



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 284 OF 2013**

**JOHN MAKOMELO KEYA.....PLAINTIFF**

**VERSUS**

**TITUS SHIKANGA AMAITSA.....1<sup>ST</sup> DEFENDANT**

**FLORA TEMBESI MATE alias**

**FLORENCE SHIMULI RAMOYA.....2<sup>ND</sup> DEFENDANT**

**MARVIN MWAVITA WANGATIAH.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

The plaintiff case is that, on 8<sup>th</sup> January 2007 he purchased a portion of land from the first defendant indicated on the agreement as Butsotso/Shikoti/2105 but actually known as Butsotso/Shikoti/14029. The plaintiff avers that by the time he was purchasing the said portion of land the first defendant had not been registered himself as the owner of the purchased portion since sub-division had not been done but had mutually agreed between the 1<sup>st</sup> and 2<sup>nd</sup> defendant that the said portion could be transferred directly to the plaintiff upon sub-division being done. The plaintiff avers that upon sub-division being done on Butsotso/Shikoti/14029 the portion the plaintiff purchased was allocated as Butsotso/Shikoti/14325 measuring 0.09 ha and registered in the names of the 2<sup>nd</sup> defendant who was in turn to transfer it to the plaintiff as earlier agreed. The plaintiff avers that he continued using the said portion till recently when discovered that the 2<sup>nd</sup> defendant had fraudulently transferred the said land Butsotso/Shikoti/14325 to the 3<sup>rd</sup> defendant. The plaintiff's claim against the defendant is an order for cancellation of the registration fraudulently done on land parcel Butsotso/Shikoti/14325 in favour of 3<sup>rd</sup> defendant and that upon cancellation the land to revert to the 2<sup>nd</sup> defendant who shall then transfer the same to the plaintiff. The plaintiff shall also seek for orders restraining the 3<sup>rd</sup> defendant from carrying on any permanent developments on the said land forthwith. The plaintiff prays for judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for:-

- (a) An order that registration of land parcel Butsotso/Shikoti/14325 registered in 3<sup>rd</sup> defendant's names be cancelled and reverts into the name of the 2<sup>nd</sup> defendant.
- (b) 2<sup>nd</sup> defendant to transfer the said land parcel Butsotso/Shikoti/14325 into the plaintiff's names and in default deputy Registrar to sign all transfer documents.
- (c) The 2<sup>nd</sup> and 3<sup>rd</sup> defendant be restrained from interfering in any manner with the said land.
- (d) Costs of the suit.

The 1<sup>st</sup> defendant admits entering into a sale agreement with the plaintiff for sale of LAND PARCEL NO. BUTSOTSO/SHIKOTI/14029 to the plaintiff and admits receiving the purchase price from the plaintiff and states that there was an error in the agreement in that it was written as BUTSOTSO/SHIKOTI/2105 instead of BUTSOTSO/SHIKOTI/14029. The 1<sup>st</sup> defendant he is not party to the fraudulent acts of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as they transferred the land in the 3<sup>rd</sup> defendant's names without any knowledge of the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant was surprised to receive complaints from the plaintiff of the fraudulent registration.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants state that, they deny that the plaintiff purchased a portion of land from the defendant indicated on the agreement as Butsotso/Shikoti/2105 but actually known as Butsotso/Shikoti/14029 or at all, deny the alleged or any agreement between the and 2<sup>nd</sup>

defendants that the said parcel of land was to be sub-divided or a portion thereof directly transferred to the plaintiff or at all, deny that upon sub-division of Butso/Shikoti/14029 the portion the plaintiff allegedly purchased was designated as Butso/Shikoti/14325 measuring 0.09 Hectares or at all and deny that the 2<sup>nd</sup> defendant was to transfer the same to the plaintiff as stated or at all and the plaintiff will be put to strict proof of his allegations. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that neither the defendant nor the plaintiff has ever occupied or taken possession of or used the parcel of land designated as Butso/Shikoti/14325 and deny that the 2<sup>nd</sup> defendant fraudulently transferred the said land to the 3<sup>rd</sup> defendant and deny all the particulars of fraud. The 2<sup>nd</sup> defendant avers that vide an agreement made on 13<sup>th</sup> April, 1997 one Christiano Ramoya Karoli now deceased agreed to sell to the 1<sup>st</sup> defendant a portion out of land parcel No. Butso/Shikoti/2105 at a consideration of Ksh.42,000/= but in breach of their agreement the 1<sup>st</sup> defendant failed to pay the balance of the consideration, thereby rendering the agreement invalid. The 2<sup>nd</sup> defendant avers that the 1<sup>st</sup> defendant never occupied or took possession of or utilised the portion of land purchased and he and the deceased Christiano Ramoya Karoli never sought or obtained consent for sub-division or transfer of the portion of land aforesaid from the area Land Control Board within the period stipulated in the Land Control Act or at all thereby rendering the purported transaction illegal, unlawful, void, improper and unenforceable and the 1<sup>st</sup> defendant disappeared to-date.

The 2<sup>nd</sup> defendant further avers that she is not the personal representative or administratrix of the estate of the deceased Christiano Ramoya Karoli and as an administrator of the said deceased's estate is yet to be appointed neither she nor any other party has the Locus Standi to sue or be sued in respect of an agreement or transaction carried out by the said deceased and this suit is hence a non-starter, incurably defective, incompetent and untenable. Further and without prejudice the 2<sup>nd</sup> defendant avers that the deceased Christiano Ramoya Karoli was never registered as the owner of nor ever had any interest in land parcel No. Butso/Shikoti/14325 and this title was never the subject of the agreement between the 1<sup>st</sup> defendant and the deceased and or the plaintiff and there is clearly a misjoinder of parties and or causes of action.

The 2<sup>nd</sup> defendant maintains that she was the registered owner of land parcel No. Butso/Shikoti/14325 which was unencumbered and she occupied and utilized exclusively, openly, notoriously and peacefully until she sold and transferred the same to the 3<sup>rd</sup> defendant who took exclusive, open and peaceful occupation and possession thereof and has already developed the said portion of land by constructing permanent buildings thereon and she continues to occupy and possess the same as the owner having purchased and obtained transfer of the said title when it was clean. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that the plaintiff herein is a total stranger to them and to land parcel No. Butso/Shikoti/14325 and the 3<sup>rd</sup> defendant avers further that being a bonafide purchaser for value without notice and having taken exclusive possession of the land which she has developed openly and peacefully she has been wrongly and improperly enjoined to this suit which raises no triable issues or cause of action against either the 2<sup>nd</sup> or 3<sup>rd</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant pray that this honourable court be pleased to dismiss this suit with costs.

This court has carefully considered the evidence and the submissions in this matter. The plaintiff alleges that the land was fraudulently transferred by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant when she had knowledge that the said land had been sold by the 1<sup>st</sup> defendant to the plaintiff and that the 2<sup>nd</sup> defendant had been informed by the 1<sup>st</sup> defendant of the said sale and upon 2<sup>nd</sup> defendant carrying out succession process, she was meant as they had agreed to transfer the said land into the names of the plaintiff. The particulars of fraud are set out in paragraph 8 of the plaint.

The plaintiff herein testified and produced documents that is, the land sale agreement dated 8/1/2007 between him and the 1<sup>st</sup> defendant buying land parcel BUTSOTSO/SHIKOTI/2105 which was the original land parcel number by then before current sub-divisions. The plaintiff also averred in his testimony that the 1<sup>st</sup> defendant surrendered to him and he took possession of the said land together with a semi-permanent house that the 1<sup>st</sup> defendant had constructed on the said plot. He further produced in his evidence agreements that had been surrendered to him by the 1<sup>st</sup> defendant, indicating how first defendant purchased the land from one Christiano Ramoya who is deceased and was the husband to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant admits having sold the said land to the plaintiff.

What the plaintiff in effect seeks in his plaint is specific performance of two agreements, the first being the agreement made on 13<sup>th</sup> April 1997 between the deceased Christiano Ramoya Karoli and the 1<sup>st</sup> defendant in respect of sale of a portion of land parcel NO. BUTSOTSO/SHIKOTI/2105 and the second one made on 8<sup>th</sup> January 2007 between the plaintiff and the 1<sup>st</sup> defendant, again in respect of apportion out of L. R. NO. BUTSOTSO/SHIKOTI/2105. I wish to refer to the decision of Judge Maraga as he then was in the case of Reliable Electrical Engineers Ltd & another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), he held that;

*“the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”*

I find that the sale agreement in question is not a valid contract for the following reasons; first the agreements are in respect of land parcel NO. BUTSOTSO/SHIKOTI/2105. The plaintiff does not explain why he now claims land parcel NO. BUTSOTSO/SHIKOTI/14325 which was created from land parcel NO. BLITSOTSO/SHIKOTI/14029, a separate and distinct title. Furthermore, neither the deceased Christiano Ramoya Karolin or the 2<sup>nd</sup> defendant were the registered proprietors of L. R. NO. BUTSOTSO/SHIKOTI/14029. The plaintiff's evidence as per the mutation form for L. R. NO. BUTSOTSO/SHIKOTI/14029 indicates that the said parcel of land was owned by Edward Omwalo Halwenge and Nancy Wanjiru Gitau who had it sub-divided. These proprietors are not parties to this suit and no nexus has been established between the latter title and L. R. NO. BUTSOTSO/SHIKOTI/2105. Second, from the documents produced by the plaintiff, the defendant purchased a portion of land parcel NO. BUTSOTSO/SHIKOTI/2105 at a consideration of Ksh. 42,000/= out of which he paid Ksh. 40,000/= leaving a balance of Ksh. 2,000/-. No evidence has been adduced of the payment of this balance. The 1<sup>st</sup> defendant was thus in breach of their agreement with the deceased Christiano Ramoya Karoli. The plaintiff also confirmed that neither him nor the 1<sup>st</sup> defendant sought or obtained consent from the area Land Control Board within a period of six months from the dates of their agreements in respect of their controlled transactions in violation of Section 6 (2) of the Land Control Act, Cap 302 which was the governing law at the material time and even now. The agreement became void for all purposes including the purpose of specific performance as failure to obtain the necessary Land Control Board consent automatically

vitiated the agreement. This coupled with the fact that the 1<sup>st</sup> defendant breached his agreement with Christiano Ramoya Karoli by failing to pay the agreed purchase price rendered their contract illegal, null, void and unenforceable. No rights can flow therefore to the plaintiff.

Lastly, the suit parcel of land L. R. NO. BUTSOTSO/SHIKOTI/14325 was created from L. R.NO. BUTSOTSO/SHIKOTI/14029 which was the property of Edward Omwalo Halwenge and Nancy Wanjiru Gitau who sub-divided it and transferred the suit title to the 2<sup>nd</sup> defendant who then sold and transferred both ownership and possession thereof to the 3<sup>rd</sup> defendant. Prior to handing over possession of the suit land, the 2<sup>nd</sup> defendant testified that she is the one who had possession. The plaintiff confirmed that currently it is the 3<sup>rd</sup> defendant in possession of the suit land and she has even put up a permanent house thereon. There is no evidence of possession by the plaintiff. The 3<sup>rd</sup> defendant testified that she carried out a search at the Lands office of the suit title and upon confirming that there was no encumbrance and that it was clean, she purchased it from the 2<sup>nd</sup> defendant who then gave her possession. The plaintiff failed to carry out any due diligence by conducting a search or ascertaining the correct status as to ownership and possession of the suit land and in the process ended up paying the 1<sup>st</sup> defendant without even indicating what he was actually buying as regards description and acreage. I find that the 3<sup>rd</sup> defendant is an innocent purchaser for value and who has invested on the suit land by putting up a house.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted and I concur that, the plaintiff filed his suit on 11<sup>th</sup> October 2013, which was 16 years after the first agreement and 6 years and 9 months after the 2<sup>nd</sup> agreement. He did not seek or obtain leave to file his suit out of time which was in violation of section 4 (I) (a) of the Limitation of Actions Act. Cap 22 Laws of Kenya which prohibits the filing of any action founded on contract after expiry of a period of six years.

I find that the plaintiff has failed to prove his case on a balance of probabilities and he can go seek a refund of his money from the 1<sup>st</sup> defendant who purported to sell to the plaintiff land which he did not possess. I therefore dismiss this case with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**