



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 71 OF 2014**

**ONDIEKI OKIRIGITI .....PLAINTIFF**

**=VERSUS=**

**CHRISTINE NAFULA WEPUKHULU .....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. The Defendant is currently registered as owner of **LR No. Kitale Municipality Block 2/Tuwan/4473 (suit land)**. The Plaintiff brought this suit against the Defendant seeking an order that the Land Registrar Trans-Nzoia County do rectify the register in respect of the suit land by de-registering the defendant and replacing the same with the Plaintiff's name.

2. The suit land is among many plots which were owned by Tuwan Farm Company Limited (The Company). The Company had sub-divided the land and given it to its shareholders. The shareholders of the company were allocated plots before formal registration and each shareholder was at liberty to sell their plots even before titles were processed.

**PLAINTIFF'S CASE**

3. The Plaintiff testified that on 4<sup>th</sup> April 2008, he bought an unsurveyed plot from one of the shareholders of the company known as John Kipsongok Lelei, at a consideration of **Kshs.280,000/=**. The plot was known as **Plot No. 1473**. When formal survey was carried out, it turned out that the plot was less than it had been anticipated.

4. The vendor *John Songok Arap Lelei* who was by then unwell authorized his daughter *Hellen Chesang Kipsongok* to enter into a fresh agreement with the plaintiff. This effectively reduced the consideration which was now **Kshs.190,000/=**. The Plaintiff was refunded the difference.

5. When the Plaintiff wanted to process title, he learnt that the husband of the defendant **Andrew Wanjala Masibo** (deceased) was also in the process of processing title documents for the same land. He (Plaintiff) went to the vendor who assured him that he had not sold the suit land to the deceased. The vendor told him that he sold **plot No. 1472** to the deceased.

6. The vendor and the plaintiff then went before the Chief of Tuwan Location where the property is situated. They lodged a complaint against the deceased. The chief summoned the deceased who allegedly admitted that he had irregularly caused documents pertaining to the suit land to appear in his names. He agreed to surrender the suit land to the plaintiff. A surrender agreement was prepared before the Chief but after the deceased consulted the defendants who was present, the deceased and the defendant declined to

sign the agreement.

7. The deceased died on 25<sup>th</sup> June 2011. The defendant has since had the suit land registered in her name. It is the Plaintiffs contention that the registration of the suit land in the defendant's name was fraudulently done hence the plea that the registration be cancelled.

### **DEFENDANT'S CASE**

8. The defendant testified that she was lawfully married to the deceased who had purchased the suit land from John Kipsongok Arap Lelei on 25<sup>th</sup> February 2007. The deceased was duly issued with a share certificate by the company. When the deceased died, she went to the company where documents pertaining to the suit land were changed into her name. She thereafter paid survey fees after which she processed title to the suit land which she obtained on 3<sup>rd</sup> April 2012 . She denied the allegations by the plaintiff that she fraudulently registered the suit land in her name.

### **ANALYSIS OF EVIDENCE ,ISSUES FOR DETERMINATION AND THE LAW.**

9. I have gone through the evidence adduced by the Plaintiff and the defendant and their respective witnesses. I have also gone through the submissions filed as well as the pleadings. The following are the issues for determination.

- 1) *Who between the plaintiff and the deceased bought the suit land?*
- 2) *Was there any fraud involved in the registration of the suit land in the name of the defendant?.*
- 3) *Which appropriate orders should be made as regards the plaintiff's prayers?*
- 4) *Which Order should be made on costs.*

*Who between the Plaintiff and the deceased purchased the suit land?.*

10. The Plaintiff contends that he is the one who bought the suit land from **John Kipsongok Arap Lelei** . The Defendant also contends that it is her deceased husband who bought the suit land from the same person. The plaintiff stated that he bought the suit land on 4<sup>th</sup> April 2008. An agreement was produced as exhibit 1. This agreement was later cancelled by the one dated 1<sup>st</sup> July 2008 produced as exhibit 2 . The explanation for the second agreement was given that the plot was found to be smaller than had expected. This second agreement was made between the Plaintiff and the daughter by **John Kipsongok Arap Lelei** . Mr Lelei later endorsed this second agreement and confirmed that his daughter had his authority to enter into it as he was unwell.

11. Both **John Kipsongok** and his daughter **Hellen Chasang Kipsongok** were called as witnesses for the Plaintiff. **John Lelei** denied ever selling the suit land to the deceased. He was categorical that he sold plot 4472 to the deceased. Though the defendant did not want to talk about plot no. 1472, documents which she presented to Court shows that among the plots which were owned by the deceased was plot No. 4472. The defendant also presented to court an original agreement dated 12<sup>th</sup> April 2001, in regard of plot No. 1472. This agreement though not produced or filed as one of the documents of the plaintiff, it shows that her deceased husband bought plot **1472** from **John Songok** at a consideration of **Kshs.50,000/=** .

12. The defendant on the other hand produced an agreement { Defence exhibit 3} dated 25<sup>th</sup> February 2007, in which it is shown that the deceased bought plot No. 4473 from **John Kipsongok** at a consideration of **Kshs. 75,000/=**. A clear observation of this agreement clearly shows that the plot number was inserted later using a different pen with quite different ink from the pen used in the rest of the agreement. It is also important to note that all the witnesses to this agreement were from the side of the deceased and one of the witnesses was the defendant herself.

13. This agreement of 25<sup>th</sup> February 2007, was never put to **John Kipsongok Lelei** to either confirm or deny its authenticity. In a case where both parties are contending that they bought one piece of land from the same person, it was obvious that any document purporting to have been signed by him ought to have been put to him to confirm or deny the same. This was not done and it speaks volumes why this was not done when the defendant was represented by an able lawyer.

14. When a dispute arose as to the ownership of the suit land, the seller that is **John Lelei** and the plaintiff went before the Chief of Tuwan Location who summoned the deceased who came along with his wife. This chief was called as a witness to the plaintiff and she confirmed that she had lengthy meetings with the concerned parties where the deceased conceded that he had irregularly had the suit land documents registered in his name. A surrender agreement (Exhibit 8) was drafted by the chief for signature by all the parties. The deceased who had initially committed herself to sign it changed his mind after he consulted the defendant who was his wife.

15. I carefully listened to the evidence of the Plaintiff, **John Kipsongok Lelei, Hellen Chasang Kipsongok** and **Monica Beatrice Mukuba** and formed an opinion that they were speaking the truth. The Chief had no reason to give false testimony. The disputants were all her subjects and there was no suggestion that she may have been biased. On the other hand, I found the evidence of the defendant and her witness to be doubtful as will be demonstrated when I deal with the second issue. I therefore find that it is the plaintiff who purchased the suit land.

Was there any fraud involved in the registration of the suit land in the name of the defendant?

16. I am aware that allegations of fraud are serious and that particulars of fraud have to be given and proved and that proof of fraud is beyond a balance of probabilities but not beyond reasonable doubt. In the instant case, the particulars of fraud were particularized in the Plaintiff. I have examined the documents produced herein vis –a vis the evidence and I have no doubt that the suit land was fraudulently registered in the name of the defendant.

17. The defendant was determined to have the suit land registered in her names even before the deceased died. The postal address of Tuwan Farm Limited has always been Box 718 Kitale. It is also common knowledge that a limited liability company which has no branches elsewhere as in the case of Tuwan Farm Limited, it should only have one postal address. A look at defence exhibit 8 shows that the stamp of Tuwan Farm Limited shows the postal address as 3944 Kitale. This stamp and address only appears on documents obtained by the defendant in her bid to have herself registered as owner of the suit land.

18. Defence exhibit 8 is titled “Transfer of **plot No.s 4473, 4472, 4011 and 1766**. The transfer is dated 10<sup>th</sup> November 2011. This transfer is expressed to be between **Andrew Wanjala Masibo** the defendant. It was purportedly witnessed by four directors of Tuwan Farm Limited. There was even a receipt issued on the same date. In these two documents, the postal address of Tuwan Farm is given as **3944 Kitale**. In the transfer documents, plot No. 4473 which is the suit land is inserted using a different pen with different ink. It is also important to note that as at the time **Andrew Masibo** was transferring the said plots to the defendant, he had already died. **Andrew Masibo** died on **25<sup>th</sup> June 2011**. There is no way a deceased person would transfer his plots. This clearly shows that these documents were forgeries.

19. Some of the persons who witnessed the alleged transfer recorded statements which were filed in court. None of those persons came to testify. Instead the defendant brought in someone else who had not recorded a statement and he is the one who testified in her favour. Surprisingly, this witness is the same person who is alleged to have witnessed the agreement between the deceased and **John Kipsongok Lelei** which agreement is a clear forgery.

20. There is also a plot certificate in the defendant’s list of documents which was not produced but is in the court file. The certificate purports to be from Tuwan Farm Limited and the postal address is given as **3944**. It has no date but is said to have been issued on *Friday November 2011*. This is one of the documents which shows that the defendant irregularly and fraudulently had herself registered as owner of the suit land.

21. There is also a transfer in her list of documents dated 30<sup>th</sup> May 2012, but lodged for registration in *April 2012*. The transfer is from Tuwan Farm Limited to the defendant. This transfer is dated even before the alleged purchase of the suit land died. This confirms that the defendant was intent on having the suit land registered in her name by *hook or crook*.

22. There is also another document in the defendant's list of documents dated **16<sup>th</sup> February 2012**. The stamp bears the postal address as 3944. This document lists **plot Nos. 1766,4473** and **4011** as belonging to the defendant. The list has conveniently omitted plot 1472 which is the one that the deceased bought from **John Kipsongok Lelei**.

23. The Plaintiff adduced evidence to show that the suit land was never sold to the deceased. It has been demonstrated that the documents presented for registration were suspect. The property in question allegedly belonged to the deceased. There was no succession carried out. This notwithstanding, the defendant had it registered in her name. I therefore find that the suit land was fraudulently registered in the name of the defendant.

### **DECISION.**

24. Having found that the deceased did not purchase the suit land and having found that the registration of the suit land in the name of the defendant was fraudulent, I find that the plaintiff has proved his case to the required standards. I order that the Land Registrar Trans-Nzoia County do cancel the registration in favour of the defendant in **LR No. Kitale Municipality Block 1/Tuwan 4473** and replace the same with the name of the plaintiff. The defendant shall pay the costs of this suit to the plaintiff.

Signed at **Nairobi**.

**E.O.OBAGA**

**JUDGE**

Dated, and delivered at **Kitale** on this **6<sup>th</sup>** day of **March 2017**.

**F. M. NJOROGE**

**JUDGE**

In the presence of :-

M/s Wanyama for Mr Onyancha for Plaintiff

Mr Bisonga for the Defendant

Court Assistant : Isabella

**F. M. NJOROGE**

**JUDGE**