



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 82 OF 2014**

**GRACE NAKHUNGU ISUBA.....PLAINTIFF**

**VERSUS**

**BENJAMIN EWADITIANG ISUBA.....1ST DEFENDANT**

**ALEX ISUBA.....2ND DEFENDANT**

**J U D G M E N T**

**INTRODUCTION**

1. The plaintiff is mother to the second defendant. The first defendant is grandson to the plaintiff. The first defendant is son to the second defendant. The first defendant is the registered owner of **LR. No. Kakamega/Sango/2749**(suitland). The plaintiff brought this suit against the defendants claiming that the registration of the suitland in the name of the first defendant was fraudulent. The plaintiff therefore seeks an order directing the District Land Registrar to cancel the title deed to the suitland and have it registered in her name. She also seeks a permanent injunction restraining the defendants or their agents from interfering in any manner with the suitland.

**PLAINTIFF'S CASE**

2. The plaintiff testified that she is the wife of **Marko Etianga Eleyo** (deceased) who died in **2000**. That on an unspecified date she and the deceased gave **Kshs.30,000/=** to her brother in-law to look for some land for them. The first defendant who is her first born son went to the brother in-law and collected the money on the pretext that he had been sent by his father to pick up the money. The second defendant then went and bought land from one **Jacob Situma**. The second defendant later registered the land in the name of his son who is the first defendant.
3. After the registration of the suitland in the name of the first defendant, the defendants started harassing her. Her house was razed down forcing her to flee from the suitland. Meetings were held to resolve the dispute of ownership of the suitland but nothing came out of the meetings forcing her to file this suit against the defendants.

**DEFENDANTS CASE**

4. The second defendant denied that he purchased the suitland through money given by his father. He stated that he is the one who bought the suitland using his own money. He at first bought one acre and thereafter bought half an acre making it **1 ½ acres**. He later decided to have the suitland registered in the name of his son who is the first defendant. That he has been having problems with his brother over the suitland.

5. On his part, the first defendant stated that the registration of the suitland in his name was done procedurally. That it was his father who bought the suitland using his own money and later decided to have the same registered in his name. He denied that there were any family meetings held as claimed by the plaintiff.

#### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

6. I have carefully gone through the evidence adduced by the plaintiff as well as that of the defendants and the documents relied on by both sides. The first issue for determination is whether the plaintiff and deceased provided **Kshs.30,000/=** towards the purchase of the suitland. The second issue is whether the **Kshs.30,000/=** was picked up by the second defendant from the plaintiff's brother in-law. The third issue is whether there was fraud involved in the registration of the suitland in the name of the first defendant.

#### **Whether the plaintiff and deceased provided Kshs.30,000/= towards the purchase of the suitland.**

7. The plaintiff did not specify the time when she and the deceased gave out **Kshs.30,000/=**. There was no mention of the name of the brother in-law who was given the money. This brother in-law if still alive was not called as a witness. Though the plaintiff stated in her evidence that the second defendant picked up the money from her brother in-law on the pretext that he had been sent by his father, evidence of **PW3 Patrick Simiyu Etiang** who is a step brother of the second defendant contradicts her. PW3 stated in his evidence that the deceased sent him and the second defendant to Saboti to pick up **Kshs. 30,000/=**. According to PW3, this was in **1984** and that it is the second defendant who carried the money and later bought the suitland using the money.
8. Both the plaintiff and PW3 did not mention the name of the person who had been given the **Kshs.30,000/=**. The first time the name of the person who was given the **Kshs.30,000/=** was mentioned is during a meeting which is said to have been held on **5/5/2013** as per minutes produced as *Exhibit 8*. In the said meeting, it was said that the money was given to **Abunwasi Wabekele** a brother to the deceased. There was no reason given why the said **Abunwasi Wabekele** was not called to testify in this case. Given the contradictory evidence by the plaintiff and PW3 and failure to call **Abunwasi Wabekele**, I find that there was actually no money provided by the plaintiff and the deceased as claimed.

#### **Whether the second plaintiff picked up Kshs.30,000/= from the brother in-law of the plaintiff.**

9. I have already made a finding that there is no evidence to show that **Kshs.30,000/=** was given to the plaintiff's brother in-law. This being the case, there was therefore no money to be picked up by the second defendant. The best person who would have shed light on this issue is the said brother in-law of the plaintiff who was not called as a witness. No explanation was given for his non availability. I found the evidence of PW3 to be unreliable. This witness insisted that he went to pick the money with the second defendant in **1984** when the plaintiff herself has indicated in her statement that she and her husband provided the **Kshs.30,000/=** on or around **1993**. This is as per the statement she filed in court. I therefore find that the second defendant did not pick the **Kshs.30,000/=** as alleged.

#### **Whether the suitland was registered in the name of the first defendant in a fraudulent way**

10. The second defendant produced a sale agreement between him and **Jacob Situma** dated **16/5/1993** [*Defence Exhibit 1*]. This agreement shows that he bought one acre from the plaintiff at **Kshs.36,500/=**. He paid the purchase price in installments until completion. On **4/3/1994**, he bought half an acre at **Kshs.19,000/=**. He again paid for the half acre in installments. The vendor of the suitland was called as a witness for the defendants. He testified that he sold **1 ½ acres** to

the second defendant. When it came to transfer, he stated that he signed transfer documents in favour of the second defendant's son.

11. The vendor **Jacob Situma Wanyama** stated that he only dealt with the second defendant. There was an agreement which is undated produced by the plaintiff *Exhibit 1*. According to this agreement it is said that the deceased bought half an acre from **Jacob Situma Wanyama** at **Kshs.28,000/=**. The purchase price was cleared on **24/1/1995** when a payment of **Kshs.7,000/=** was made. Both the second defendant and Jacob Situma who testified, denounced this agreement and the signatures thereon.
12. The first agreement for one acre was witnessed by the area assistant chief who later became a chief. I do not find anything wrong in the dealings between the second defendant and Jacob Situma who was the vendor. There was nothing wrong in the second defendant authorising the suitland to be registered in the name of his son who is the first defendant. I therefore find that there was no fraud involved in the registration of the suitland in the name of the first defendant.
13. The plaintiff produced minutes of a family meeting which was allegedly held on **5/5/2013** and **12/5/2013** as *Exhibit 8* and *9* respectively. It is said in the minutes that the dispute as to the ownership of the suitland had been resolved. All these minutes have been disowned by the defendants. It turned out that the ID card number in one of the minutes which purport to be that of the second defendant is actually not that of the second defendant. Some minutes allege that the vendor of the suitland was present something he has denied. It is clear that the plaintiff was out to create an impression that the dispute had been resolved which is not the case. I did not find the plaintiff and her two witnesses to be credible. Their evidence is contradictory.

### **DECISION**

14. For the reasons given hereinabove, I find that the plaintiff has not proved her case against the defendants. The same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kitale on this **6th** day of **June, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of Ms. Arunga for Plaintiff and the second defendant.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**6/6/2016**