



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**ELC NO. 37 OF 2015**

**CHESHIRE FREIGHT LTD.....PLAINTIFF**

**VERSUS**

**LENOX OYUGA ANYANGO.....DEFENDANT**

**JUDGMENT**

By a plaint dated 10<sup>th</sup> February 2015 the plaintiff herein sued the defendant seeking for the following orders:-

- a) A declaration that registration of the defendant on land parcel No. KISUMU/KANYAKWAR 'B'/341 was fraudulent and therefore null and void and that the plaintiff is the rightful purchaser of the subject land and should be registered as such.
- b) An order directing the County Land Registrar Kisumu to rectify the register by cancelling the name of the defendant from the register in respect to land parcel No. KISUMU/KANYAKWAR 'B'/341 and substitute the same with that of the plaintiff upon payment of the requisite charges.
- c) A permanent injunction against the defendant restricting him, either by himself or through his agents, employees, children, brothers, sisters, wife or any other person deriving authority from him from entering, occupying, working on, claiming ownership or in any other way or manner interfering with the plaintiff's quiet ownership occupation and or possession of the subject land.
- d) An order that NICODEMUS ATITO ARODI do execute the transfer forms, application for consent of the Land Control Board and avail all the necessary documents to enable the plaintiff transfer the subject land into its name or in the alternative the Deputy Registrar do execute the said transfer instruments for purposes of transfer and order that the defendant do surrender back the title deed in respect of the subject land to the Registrar within a period of 30 days failure of which the same be deemed as cancelled.
- e) Costs of the suit.

The defendant was served with summons to enter appearance but only filed a notice of appointment of Advocates but never filed a defence. The matter therefore proceeded by way of formal proof.

The plaintiff gave evidence through its director John Ochieng Onyango who adopted his statement as his evidence before the court. PW 1 stated that on 1<sup>st</sup> June 2012 the plaintiff company entered into a sale agreement with one NICODEMUS ATITO ARODI for purchase of land parcel No. KISUMU/KANYAKWAR 'B'/341 for a consideration of Kshs. 432,000/ which amount was paid in full and the plaintiff took possession of the suit land.

It was further PW1's evidence that on 12<sup>th</sup> November 2012 the defendant fraudulently caused the suit land to be transferred and registered in the name of the defendant who subsequently obtained the title deed without the authority and consent of the plaintiff.

The plaintiff also stated that the said transfer was illegal and has denied it its legal right to enjoy, own and use the subject parcel.

PW2 NICODEMUS ATITO ARODI adopted his witness statement and reiterated the evidence of PW1 on the transaction that they entered into for the sale of the suit land. He stated that the plaintiff paid the full purchase price and took occupation of the suit land. It was also his evidence that he executed the transfer documents in favour of the plaintiff and not the defendant and therefore the transfer and registration of the suit land in the name of the defendant is fraudulent.

PW2 also confirmed that he knew the defendant who was at one time managing his properties and that he had given him the documents to register the transfer in favour of the plaintiff but he fraudulently registered in his name. The plaintiff therefore closed his case.

## **Analysis and determination**

The issues for determination in this case are who the rightful owner of the suit land is and whether the defendant fraudulently and unprocedurally registered the suit land in his name. The other issue is as to whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff gave evidence through PW1 a director of the plaintiff company and produced exhibits in support of his case which was uncontroverted. The plaintiff further gave particulars of fraud in his pleadings and led evidence to prove that the defendant fraudulently transferred and registered the suit land in his name after being entrusted with the documents by PW2 who gave evidence before the court.

It is trite law that particulars of fraud must be specifically pleaded and strictly proved by the person who alleges it. The evidence of PW2 reinforced the plaintiff's claim that the defendant had illegally and fraudulently transferred the suit land in his name without authority or consent. The defendant breached the trust that PW2 had bestowed upon him to process the registration in the plaintiff's name.

Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendant irregularly, fraudulently and unprocedurally registered the suit land in his name and the same should not be allowed to stand.

I have considered the evidence on record, the documents produced in support of the case together with the judicial authorities and I find that the plaintiff have proved its case on a balance of probabilities as required by law and enter judgment in their favour as prayed in the plaint and make the following orders:

- a) A declaration is hereby issued that registration of the defendant on land parcel No. KISUMU/KANYAKWAR 'B'/341 was fraudulent and therefore null and void and that the plaintiff is the rightful purchaser of the subject land and should be registered as such.
- b) An order is hereby issued directing the County Land Registrar Kisumu to rectify the register by cancelling the name of the defendant from the register in respect to land parcel No. KISUMU/KANYAKWAR 'B'/341 and substitute the same with that of the plaintiff upon payment of the requisite charges.
- c) A permanent injunction is hereby issued against the defendant restricting him, either by himself or through his agents, employees, children, brothers, sisters, wife or any other person deriving authority from him from entering, occupying, working on, claiming ownership or in any other way or manner interfering with the plaintiff's quiet ownership occupation and or possession of the subject land.
- d) An order is hereby issued that NICODEMUS ATITO ARODI executes the transfer forms, application for consent of the Land Control Board and avail all the necessary documents to enable the plaintiff transfer the subject land into its name or in the alternative the Deputy Registrar do execute the said transfer instruments for purposes of transfer and that the defendant surrenders back the title deed in respect of the subject land to the Registrar within a period of 30 days failure of which the same be deemed as cancelled.
- e) Defendant to pay costs of the suit.

**DATED and DELIVERED** at KISUMU this 6<sup>TH</sup> DAY OF **DECEMBER, 2018.**

**M. A. ODENY**

**JUDGE**

**JUDGMENT READ, and SIGNED** in open court in the presence of :-

Mr. Omondi holding brief for Ken Omollo for Plaintiff, Court assistant Joanne and in the absence of the defendant.

**M. A. ODENY**

**JUDGE**