



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 252 OF 2008**

**WILFRED JOSA & ANOTHER.....PLAINTIFF**

**-VERSUS-**

**GEORGE PATRICK & ANOTHER.....DEFENDANT**

**JUDGEMENT**

1. The two plaintiffs who are a couple filed the suit against the three defendants George Patrick Mwashigadi, Stephen Muchora Kagure & the Commissioner of Lands vide their plaint dated 22<sup>nd</sup> September 2008. The plaintiffs sought for judgement against the defendants jointly and severally for an order of:

- a. A permanent injunction to issue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants restraining them either by themselves, their servants employees, agents and/or whomsoever from trespassing, continuing to trespass, constructing, offering for sale, selling and/or in any other manner dealing with all that parcel of land measuring 0.1496 hectares more specifically referred to as Certificate of Registration CR. 32577, Plot Number 1956/726 Voi Municipality.
- b. A mandatory injunction to issue against the 2<sup>nd</sup> defendant compelling him to demolish all the construction works illegally undertaken on the plaintiffs' parcel of land measuring 0.1496 hectares more specifically referred to as Certificate of Registration CR. 32577, Plot Number 1956/726 Voi Municipality.
- c. A declaration that the plaintiffs are the lawful owners/proprietors of the parcel of land more specifically known as CR. 32577, Plot Number 1956/726 Voi Municipality and the transfer by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent and unlawful and that the same be revoked, rescinded, vacated, and/or set aside and that the 1<sup>st</sup> defendant do effect specific performance of the contract of sale of the said land to the plaintiffs.
- d. The 3<sup>rd</sup> defendant does effect the revocation and/or rescission of the provisional certificate of title and the transfer of title by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.
- e. General damages for trespass and breach of contract.
- f. Costs of and incidental to this suit.
- g. Any further relief this Honourable Court may deem fit.

2. The plaintiffs claim as contained in the plaint is that the 1<sup>st</sup> defendant was the registered owner of the lease hold interest in the certificate of title No 1956/726 Voi Municipality. The 1<sup>st</sup> defendant sold this land to them on 17<sup>th</sup> November 1999 which sale was reduced into writing for a consideration of Kshs 200,000= . The plaintiff paid a deposit of Kshs 180,000 and the balance was to be paid upon the 1<sup>st</sup> defendant paying all outstanding land rates & rents. Instead the 1<sup>st</sup> defendant sold the said parcel to the 2<sup>nd</sup> defendant and transferred the suitland to him. The plaintiffs accuse the 1<sup>st</sup> & 2<sup>nd</sup> defendants of fraud as particularized in paragraph 8 of the plaint hence the need for the orders sought to be granted.

3. Together with their pleadings, they also filed several documents inter alia copies of bankers cheque in favour of 1<sup>st</sup> defendant for the sum of Kshs 180000; fixed deposit slips for sums of monies saved under their name; statement of 1<sup>st</sup> defendant acknowledging receipt of the Kshs 180,000= & referred to as the sale agreement and the 1<sup>st</sup> defendant's statement to the police; Police investigations Diary dated 27.7.2005 reporting loss of title and photographs of a house under construction said to belong to the 2<sup>nd</sup> defendant.

4. The suit was defended by the 2<sup>nd</sup> defendant only. He filed his statement of defence on 14<sup>th</sup> October 2008 which was later amended on 23<sup>rd</sup> March 2011. The 2<sup>nd</sup> defendant denied in totality the plaintiffs' claim and counter – claimed that he paid for the whole consideration as required by the 1<sup>st</sup> defendant and obtained title in his name on 7<sup>th</sup> February 2006. That subsequently he took possession and started construction works on the suit property. He prayed for judgement in his counter-claim against the plaintiffs for:

**a. A declaration that he is the lawful owner of the suit property.**

**b. An order that the plaintiffs do pay him rent at the rate of Kshs 54000 per month from 22.9.06 until the determination of this suit.**

**c. A permanent injunction restraining the plaintiffs from interfering with the suit land.**

**d. Interest on (a) – (c) from 22.9.06.**

**e. Costs of the suit**

The defendant also filed two sets of lists of documents to support his case. The 1<sup>st</sup> was filed on 4<sup>th</sup> July 2012 and the further list filed on 7<sup>th</sup> September 2012.

5. The hearing commenced before Mukunya J on 31<sup>st</sup> July 2013. Mr Wilfred Josai Mkosi testified as PW 1. He stated that he comes from Taita Taveta and is a librarian. That the 1<sup>st</sup> defendant was his friend and he sold to him the suit property vide the sale agreement produced as Pex 1 and deposit paid vide the cheque produced as Pex 3. The witness said on payment, he was handed the original title deed which he produced as Pex 5. The witness continued that the transfer was not done. Instead the 1<sup>st</sup> defendant disappeared after receiving the money. In 2008 when PW 1 visited the land, he found a heap of sand & ballast and he took photographs which he produced as Pex 7. He reported the matter to Voi Police Station.

6. This witness averred that the 1<sup>st</sup> defendant was summoned by the police but he did not appear. The workers on the sight directed him to a chemist owned by the 2<sup>nd</sup> defendant. He learnt that the 2<sup>nd</sup> defendant had reported loss of the title deed he was holding on 27<sup>th</sup> July 2005. The witness produced the police abstract of lost title as Pex 9, statutory affidavit as Pex 10 and a copy of the provisional title as Pex 11. The plaintiff said because the 2<sup>nd</sup> defendant reported the loss of title before becoming registered owner proves the collusion between the 1<sup>st</sup> & 2<sup>nd</sup> defendant. That both defendants were charged with a criminal case of inter alia giving false information to the police (Pex 15 & 16). That the plaintiffs

obtained injunctive orders in this file for which the 2<sup>nd</sup> defendant was punished of disobeying. PW1 contends the 2<sup>nd</sup> defendant's structures were built during the subsistence of this case. He denies the 2<sup>nd</sup> defendant is a bona fide purchaser. He asked the Court to grant them the orders as per the plaint and the 2<sup>nd</sup> defendant be directed to demolish his structures.

7. On cross – examination PW 1 identified the agreement which he said was in his own handwriting. That the 1<sup>st</sup> defendant signed it on 24<sup>th</sup> November 1999. That the price of the land was not indicated in the agreement but it was 200,000/=. PW 1 did not find out whether rents and rates were subsequently paid. That the document between them & the 1<sup>st</sup> defendant was never registered nor did he restrict the title. PW 1 said he did not do any development on the suit land. That he obtained from the O. B document after he wrote to the police. That the 2<sup>nd</sup> defendant was acquitted of the criminal charges. He still holds the view that the 2<sup>nd</sup> defendant is guilty of the fraud. He was aware there was a transfer in favour of the 2<sup>nd</sup> defendant which he produced as Pex 13. That the building was 2 feet from the ground when he served the Court order. That the 1<sup>st</sup> defendant offered him something different but which he refused.

8. PW 2 testified much later. He is No 57354 Police Inspector SAMUEL MALINGE CHIWAI from Voi Police Station. He told Court that he was two weeks old at the police station. He searched for the OB No 17 of 27.7.2005 but was unable to find it as it is not in their archives. On cross – examination he said that an OB is a big book. That he was not in Voi Police Station in 2005 when the report was made. That he also did not find the investigations diary as it is also contained in that book. The plaintiffs closed their case.

9. The 2<sup>nd</sup> defendant also gave his evidence. He said the suit plot belongs to him after he bought it from the 1<sup>st</sup> defendant in September 2005. That he was introduced to the 1<sup>st</sup> defendant by Wanjiru Wachira who is a broker. He produced a sale agreement dated 15<sup>th</sup> December 2005 as Dex 1 for purchase price of Kshs 286000 prepared at the offices of Nyasae & Associates Advocates. That he paid Kshs 30000 as initial deposit and later cleared the balance when the 1<sup>st</sup> defendant brought him the title on 31<sup>st</sup> January 2006. DW 1 testified that 1<sup>st</sup> defendant told him the original title got lost when he was moving house. That the plot was bushy and undeveloped when he was taken to see it.

10. DW 1 continued that he started working on the plot towards the end of 2006. He produced receipts for transfer and registration as Dex 4(a) – (c) and the title deed reading his name as Dex 5. He also produced notices advertising loss of the original title as Dex 6 (a) & (b) and consent to transfer the land as Dex 7 (a) & (b). The clearance certificate was produced as Dex 8. DW 1 stated further that when his money became less, he applied for a loan with KCB and produced loan documents as Dex 9 (a) – (b). He denied making any report of lost title. He was summoned by the police and later charged with giving false information but he was acquitted because the police officer who received the report said he did not know him.

11. DW 1 said he was not privy to any arrangements between the 1<sup>st</sup> defendant and the plaintiffs. He did not know the plaintiffs before this case. The witness said he has built on the plot with 9 units each to fetch about Kshs 6000 giving a total of Kshs 54000 per month. He produced a valuation reported dated 11<sup>th</sup> May 2010 and that the units were to be ready in January 2009. He does not receive any money from the place yet he pays watchman and electricity. He urged the Court to grant the orders as contained in his counter – claim.

12. Put to cross – examination, DW 1 denied use of any fraudulent means to acquire the land as he paid for the purchase price. He denied making any report to Voi Police Station in regard to loss of title. That on 27<sup>th</sup> July 2005, the title deed was not in his name as the transfer to himself was done on 7<sup>th</sup> February 2006. That when he was shown the plot, it was vacant and no building materials had been deposited there. He only became aware of the plaintiffs interest after being served with the summons to enter appearance. He denied being served with any order in 2008. That from 24.2.2009 when he was served with the order no one returned there except the watchman. He is asking for rent from the person who

placed the order. He admitted taking a loan to complete the building. That if the premises were occupied he would be receiving rent of Kshs 54000 per month. The defendant also closed his case with this evidence.

13. Parties asked for time to file submissions. The Court directed them to file within 21 days each from 9.2.2017. However none was filed as at 25.5.2017 when judgement was first scheduled. I will therefore proceed to write my determination on the basis of evidence tendered before the Court. From the evidence on record, the plaintiffs did pay for the suit land a sum of Kshs 180,000= leaving some balance. This balance PW 1 said was to be paid once the 1<sup>st</sup> defendant paid all the outstanding rents and rates. In the documents produced by the plaintiffs, it seems timelines were not set when this was to be done or how much rents/rates were due. This is what their agreement stated, ***“Any balance thereof shall be paid at the time of transfer of the title deed and also after ensuring all rates and rents are fully paid by myself.”***

14. The plaintiffs were also not given any signed transfer by the 1<sup>st</sup> defendant. PW 1 said that they were friends with the 1<sup>st</sup> defendant but after he was paid the money, he disappeared without a trace. The evidence of PW 1 does not suggest that they took possession of the land. They also did not register a restriction on the title. The 1<sup>st</sup> defendant later turned around and sold the same land to the 2<sup>nd</sup> defendant. The plaintiffs pleaded the particulars of fraud as; *reporting that the title deed was lost when the defendants knew he had been given the original title.* The 2<sup>nd</sup> defendant was charged with giving false information but was acquitted after the police who received the report confirmed to the Court during the trial in criminal case that he had never seen the 2<sup>nd</sup> defendant before (Pex 16). Further all the documents prepared to replace the ***“lost”*** title were all in the name of the 1<sup>st</sup> defendant (pex 9, 10, 11).

15. The 2<sup>nd</sup> defendant told this Court that he was not aware the land had been sold to the plaintiffs. That before he entered into the contract of sale, he was shown the land which was in vacant state. The 2<sup>nd</sup> defendant said he had not known the 1<sup>st</sup> defendant before this transaction. When he did a search, the records showed that the land was registered in the name of the 1<sup>st</sup> defendant. He also stated that the 1<sup>st</sup> defendant informed him that he had lost the original title when he was moving house. He got into the transaction of buying the suit land and had the property transferred to his name by 7<sup>th</sup> February 2006. He referred to the copy of the transfer produced as Pex 13 transferring the land from the 1<sup>st</sup> defendant to himself. He also produced receipts showing payments he made for the stamp duty and registration fee. He contended that he is a bonafide purchaser for value without notice.

16. Under the provisions of section 26 of the Land Registration Act, title of a registered owner can be cancelled only if it is proved that he was a party to the fraudulent means used to acquire the title. The burden of proving such fraud is on the person alleging to discharge (as provided in **sections 107-109 of the Evidence Act cap 80 and the case of Koinange & 13 others vs Koinange (1968) KLR 23**) and the standard of proof must be higher than that in a civil case and strictly proved (see the holding in **R. G Patel vs Lalji Makanji (1957)EA 314 at 317**). The plaintiffs did prove that they were given the original title by the 1<sup>st</sup> defendant. It was therefore a misrepresentation for the 1<sup>st</sup> defendant to report that the title was lost. In the statement made to the police on 6<sup>th</sup> May 2008 produced as exhibit by the Plaintiffs, the 1<sup>st</sup> defendant stated thus ***“Mr Mkofi never availed himself to complete the process and all efforts to trace him proved futile. All this time he had in his possession my original title deed and deed plan.”***This statement explains that the 1<sup>st</sup> defendant was aware who had his title was except he did not know where to find them.

17. The plaintiffs did not produce the decision reached in the criminal case against the 1<sup>st</sup> defendant where he was charged with obtaining by false pretence and false swearing. The plaintiffs did also not show why they thought/felt the 2<sup>nd</sup> defendant knew they had bought the suit land and or that they were holding the original title deed. This is worsened by the fact that the plaintiffs did not register their interest at the lands office by way of placing a caution or restriction to forewarn any 3<sup>rd</sup> parties from dealing on the land. Accordingly it is my finding that 2<sup>nd</sup> & 3<sup>rd</sup> defendants are not guilty of any fraud as there was

nothing done on the land both physical possession and the register to make them aware of the earlier transaction between the plaintiffs and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant had no reason to conclude the 1<sup>st</sup> defendant lied when he stated that he lost the original title while moving house as there was no encumbrance entered in the register.

18. The title had not passed to the plaintiffs when the 2<sup>nd</sup> defendant purchased the suit property therefore the plaintiffs' claim if any lie as against the 1<sup>st</sup> defendant only for breach of contract. I say so because holding a title deed in someone's name without any executed transfer documents cannot and does not pass title and or interest in land. Therefore the prayers (a) – (d) sought in the plaint which were made in 2008 long after the title had lawfully passed on to the 2<sup>nd</sup> defendant cannot be granted. Under prayer (e) for general damages for breach of contract, I do make an order that the 1<sup>st</sup> defendant do refund the plaintiffs the sum of Kshs 180,000 paid to him plus interest at Court rates from 24<sup>th</sup> November 1999 till payment is made in full together with costs of this suit. The plaintiffs' suit as against the 2<sup>nd</sup> & 3<sup>rd</sup> defendant fails and is hereby dismissed.

19. As regards the 2<sup>nd</sup> defendant's prayer's in the counter – claim, I am satisfied that he has proved:

**(i) That the 2<sup>nd</sup> defendant is a bonafide purchaser for value.**

**(ii) That he developed the suit premises with 9 units of residential houses for which he incurred costs but he was denied receiving rent due to the injunction order obtained by the plaintiff.**

**(iii) That the development is capable of fetching the sum of Kshs 54,000= per month as pleaded as no contrary evidence has been presented to this court.**

Accordingly I enter judgement in favour of the 2<sup>nd</sup> defendant as against the plaintiffs as contained in prayers (a) – (e) of the counter – claim.

**Judgemnet dated & signed at Mombasa this 27<sup>th</sup> day of June 2017.**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 29<sup>th</sup> day of June 2017 by**

**C.YANO**

**JUDGE**