



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL CASE NO.116 OF 2000**

**BENEDICT MUNIALO KHAOYA.....PLAINTIFF**

**VERSUS**

**GABRIEL MAHINDI WASIKE.....1<sup>ST</sup> DEFENDANT**

**ALBERT ONYAPITI EPARA.....2<sup>ND</sup> DEFENDANT**

**CONSOLATA AUMA OTINDA.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

By an amended Plaint dated 26<sup>th</sup> March 2003 and filed on 11<sup>th</sup> April 2004 the Plaintiff **BENEDICT MUNIALO KHAOYA**(deceased) who has now been substituted with his sons **DAVID WAFULA MUNIALO** and **ROGERS SIKUKU MUNIALO** sought judgment against the three defendants **GABRIEL MAHINDI WASIKE** (1<sup>st</sup> defendant deceased and now substituted with his son **ALI WANGILA**) **ALBERT ONYATITI EPARA** (2<sup>nd</sup> defendant) and **CONSOLATA AUMA OTINDI** (3<sup>rd</sup> defendant) in the following terms:

- 1. A declaration that the transfer of plot No. KIMILILI/KIMILILI/3126 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and it is subsequent combination with Plot No. KIMILILI/KIMILILI/3125 to create a new plot NO. KIMILILI/KIMILILI/3806 is null and void.**
- 2. An order specifically compelling the defendants to transfer land parcel NO. KIMILILI/KIMILILI/3126 to the Plaintiff and to relinquish any claims whatsoever thereto.**
- 3. Costs of this suit.**
- 4. Interest on (3) at the usual Court rates.**
- 5. Any other relief that this Honourable Court deems fit and just to grant.**

The basis of the claim was that at all material times, the 1<sup>st</sup> defendant was the owner of an un-developed plot of land known as KIMILILI/KIMILILI/1132 which he had pledged as security for a financial facility which he however failed to service and requested the Plaintiff to liquidate the facility for him which the Plaintiff obliged. The 1<sup>st</sup> defendant was again un-able to repay the Plaintiff and requested the Plaintiff to develop the Plot upon a promise that half of it would be ceded to him as consideration for the funds paid for the redemption of the Plot from the earlier lender and the amount spent on developing the plot. The Plaintiff again obliged and fully developed the plot with two shops and has retained one shop since 1992 which he let out to a tenant. However, when the Plaintiff requested the 1<sup>st</sup> defendant to sub-divide the plot and transfer one portion to him, the 1<sup>st</sup> defendant declined and instead sub-divided it into two portions being KIMILILI/KIMILILI/3125 and KIMILILI/KIMILILI/3126 the latter of which was to be the Plaintiff's portion but which the 1<sup>st</sup> defendant transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants with a view to defeating the Plaintiff's interest. Plot No. KIMILILI/KIMILILI/3126 was later combined with Plot No. KIMILILI/KIMILILI/3125 to create a new plot No. KIMILILI/KIMILILI/3806 which the defendants have now embarked on developing without regard to the Plaintiff's claim. It is the Plaintiff's case therefore that having performed his part of the bargain, he is the true owner of the portion No. KIMILILI/KIMILILI/3126 and its transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and its subsequent combination with Plot No. KIMILILI/KIMILILI/3125 to form Plot No. KIMILILI/KIMILILI/3806 was fraudulent and of no effect whatsoever and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are only holding it in trust for the Plaintiff and should be ordered to relinquish the title to him. The particulars of fraud are pleaded in paragraph 9 of the Plaint as follows:

- 1. Transferring the suit land when there is a subsisting caution.**

**2. Transferring the suit land when there is a pending suit in respect of it.**

**3. Transferring the suit land at no consideration.**

**4. Combining the same with No. 3125 to create 3806.**

The record shows that this suit was previously filed only against the 1<sup>st</sup> defendant on 10<sup>th</sup> August 2000 before the Plaintiff was amended following an application dated 26<sup>th</sup> March 2003 to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. However, there is no record to show that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed any defence after they were enjoined in the suit. What I have on record is only the 1<sup>st</sup> defendant's defence filed on 8<sup>th</sup> September 2000 in which he averred, inter alia, that he is the registered proprietor of Parcel No. KIMILILI/KIMILILI/3125 on which the Plaintiff is encroaching. He added that the Plaintiff cheated him to obtain a loan and refused to pay the same and so he (defendant) was forced to settle the debt from other sources. He also pleaded that there was another case at KIMILILI RM'S COURT being Case No.66 of 1999 and wondered why the Plaintiff had rushed to this Court over the same matter adding that the Plaintiff can only sue for monies which he can prove to have been used in the construction of the building. He urged the Court to dismiss the Plaintiff's case.

The suit commenced before **SERGON J** on 19<sup>th</sup> October 2005 when the Plaintiff testified in support of his claim. He told the Court that he knew all the defendants. That the 1<sup>st</sup> defendant was the registered proprietor of land parcel No. KIMILILI/KIMILILI/1132 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are a man and wife. He added that the 1<sup>st</sup> defendant had pledged the title to land parcel No. KIMILILI/KIMILILI/1132 at the Trade Office Bungoma for a loan which he however failed to service and approached the Plaintiff who agreed to re-pay the loan on condition that the land parcel No. KIMILILI/KIMILILI/1132 would be shared equally. The Plaintiff developed his portion of the land and when the land was subsequently divided into KIMILILI/KIMILILI/3125 and KIMILILI/KIMILILI/3126 it was agreed that the Plaintiff would retain the portion KIMILILI/KIMILILI/3126. However, the 1<sup>st</sup> defendant transferred that portion to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants yet the Plaintiff had placed a Caution on it which was ignored.

He called his witness **JOSHUA SIMIYU NJABI (PW2)** who testified that he bought a Plot No. KIMILILI/KIMILILI/1131 which is adjacent to the Plaintiff's land.

It is not clear from the record when the Plaintiff closed his case. What is clear is that the suit was subsequently handled by **N.R.O. OMBIJA J, WANJIRU KARANJA J** (as she then was), **MUCHEMI J, ONYANCHA J** and finally **MUKUNYA J**. It is also clear from the record that when both Mr. KHAKULA ADVOCATE for the Plaintiff and Mr. WACHANA ADVOCATE for the defendants appeared before **ONYANCHA J** on 23<sup>rd</sup> May 2011, it was agreed that what was remaining was the defendant's case. On 19<sup>th</sup> March 2018 when both Counsel appeared before **MUKUNYA J** for the defence case, the Judge, aware that this suit was quite old having been filed over 18 years ago, granted the defendants an adjournment upto 23<sup>rd</sup> April 2018 and directed further that all costs payable to the plaintiff be paid before 22<sup>nd</sup> April 2018 "**failing which the defence case shall close**". The suit did not proceed to hearing on the day but a consent date for hearing of the defendants Case was taken in the Registry for 25<sup>th</sup> June 2018.

When the Case came up before me on 25<sup>th</sup> June 2018, only the Plaintiff's Counsel and the 1<sup>st</sup> defendant attended Court. There was no appearance by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants or their Counsel. The 1<sup>st</sup> defendant informed the Court that he was ready to proceed with his case and since the defendants had been given the last adjournment, the Court allowed him to state his Case.

In his defence, the 1<sup>st</sup> defendant confirmed that his late father owned land parcel No. KIMILILI/KIMILILI/1132 which he was unable to develop and so he agreed with the Plaintiff to develop it and that the Plot would thereafter be shared equally with the Plaintiff retaining one portion and the 1<sup>st</sup> defendant's late father the other portion. However, in 1998, his late father sold the Plaintiff's portion to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant against the wish of the 1<sup>st</sup> defendant.

As the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not attend Court for hearing, the Court marked their defence as closed and fixed judgement for 19<sup>th</sup> July 2018.

I have considered the Plaintiff's evidence in support of his claim and the 1<sup>st</sup> defendant's defence. I have also perused the documentary exhibits in this case. It is clear from the title deed in respect to the land parcel No. KIMILILI/KIMILILI/3806 that the same was registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 28<sup>th</sup> March 2002 and a title deed was issued in their joint names. The said title deed is among the copies of documents annexed to the replying affidavit of the 3<sup>rd</sup> defendant filed in response to the Plaintiff's application for injunction dated 28<sup>th</sup> February 2002. In view of the age of this suit, many of the documentary exhibits are either misplaced or torn. The Plaintiff's Case, which is not rebutted and is in fact substantially supported by the 1<sup>st</sup> defendant, is that the land parcel No. KIMILILI/KIMILILI/3806 arose out of a combination of land Parcel No. KIMILILI/KIMILILI/3125 and KIMILILI/KIMILILI/3126 which was done fraudulently because the plaintiff had in fact placed a restriction on land parcel No. KIMILILI/KIMILILI/3125 on 17<sup>th</sup> April 2001 which was however removed on the basis of a letter of a chief.

That evidence was not rebutted and it is un-clear how a Chief could order the removal of a restriction placed by the land without the involvement of the Plaintiff. That is clear evidence of fraud.

There is also un-controverted evidence by the Plaintiff that the 1<sup>st</sup> defendant had agreed to surrender to him land Parcel No. KIMILILI/KIMILILI/3126. This was in appreciation of the fact that the Plaintiff had not only redeemed the original land parcel No. KIMILILI/KIMILILI/1132 from financiers but had also developed it by putting up two shops thereon. By failing to keep his part of bargain, the 1<sup>st</sup> defendant was un-justly enriching himself. It will not be equitable for this Court to look aside while the 1<sup>st</sup> defendant transfers to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' property that has been developed by the Plaintiff on the understanding that it would be transferred to him. This is

both a Court of Law and Equity. Equity frowns upon un-just enrichment. That is precisely what the 1<sup>st</sup> defendant set to achieve by transferring the land parcel No. KIMILILI/KIMILILI/3126.

The Plaintiff has sought an order of specific performance to compel the defendants to transfer land parcel No. KIMILILI/KIMILILI/3126 to him and to relinquish any claim thereto. The un-controverted evidence by the Plaintiff is that the 1<sup>st</sup> defendant agreed to sub-divide land parcel No. KIMILILI/KIMILILI/1132 into two portions and give him one. This agreement was made before the Assistant Chief. This is what the Plaintiff told the Court in his evidence in chief:

**“On 13.4.94, I and GABRIEL appeared before the Assistant Chief and entered into an agreement in which the plot was split into half-half. I have a copy of the agreement which I wish to produce as an exhibit in evidence. The same is produced as PEX.3”.**

As I have indicated above, some of the documentary exhibits are missing from the file either due to the age of the case, or even mischief. I however traced what must be the agreement in question between the Plaintiff and 1<sup>st</sup> defendant and it needs as far as is relevant that:

**“The plot mentioned has been sub-divided into two portions on one title deed in that the proprietor Mr. GABRIEL MAHINDI has given Mr. BENEDICT MUNIALO 16X100 ft and the remaining 16X100ft to the owner. Agreement is done before me as witness.”**

The agreement is signed both by the Plaintiff and the 1<sup>st</sup> defendant and counter-signed by PATRICK MULAT the SENIOR ASSISTANT CHIEF. And although that agreement is not dated, it is clear from the list of exhibits which is available on the file that it was the only agreement produced by the Plaintiff in support of his Case. In any event, the evidence remains un-controverted and was infact supported by the 1<sup>st</sup> defendant's own son **ALI WANGILA (DW1)** who said as follows under cross examination by Mr. KHAKULA:

**“It is true that my late father agreed to give a portion of the land to the plaintiff. The parcel No. KIMILILI/KIMILILI/1132 was later sub-divided into KIMILILI/KIMILILI/3125 and 3126. When my father sub-divided the land parcel No. KIMILILI/KIMILILI/1132 into two portions KIMILILI/KIMILILI/3125 and 3126, his intention was to give one portion to the Plaintiff to compensate him for what he had done for my father. So the Plaintiff is in order to ask the defendants to give him parcel No. KIMILILI/KIMILILI/3126.”**

The agreement referred to above was entered into, by the Plaintiffs evidence, on 13<sup>th</sup> April 1994. By then, the Law of contract was yet to be amended and Section 3(3) thereof allowed even an oral contract so long as the purchaser had gone into occupation of the land in question. Prior to the amendment of **Section 3(3) of the Law of Contract Act in 2003**, it read as follow:

**“No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;**

**Provided that such a suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who has performed or is willing to perform his part of a contract -**

**I) Has in part performance of the contract taken possession of the property or any part thereof; or**

**II) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract”**

The agreement referred to above was clearly sufficient to dispose of the land parcel No. KIMILILI/KIMILILI/3126 in favour of the Plaintiff as it was duly signed by the 1<sup>st</sup> defendant. He could therefore not run away from it and it was a clear Case of fraud when he transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Both Section 143 of the repealed Registered Land Act which was the Law then applicable, and Section 80 of the new Land Registration Act empowers this Court to cancel any registration obtained through fraud and it is clear in the circumstances of this Case that all the defendants had knowledge of the fraudulent transfer of the land parcel No. KIMILILI/KIMILILI/3126 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who cannot be innocent purchasers for valuable consideration. The plaintiff is therefore entitled to judgement as prayed for in the plaint.

The issue of costs as against the 1<sup>st</sup> defendant has engaged my thoughts considerably. The prime mover of this fraud was un-doubtedly the 1<sup>st</sup> defendant GABRIEL MAHINDI WASIKE now deceased and substituted with his son ALI WANGILA who is his testimony substantially supported the Plaintiff's Case. Although costs follow the event, it is my view that in the circumstances of this case, the interests of justice will best be served if ALI WANGILA is not penalized with an order to pay the Plaintiff's costs. An order for costs against him will, in my view, be harsh considering his role in these proceedings. There is good reason therefore to make that order with regard to costs.

Ultimately therefore and having considered all the evidence herein, I enter judgement for the Plaintiff against the defendants in the following terms:

**1. A declaration that the transfer of parcel No. KIMILILI/KIMILILI/3126 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and it is subsequent combination with parcel No. KIMILILI/KIMILILI/3125 to create a new parcel No. KIMILILI/KIMILILI/3806 was null and void.**

2. An Order specifically compelling the 2<sup>nd</sup> & 3<sup>rd</sup> defendants to transfer parcel No. KIMILILI/KIMILILI/3126 to the Plaintiff and to relinquish any claim whatsoever thereto.

3. Should any of the defendants fail to execute the transfer documents upon being served with the decree herein, the Deputy Registrar of this Court shall be at liberty to sign the same on behalf of the defendants and the Land Registrar shall transfer the same.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall meet the plaintiff's costs of this suit with interest.

**BOAZ N. OLAO**

**JUDGE**

**19<sup>TH</sup> JULY 2018**

Judgement dated, delivered and signed in open Court this 19<sup>th</sup> day of July 2018 at Bungoma.

Ms. Lunani for Mr. Khakula for Plaintiff present

No appearance by the Defendant

**BOAZ N. OLAO**

**JUDGE**

**19<sup>TH</sup> JULY 2018**