



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC NO. 210 OF 2014**

**SILVANUS ANAKAYI**

**KABULA.....PLAINTIFF**

**VERSUS**

**DAVID ALINYO OTIENO being sued in his own capacity and as a legal and personal representative**

**of the estate of the Late WELLINGTON ALINYO INDIEKA  
(DECEASED).....DEFENDANT**

**JUDGMENT**

The summary of this suit is as follows; PWI, the plaintiff gave evidence that, at all material times to this suit he was the immediate and or former registered owner of all that parcel of land comprised in title number BUTSOTSO/ESUMEYIA/1456 before its survey, subdivision and registration into new numbers comprised in land parcels numbers BUTSOTSO/ESUMEYIA/2077 and 2078(PEX1). That by a mutual understanding and by a written agreement dated the 18<sup>th</sup> July, 1991 between the plaintiff and the late Wellington Alinyo Indieka (deceased) the plaintiff agreed and sold to the said deceased a portion of land measuring 4 acre which was to be excised, created and or curved from the initial title in land parcel number BUTSOTSO/ESUMEYIA/1456 measuring approximately 1.95 hectares or thereabout at an agreed consideration of a sum of Ksh. 120,000/= (PEX 2). That the defendant is the son, heir apparent and the legal and personal representative of the estate of the late Wellington Alinyo Indieka and is also being sued in his own capacity as a defendant in this suit. The plaintiff stated that the said deceased only deposited with him a sum of Ksh. 10,000/= which he acknowledged receipt but failed to pay the sum of Ksh. 110,000/= being the outstanding balance due to him as provided in the said agreement. That the plaintiff further avers that as an indication to perform part of his bargain of the sale agreement he prepared and signed all the necessary mutation forms, Land Control Board forms and successfully obtained the first Land Control Board for survey and subdivision of the original land into 2 portions measuring 1 and 4 acres respectively. That it is the plaintiff's case that the remaining issue was to attend the final land control board to obtain consent for transfer of the said portion of 4 acres comprised in title number BUTSOTSO/ESUMEYIA/2078 to the said deceased whereof he was to sign the transfer forms to that effect after receiving the final payment from him. That the plaintiff further avers that the said purchaser passed on, on or around the 29<sup>th</sup> January, 1993 before he paid him the balance due and owed to him in the sum of Ksh. 110,000/= and that he had not signed any transfer forms and appeared to obtain the consent to transfer the said portion to the deceased. That the plaintiff avers that when he was on a routine check in the lands registry and upon conducting a search to verify the position of his land, he was informed that the said land which comprised of BUTSOTSO/ESUMEYIA/2077 and 2078 whereof the latter portion had been registered in the names of the deceased purchaser herein on the 1<sup>st</sup> July, 1993 by the defendant as an administrator of the estate of the purchaser. That the said transfer and registration

was fraudulent, malicious, dubious, and unlawful as there was no valid consent obtained from the relevant land control board and the plaintiff had not signed any transfer forms in his favour.

That as aforesaid the unlawful actions by the defendant have fairly existed for a very long time and the defendant has sued the plaintiff in the Kakamega Chief Magistrate's Court Civil suit Number 289 of 1994 seeking to restrain him and evict him from land parcel number BUTSOTSO/ESUMEYIA/2078 which land he has resided on for a period of not less than 30 years and the case was dismissed (PEx6 a & b copy of the said judgment and decree).

The plaintiff's claim against the defendant is therefore for:- A declaration that the registration and transfer of land parcel number BUTSOTSO/ESUMEYIA/2078 in the names of the late Wellington Alinyo Indieka deceased who passed on, on the 29<sup>th</sup> January, 1993 which registration was effected on the 1<sup>st</sup> July, 1993 or thereabout was unlawful, null and void and an order for cancellation of the deceased's names from the title comprised in land parcel number BUTSOTSO/ESUMEYIA/2078 so that it reverts back to the plaintiff and further a permanent injunction restraining the defendant, his servants and or authorized agents and or any of this representatives claiming through him from interfering, alienating, evicting or in any way interfering with land parcel number BUTSOTSO/ESUMEYIA/2078.

Despite the hearing date having been taken by consent the defendant failed to attend court and the matter proceeded *ex parte*. The defendant in his written defence avers that the plaintiff sold to his deceased father L.R. NO. BUTSOTSO/ESUMEYIA/2078 for an agreed sum of Ksh. 120,000/= which amount was duly paid to and acknowledged by the plaintiff in full. It is the defendant's contention that in view of such a LR. NO. BUTSOTSO/ESUMEYIA/2078 was legally transferred to his deceased father in full knowledge and by consent of the plaintiff. The defendant denies that his deceased father had the capacity to intimidate, coerce and or give false information that would direct and order the Lands Registry officers to register LR. NO. BUTSOTSO/ESUMEYIA/2078 in his names as he had no powers no authority to do so.

This court has considered the evidence in this case. It is not in dispute that the plaintiff is the immediate and or former registered owner of all that parcel of land comprised in title number BUTSOTSO/ESUMEYIA/1456 before its survey, subdivision and registration into new numbers comprised in land parcels numbers BUTSOTSO/ESUMEYIA/2077 and 2078. It is also not in dispute that by a mutual understanding and by a written agreement dated the 18<sup>th</sup> July, 1991 between him and the late Wellington Alinyo Indieka (deceased) he agreed and sold to the said deceased a portion of land measuring 4 acres which was to be excised, created and or carved from the initial title in land parcel number BUTSOTSO/ESUMEYIA/1456 measuring approximately 1.95 hectares or thereabout at an agreed consideration of a sum of Ksh. 120,000/= (PEx2). The Defendant is the son of the late Wellington Alinyo Indieka. What is in dispute is that the said deceased only deposited with the plaintiff a sum of Ksh. 10,000/= which he acknowledged receipt but failed to pay the sum of Ksh. 110,000/= being the outstanding balance due to the plaintiff as provided in the said agreement.

Be that as it may, the plaintiff as an indication to perform part of his bargain of the sale agreement he prepared and signed all the necessary mutation forms, land control board forms and successfully obtained the first land control board for survey and sub division of the original land into 2 portions measuring 1 and 4 acre respectively (PEx 3 consent letter). That the remaining issue was to attend the last and final land control board and get the land control board consent for transfer of the said portion of 4 acres comprised in title number BUTSOTSO/ESUMEYIA/2078 to the said deceased whereof the plaintiff was to sign the transfer forms to that effect receiving the final payment from the deceased.

However, the said purchaser passed on, on around the 29<sup>th</sup> January, 1993 before he paid the balance due and owed to the plaintiff in the sum of Kshs. 110,000/= and that he had not signed any transfer form so as to obtain the final consent to finally transfer the said portion to the deceased. That when the plaintiff was on a routine check in the lands registry and upon conducting a search to verify the position of his land, he was informed that the said land had been registered in new portions comprised of land parcel number BUTSOTSO/ESUMEYIA/2077 and 2078 whereof the former portion had been registered in the names of the deceased purchaser herein which registration registration was effected on the 1<sup>st</sup> July, 1993 by the defendant herein as an administrator of his estate while the deceased had long demised (PEx 5

official search). The plaintiff therefore contends that the said transfer and registration was fraudulent, malicious, dubious and unlawful as there was no valid consent obtained from the relevant land control board.

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

Section 26 (1) of the Land Registration Act states as follows:

***“The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except –***

***a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

Looking at the facts of this case, the Plaintiff has produced documents in the pleadings of assertion of ownership over the disputed parcel of land, namely the Title Deed showing the ownership of the said parcel of land. The law is clear that, the Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of **Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. **Hon Justice Munyao Sila** in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

**-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.**

In the instant case the issue to be determined is whether the title held by the defendant in the deceased name is valid title. Evidence adduced by the Plaintiff has not been challenged as evidence of the said deceased only deposited a sum of Ksh. 10,000/= which he acknowledged receipt but failed to pay the sum of Ksh. 110,000/= being the outstanding balance due to the plaintiff as provided in the said agreement. That he prepared and signed all the necessary mutation forms, land control board forms and successfully obtained the first land control board for survey and sub division of the original land into 2 portions measuring 1 and 4 acre respectively (PEX 3 consent letter). That the remaining issue was to attend the last and final land control board and obtain the land control board consent for transfer of the said portion of 4 acres comprised in title number BUTSOTSO/ESUMEYIA/2078 to the said deceased whereof he was to sign the transfer forms to that effect after receiving the final payment from him.

However, the said purchaser passed on, on or around the 29<sup>th</sup> January, 1993 before he paid him the balance due and owed to me in the sum of Kshs. 110,000/= and that he had not signed any transfer forms to obtain the final consent to finally transfer the said portion to the deceased. It is strange that the title was issued in July 1993 long after the intended buyer had passed away. This court can therefore come to the

conclusion in the absence of evidence to the contrary that the defendant fraudulently obtaining registration of the plaintiff's land on an agreement which had been violated. That he caused the registering the plaintiff's land and transferring it without paying the balance of the agreed sum. I find that the title was obtained by fraud and/or misrepresentation to which the defendant was a party. The plaintiff has proved his case and I make the following orders;

1. A declaration that the registration and transfer of land parcel number BUTSOTSO/ESUMEYIA/2078 in the names of the late Wellington Alinyo Indieka deceased who passed on, on the 29<sup>th</sup> January, 1993 which registration was effected on the 1<sup>st</sup> July, 1993 or thereabout was unlawful, null and void and an order for cancellation of the deceased's names from the title comprised in land parcel number BUTSOTSO/ESUMEYIA/2078 so that it reverts back to the plaintiff is granted.
2. A permanent injunction restraining the defendant, his servants and or authorized agents and or any of this representatives claiming through him from interfering, alienating, evicting or in any way interfering with land parcel number BUTSOTSO/ESUMEYIA/2078.
3. Costs of this suit to be borne by the defendant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 13<sup>TH</sup> DAY OF JULY 2017.**

**N.A. MATHEKA**

**JUDGE**