



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 202 OF 2013

HARRISON ABWALABA OTOTA.....PLAINTIFF

VERSUS

SALOME AJWANG ALWANDA

LAND REGISTRAR, KAKAMEGA.....DEFENDANTS

JUDGEMENT

The plaintiff's case is that, the subject matter herein is Land Parcel Number Butsotso/Shibeye/5016 measuring 0.14 Ha in area, situated at Shibuli market of the greater Butsotso location, greater Shibeye sub-location which is free hold in nature. That vide an agreement dated 21st May, 2012 the 1st defendant and her husband one ALFRED MWALO OKUMALI did sell to the plaintiff land parcel no. Butsotso/Shibeye/5016 at a consideration of Ksh. 1,400,000/= . That due procedure was followed and the plaintiff was duly registered as the absolute proprietor of Land Parcel No. Butsotso/Shibeye/5016 in respect of which he has exclusive ownership and possession. That the 2nd defendant in collusion with the 1st defendant have commenced a process seeking to cancel the plaintiff's registration on allegation of fraud.

That the 1st defendant now currently married to a senior police officer in Kisumu is using the office of the D.C.I.O. Kakamega and the 2nd defendant to cancel a lawful registration. The 1st defendant who signed all relevant documents and attended Land Control Board meeting is feigning ignorance. The defendants have colluded to give false information to the police. The 1st defendant is using her relationship with senior police officers to frustrate the registered proprietor. Falsification of documents at the lands office. Denying the plaintiff copies of the documents leading to the registration of Land Parcel No. Butsotso/Shibeye/5016. The defendants are interested in the subject matter and they are liable to be called upon to answer the plaintiff's claim by virtue of having commenced a process to de-register the plaintiff from Land Parcel No. Butsotso/Shibeye/5016. The plaintiff avers that there is no suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint. Demand and notice of intention to sue was issued but ignored. The plaintiff prays for judgment against the defendants for:-

- a. A declaration that the plaintiff is the lawfully registered absolute proprietor of Land Parcel No. Butsotso/Shibeye/5016.
- b. An order restraining the defendants or any other person claiming through them from deregistering the plaintiff from Land Parcel No. Butsotso/Shibeye/5016 or cancelling his title.
- c. An order of inhibition/restriction inhibiting and/or restrict any registration adverse to the plaintiff's interest on Land Parcel No. Butsotso/Shibeye/5016.
- d. Costs of this suit.
- e. Any other relief this honourable court deems just and fit to grant.

The plaintiff testified that, he is the registered absolute proprietor of the whole of that parcel of land known as L.P. No. Butsotso/Shibeye/5016 PEx 2 title deed). That he purchase the suit land from the 1st defendant and her husband one ALFRED MWALO OKUMALI (PEx 1 sale agreement). That the 1st defendant was registered to hold the land in trust for her husband Alfred Mwalo Okumali who had purchased the same from the previous owner one Wellington Mzee Wetende. That the 1st defendant voluntarily executed all the relevant documents including but not limited to application for consent forms, transfer form, supplied copies of her National Identification Card, PIN card, passport size photographs and attended the relevant Land Control Board meeting to facilitate the transfer of the land into his names (PEx 3 copy of the register). That the reason for the sale of the suit land was to enable them pay school fees for their children in Alliance High School and Ingotse High School and further build a house at their home in Eshimichini village. That currently the 1st defendant and her husband are not in good terms, have family differences and the 1st defendant is hooked up to a senior police officer in Kisumu, give him false information who in collusion with the D.C.I.O Kakamega have written to the 2nd defendant to put a restriction on his

title as exhibited by entry number 7 on the copy of the register.

That on 8th July, 2013 he received a letter dated 29th May, 2013 from the 2nd defendant threatening to cancel his title anytime and he is apprehensive that the 2nd defendant is likely to carry out his threats unless inhibited by the orders of this court. That he has never been investigated, charged and/or convicted for a criminal offence relating to acquisition of the suit land and the actions by the defendants and the D.C.I.O, Kakamega are meant to unlawfully take away his land and give back to the 1st defendant whom he paid full consideration in exchange for the suit land and this amounts to serious miscarriage of justice.

The plaintiff submitted that, the 2nd defendant did not file any documents to challenge the plaintiff's case. The 1st defendant filed her defence in which she averred that the transfer of the suit land to the plaintiff was by way of fraud and illegality.

The action by the 2nd defendant to try and interfere with the plaintiff's title amounts to an abuse of office and they urge this court to protect plaintiff from such arbitrary action. The plaintiff should be allowed to enjoy his right as the registered absolute proprietor of the suit land which he acquired for value.

The 1st defendant denies the plaint in toto that vide agreement dated 21st May, 2012, that the 1st defendant and her husband one Alfred Mwalo Okumali did sell to the plaintiff land parcel No. Butso/So/Shibuye/5016 at a consideration of Ksh. 1,400,000/= which is actually denied then the 1st defendant avers that he was never a party to the said transaction and even her husband Alfred Mwalo Okumali working in cahoots with the plaintiff forged her signature in the purported agreement dated 21st May, 2012 the plaintiff shall be put to strict proof thereof. The 1st defendant denies the contents of paragraph 6 of the plaint and puts the plaintiff to strict proof absolutely without prejudice to the foregoing and to the generality the 1st defendant avers that the procedure followed by the plaintiff to register the land parcel No. Butso/So/Shibuye/5016 was fraudulently ab initio since the plaintiff working in cahoots with her husband Alfred Mwalo Okumali forged her signature in the sale agreement dated 21st May, 2012 and even consent document which was interrupted by the chief upon sensing fraud in the said document and further informed the district Officer and therefore the consent was not accepted by Land Control Board. Absolutely without prejudice to the foregoing and strictly to the generality the 1st defendant in reply to paragraph 7 of the plaint avers that the 2nd defendant was mainly doing his statutory duty upon realizing that the transaction relating to Butso/So/Shibuye/5016 was laced with fraud and irregularity and since the plaintiff's hands were tainted he could not get solace in arm of equity.

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.

This court has carefully considered the plaintiff's case and the submissions therein. The plaintiff withdrew his case against the 1st defendant since the action complained of was instigated and carried out by the 2nd defendant. The plaintiff having withdrawn his claim against the 1st defendant and the 2nd defendant not having defended this case, the same is opposed.

The plaintiff testified that, he is the registered absolute proprietor of the whole of that parcel of land known as L.P. No. Butso/So/Shibeye/5016. That he purchase the suit land from the 1st defendant and her husband one ALFRED MWALO OKUMALI. That the 1st defendant was registered to hold the land in trust for her husband Alfred Mwalo Okumali who had purchased the same from the previous owner one Wellington Mzee Wetende. That the 1st defendant voluntarily executed all the relevant documents including but not limited to application for consent forms, transfer form, supplied copies of her National Identification Card, PIN card, passport size photographs and

attended the relevant Land Control Board meeting to facilitate the transfer of the land into his names.

The 2nd defendant did not defend the suit, they should have laid the grounds upon which he proceeded to restrict the plaintiff's title number Butso/so/Shibeye/5016 and to recall the title. According to the plaintiff and PW2, the plaintiff's husband, the purchase of the suit land was above bar and properly witnessed by an advocate. The 1st defendant whose case was withdrawn signed the agreement.

The statement of Mr. Jumba, the land officer which was produced in this case was very clear that all the necessary documents leading to the registration of the plaintiff as proprietor were filed at the lands office (PEx5). No evidence has been adduced to show that the plaintiff's title was obtained by fraud or misrepresentation. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

- f. A declaration that the plaintiff is the lawfully registered absolute proprietor of Land Parcel No. Butso/so/Shibeye/5016.
- g. An order restraining the 2nd defendant or any other person claiming through them from deregistering the plaintiff from Land Parcel No. Butso/so/Shibeye/5016 or cancelling his title.
- h. An order of inhibition/restriction inhibiting and/or restrict any registration adverse to the plaintiff's interest on Land Parcel No. Butso/so/Shibeye/5016.
- i. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE