possession of the purchased portion. The plaintiff produced consent dated 10<sup>th</sup> September, 1997 and application for consent dated 21<sup>st</sup> July, 1997 as PEx2 indicating the 1<sup>st</sup> defendant in his defence denies generally the plaintiff's allegations. The Plaintiff avers that there is a clear boundary on the ground demarcating his portion of land which he occupies and utilizes without the interruption of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant also has his distinct portion. The 3<sup>rd</sup> Defendant who is the District Land Registrar is enjoined in this suit for reasons that he irregularly registered the whole parcel of land Kakamega/Shiru/818 into the 2<sup>nd</sup> defendant's names without due regard to the Plaintiff's interest.

PW2, Jonathan Basiye testified and confirmed that he knew the Plaintiff and the 1<sup>st</sup> Defendant herein and that he was present as the village elder when the Plaintiff bought the land from the 1<sup>st</sup> Defendant. He also confirmed from his testimony that he is the one who demarcated the land to show the portion bought by the Plaintiff.

The 1<sup>st</sup> defendant, ALPHONCE MUSOTSI AMBALI died during the pendency of this suit and was substituted by NOEL NYARANGA AYUYA, Noel Nyaranga Ayuya, DW1 testified and confirmed that the 2<sup>nd</sup> Defendant purchased only 1 acre from Alphonse Musotsi Ambali and Samson Khasiani Amusibwa bought ½ Acre and each of them occupy their respective portions on this suit land. In her testimony, she further told the court in cross-examination that her father-in-law Alphonse Musotsi Ambali never transferred the whole land to Mulogosi but had only sold 1 acre to him. She also confirmed that two people occupy the land. Mulogosi uses his parcel and Samson uses his.

The defendant Alphonse Musotsi Ambali confirms from his pleadings Defendant's in paragraph 3 that he was misdirected by the 2<sup>nd</sup> defendant in signing transfer documents while believing that he was only transferring one acre of land to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant substitute one NOEL NYALANGA confirms this from her testimony that the 2<sup>nd</sup> defendant had only purchased 1 acre and not the whole land and that both the plaintiff and the defendant occupy their respective portions on the ground.

That in answer to paragraph 9 of the plaint, the 1<sup>st</sup> defendant was misdirected by the 2<sup>nd</sup> defendant into signing documents while he believed that he was transferring to the 2<sup>nd</sup> defendant the portion he had bought and not the whole land as it later turned to be. The plaintiff is entitled to his 0.5 acres of land reference No. Kakamega/Shiru.818. In answer to paragraph 10 of the plaint the 1<sup>st</sup> defendant did not have any intention to defraud the plaintiff at all.

As a result of the aforesaid matters the 2<sup>nd</sup> defendant avers that he is entitled to a peaceful occupation of the aforesaid parcel of land instead of the plaintiff. The defendant avers that the suit instituted herein is bad in law and does not disclose any reasonable cause of action and the defendant will raise a preliminary objection thereto. WHEREFORE the 2<sup>nd</sup> defendant prays that the suit herein be dismissed with costs.

The 2<sup>nd</sup> defendant testified that he does not know the plaintiff herein Samson Khasian Amusibwa. He knew one Alphonse Musotsi Ambali who is now deceased and was substituted by Noel Nyaranga Ayuya herein. That on or about the year 1980 he was looking for a land to buy and through his father one John I. Mulogosi informed him that Alphonse Musotsi Ambali had a land and wanted to dispose off and or sale. That he went to the home of Alphonse Musotsi Ambali with his father John I. Mulogosi. That Alphonse Musotsi Ambali (now deceased) informed them that he had no wife nor child and wanted to sell his land parcel known as KAKAMEGA/SHIRU/818 at a consideration of Kshs. 125,000/=. That they entered into agreement on 16<sup>th</sup> day of March 1988 and he paid Alphonse Musotsi Kshs. 82,000/= as first installment. The balance owing remained Kshs. 43,000/=. The agreement was witnessed by John Matayo, Jeremiah Mugotiza Kisanyanya, Village elder one Jonathan Masiya and Caroli Patrick. The remaining balance of Kshs. 43,000/= he did paid to Alphonse Musotsi by installment until payment was made in full on the 9<sup>th</sup> day of August 1999. That later in the year 2000 the said Alphonse Musotsi transferred to him the suit land and executed every document. That they filed the transfer application for consent and consent obtained from the land control board at lands office Vihiga and later he was issued with a title deed which he holds the same to date. That he took possession of the land immediately and started utilizing the same. Currently he is not using the land due to the court case. That he prays the court to dismiss the plaintiff suit with costs and allow him proceed using his land which he legally purchased from Alphonse Musotsi and he holds title deed to the same without hinderance from the plaintiff herein.

The 2<sup>nd</sup> defendant is the registered proprietor and title holder of land parcel known as KAKAMEGA/SHIRU /818 measuring about 0.37 Hectares which the plaintiff seeks to cancel through these proceedings.

His case is that he had bought a portion of the land measuring 0.5 acres from the original owner defendant Alphonse Mutsotso Ambali on 3<sup>rd</sup> June 1996. He went to the land control board after paying the consideration of Kshs. 7000/= to the buyer on 21<sup>st</sup> July 1997 that was after one year. He never followed on the said consent to subdivide and transfer the portion to himself. In the year 2000 he found out the land had been sold to the 2<sup>nd</sup> defendant who had title to the same after being served with notice to vacate by the lawyers to the 2<sup>nd</sup> defendant.

His substantive prayers in the plaint are that the court declares the title held by the 2<sup>nd</sup> defendant illegal and cancels it. The 1<sup>st</sup> defendant be ordered to transfer 0.5 acres to him and retains the balance. He gave evidence and produced his documents in support.

In his defence, the 2<sup>nd</sup> defendant explained that he bought the suit land from the 1<sup>st</sup> defendant through his father DW1 as an agent and got title after going through the process. DW 1 supported him and also the daughter to the 1<sup>st</sup> defendant Noel Nyaranga Ayuya and the land registrar DW 3 Kalori Okwaro.

The 2<sup>nd</sup> defendant submitted that, the suit is null and void for non service of the statutory notice to the 3<sup>rd</sup> defendant the District Land Registrar who is and was a government Officer by then and by virtue of the section 13 of the Government Proceedings Act which was and still is mandatory that one serves notice to the Attorney General before filing a suit against a government officer. The plaintiff claimed in cross examination that he did serve the notice but never produced such notice in evidence to support his claim.

The plaintiff hangs on a copy of sale agreement he claims to have signed with the defendant and an application form for land control board consent and the consent. These, he produced as Exh. P 1,2 and 3. A scrutiny of the documents reveals that the agreement was for Kshs. 7000/= as consideration yet only Kshs. 6000/= was indicated in the agreement as having been paid and no evidence of the payment of Kshs. 1000/= being the balance. The application for the land control board consent did not state the interest to be 0.5 acre by purchase but transfer by way of undivided shares. Both the application for the land control board consent and the consent itself indicated that the transaction was not a sale but a transfer by way of gift. In fact the consent discloses fraudulently designs as it refers to the whole parcel TIRIKI/SHIRU/818 being transferred for no consideration paid. These documents could not validly effect the transfer of any proprietary interest to the plaintiff. That

could explain why he never perhaps transferred the property from the date of consent on the 10<sup>th</sup> September 1997 until when it was sold and transferred to the 2<sup>nd</sup> defendant Robert Mulogosi on the 22<sup>nd</sup> November 2000.

The consent of the land control board which the plaintiff hangs on to defeat the title to the 2<sup>nd</sup> defendant was applied for on 21<sup>st</sup> July 1997 and issued on 10.9.1997. Besides the consent being suspect (as the plaintiff's case is that he bought only 0.5 acres and not the whole portion as purported in the said consent) the same was obtained beyond the statutory period of three months after the transaction of the alleged sale on 3.6.1996 which was in violation of section 6(2)(a) of the Land Control Act Cap 302 Laws of Kenya and to that extend null and void for the purpose. See KARURI -VS- GITURU(1981) KLR 247 -259

The 2<sup>nd</sup> defendant has demonstrated to the court that he bought the land from the owner at Kshs. 125,000/= which he paid in full. The figure is even reflected in the title deed. The plaintiff had never filed anything on the register to stop the 2<sup>nd</sup> defendant or any other person from buying or the Land registrar from registering the transaction. In fact the person who had lodged a caution on August 1998 was Jackson Okeyo Ogaye who withdrew it on 23<sup>rd</sup> March 2000 long before the 2<sup>nd</sup> defendant bought it.

The plaintiff's lawyer went to the pain of demanding the 2<sup>nd</sup> defendant to testify in person to put across the claim that the sale agreement the 1<sup>st</sup> and 2<sup>nd</sup> defendant drew was defective. The plaintiff's lawyer could not question an agreement to which his client was never party. The 1<sup>st</sup> defendant and his legal representative had no issue with the agreement. In any case the 1<sup>st</sup> defendant never laid any allegations of fraud against the 2<sup>nd</sup> defendant.

The plaintiff's case is that he bought the land in March 1996 and only secured the land control board consent one and half years on 9<sup>th</sup> October 1997. There is no evidence that he even attempted to register it to transfer the land to his name to date. And he wants the court to assist him get the whole land to the 1<sup>st</sup> defendant with whom he wants to share to the exclusion of the 2<sup>nd</sup> defendant. He projects to belittling on behalf of the 1<sup>st</sup> defendant without any legal authority. The plaintiff wants the court to believe he is resident on the land pursuant to the said sale agreement yet it is clear that he has hanged on the application dated 29<sup>th</sup> September 2003 to occupy the whole land and lock out the 2<sup>nd</sup> defendant. The order is on the court file.

The 3<sup>rd</sup> defendant submitted that, the Land Registration Act Section 26 gives the person named as proprietor of land absolute and indefeasible ownership the remedy which the plaintiff seeks in this case can only be available to him if he can prove that the title was issued on;

- a) 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.

No evidence has been presented by the Plaintiff or the other two Defendants to show that the 3<sup>rd</sup> Defendant was in any way involved in a fraudulent scheme.

The Evidence Act is clear in Chapter IV that whoever alleges must prove specifically Section 109 states.

“The burden of proof as to any particular fact lies on the person who wished the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person”

The 3<sup>rd</sup> Defendant is enjoined in this suit for the alleged reason that he registered the title in favour of the 2<sup>nd</sup> Defendant without due regard to the Plaintiff's interest. It is their humble submission that the registration of the title was done procedurally. No evidence of fraud has been presented against the 3<sup>rd</sup> Defendant. It's the 3<sup>rd</sup> Defendant's submission that from the evidence tendered the plaintiff has not proved his case against the 3<sup>rd</sup> Defendant on a balance of probabilities as required by law. They pray that this court dismisses the suit against the 3<sup>rd</sup> Defendant with costs.

This court has carefully considered both the plaintiff's and the defendants' evidence and submissions herein. The Plaintiff filed this suit vide a Plaint dated 7<sup>th</sup> April 2003 praying for orders that the title deed for Parcel No KAKAMEGA/SHIRU/818 held by the 2<sup>nd</sup> Defendant be cancelled or rectified and he be given a portion measuring 0.5 Acres. The suit came up for hearing on diverse dates where the Plaintiff and Defendants testified. The plaintiff alleges that the Defendants in collusion transferred the parcel of land known as KAKAMEGA/SHIRU/818 to the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant who is the Land Registrar was sued for irregularly registering the said parcel of land to the 2<sup>nd</sup> Defendant without considering the Plaintiff's interests in the property. The Plaintiff testified and produced a sale agreement a consent dated 10<sup>th</sup> September, 1997 and an application for consent dated 21<sup>st</sup> July 2017 PEx 1&2).

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed their statements of defence and their written statements in court. In his pleadings the 1<sup>st</sup> Defendant alleges to have been misdirected to sign transfer documents by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant on the other hand says that after he paid the full purchase price they (1<sup>st</sup> and 2<sup>nd</sup> Defendant) filed the transfer application for consent. The consent was obtained and later a title was issued by the 3<sup>rd</sup> Defendant (DEx 1, 2&3). The 3<sup>rd</sup> Defendant alleges in paragraphs 5 and 6 of his defence states that if he effected the transfer then the same was done with due regard to the law. The Plaintiff's allegations that the Defendants fraudulently issued a title to the 2<sup>nd</sup> Defendant therefore misguided.

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. 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.

This court noted that, the 1<sup>st</sup> defendant filed his defence dated 11<sup>th</sup> June, 2004 and in paragraph 3 of the defence avers as follows:-

*“That in answer to paragraph 9 of the Plaintiff, the 1<sup>st</sup> Defendant was misdirected by the 2<sup>nd</sup> defendant into signing documents while he believed that he was transferring to the 2<sup>nd</sup> defendant the portion he had bought and not the whole land as it later turned to be. The Plaintiff is entitled to his 0.5 acres of land reference No. KAKAMEGA/SHIRU/818”.*

It is clear from the evidence on record taking into account the testimonies of the parties and their witnesses and taking into account of the documentary evidence adduced, the plaintiff has proved his case on a balance of probabilities and the court should grant the reliefs sought as prayed in the plaint. The plaintiff’s sale agreement is dated way back 3<sup>rd</sup> June 1996 while the 2<sup>nd</sup> defendant’s title was issued on 22<sup>nd</sup> November 2000. The Plaintiff in his testimony avers that he purchased a portion of land on 3/6/96 measuring 0.5 acres from the 1<sup>st</sup> Defendant and produced an agreement as Exhibit PEx1. The Plaintiff took possession of the purchased portion. The plaintiff produced consent dated 10<sup>th</sup> September, 1997 and application for consent dated 21<sup>st</sup> July, 1997 as PEx2. The 1<sup>st</sup> defendant admitted that he did not intend to transfer the entire parcel to the 2<sup>nd</sup> defendant. Indeed the 2<sup>nd</sup> defendant should have pursued the seller for compensation if he was under the impression that he was buying the whole parcel of land. He confirmed that the Plaintiff is entitled to his 0.5 acres of land reference No. KAKAMEGA/SHIRU/818. I find that there was misrepresentation in the transfer of this title and the 2<sup>nd</sup> defendant was a party.

No evidence has been presented by the Plaintiff or the other two Defendants to show that the 3<sup>rd</sup> Defendant was in any way involved in a fraudulent scheme and the case against him is dismissed. I therefore grant the following orders;

1. A declaration that the title held by the 2<sup>nd</sup> defendant is illegal and should be cancelled and the 1<sup>st</sup> defendant be ordered to transfer 0.5 acre to the plaintiff.
2. That the land register be rectified and title No. L.R. Kakamega/Shiru/818 be subdivided into two so as the plaintiff to hold his 0.5 acre and the balance to the 1<sup>st</sup> defendant.
3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**