



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CIVIL SUIT NO. 69 OF 2010

SHEM OKEMBIA (suing as the donee of power

**of attorney donated by BJOURN OTTO BERENDES
PLAINTIFF**

VERSUS

ABDALLA APONDI

ABDALLA1ST DEFENDANT

ZAINABU MOHAMMED

.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR

KISUMU.....3RD DEFENDANT

KENYA COMMERCIAL BANK

LIMITED.....4TH DEFENDANT

JUDGMENT

1. Shem Okemia, the plaintiff, suing as the donee of power of Attorney donated by Bjourn Otto Berendes, sued Abdalla Apondi Abdalla, Zainabu Mohammed, the District Land Registrar, Kisumu, and Kenya Commercial Bank Limited, hereinafter referred to as the 1st to 4th Defendants respectively, seeking for the following orders;

- a. A declaration that the transfers in favour of the 1st and 2nd Defendants were procured by fraud and the 2nd Defendant was therefore not legally able to charge the land parcel numbe **Kisumu/Korando/3796** as security with the 4th Defendant.
- b. An order that the title deed issued to the 2nd Defendant be recalled, canceled and revoked on the basis that it was procured by fraud and outright illegality.
- c. That the Lands records/Registrar to be rectified and do read the Bjourn Otto Berendes as the rightful owner of land parcel number Kisumu/Korando/3796.
- d. General exemplary and punitive damages for fraud and trespass.

e. Costs of the suit

f. Any other further orders this court may deem just and expedient to grant.”

The Plaintiff avers that **Bjourn Otto Berendes**, hereinafter referred to as **Berendes**, and his late wife **Husna Zainabu Suguti**, hereinafter referred to as **Husna**, bought land parcel **Kisumu/Korando/3796**, hereinafter referred to as the suit land, from Omwamba Opala in 1989 and were therefore the registered proprietors at all material times. That later in 2002, Berendes learnt that the suit land had been transferred to the 1st Defendant name and he registered a restriction on the title. That on 5th December 2008, the Land Registrar, removed the restriction Berendes had registered without informing him and effected a transfer of the land to the 2nd Defendant who subsequently charged it with the 4th Defendant. That Berendes still holds the original title deed issued in 1989 and is therefore still the legal owner of the suit land as he has never transferred it to anyone. That the Defendants committed fraud by causing the land to be transferred to the 1st and 2nd Defendants and thereafter having it charged with the 4th Defendant.

2. The suit is opposed by the 2nd to 4th Defendants who filed their statements of defence summarized as follows:

a. 2ND DEFENDANT’S DEFENCE DATED 7TH JUNE 2010

i. That the Plaintiff is not a donee of power of attorney from **Berendes** and or the power of attorney is invalid for not being registered, attested by a qualified person and executed outside the country without following the requirements of attestation under the law.

ii. The 2nd Defendant disputed that Berendes and his alleged wife had bought the suit land from Omwamba Opala in 1989 and that he had registered a restriction over its register.

iii. The 2nd Defendant averred that she is the registered proprietor of the suit land and denied that her registration was tainted with fraud.

iv. She confirmed charging the suit land with 4th Defendant and averred that it was in accordance with the law.

v. That the Plaintiff has no locus standi to file this suit and that the suit discloses no cause of action.

b. 3RD DEFENDANT’S DEFENCE DATED 9TH MARCH 2012

i. The 3rd Defendant denied frustrating the Plaintiff in his efforts to seek legal justice.

ii. The 3rd Defendant also denied the particulars of fraud.

iii. That no notice of intention to sue was served as required under **Section 13** of Government Proceedings Act **Chapter 40** Laws of Kenya.

iv. That the suit is time barred and contravenes **Section 3(1)** of the Public Authorities Limitation Act Chapter 39 of Laws of Kenya.

c. 4TH DEFENDANT’S AMENDED DEFENCE DATED 23RD FEBRUARY 2011.

i. The 4th Defendant disputed that the Plaintiff was the registered proprietor of the suit land.

ii. They also denied having been involved in any fraudulent act as alleged by the Plaintiff and that they had been served with notice of intention to sue.

iii. That the Plaintiff as a donee of power of attorney has no interest over the suit land allowing him to sue in his own name.

iv. That they took the suit land as security for financial facilities granted to 2nd Defendant after carrying out due diligence.

v. That the suit is statute barred as it is based on fraud and was filed more than seven years after the Plaintiff become aware of the alleged fraud.

3. The court takes note that the 1st Defendant was served with the summons as confirmed in the affidavit of service sworn by James Otieno Raminya on 29th July 2010 and filed in court on 26th August 2010 and did not enter appearance or file defence.

4. The hearing commenced on 12th October 2015 with Mr. Owino, Makuto and Nyauma advocates for the Plaintiff, 2nd and 3rd Defendants respectively representing their clients. The Plaintiff testified as PW1 and called George Nyangweso, the Land Registrar Kisumu, as a witness who testified as PW2. The 2nd Defendant testified as DW1 while the 4th Defendant called Jonathan Kipkosgey, the mortgage manager, who testified as DW2. The following is the summary of their evidence,

a. PLAINTIFF'S EVIDENCE;

The Plaintiff, who is an estate agent, knew Berendes who lived in Kisumu from 1996 to 2001 when he left for Germany. That the

said Berendes donated a power of attorney to the Plaintiff which was registered with Land Registry, Kisumu on 10th February 2010 and under which the Plaintiff has filed this suit. That the 1st Defendant had fraudulently transferred the suit land, which was in the names of Berendes and another, to his names and thereafter to 2nd Defendant. That in 2010 Berendes instructed the Plaintiff to make a follow up on the land and on conducting a search at the Lands office he found that the 2nd Defendant had charged the land with 4th Defendant. The Plaintiff did a letter to the Land Registrar asking for a restriction to be registered on the land. The Plaintiff later obtained a copy of the register showing a restriction had been registered on 12th November 2008 on the suit land. That on further enquiries, the Plaintiff found out that the transfer to the 1st Defendant was allegedly through a succession cause of 2002 but did not trace the succession cause reference. He further found out that the 2008 restriction was allegedly lifted on the strength of a letter written by Berendes to the Land Registrar who however could not trace a copy. That the transactions transferring the land to the 1st Defendant and thereafter to 2nd Defendant and the charging of the suit land with the 4th Defendant were fraudulent as Berendes had not authorized them. During cross examination the Plaintiff said he could not tell when Husna, the wife of Berendes and the co-registered proprietor of the suit land, died. He added that he does not know what relationship, if any, the 1st and 2nd Defendants have or whether Berendes know the 1st Defendant. That he received instructions from Berendes in February 2010. He confirmed that the power of attorney was signed by a notary public in Germany whose details are in a language he could not understand on the 17th February 2009. He added that he did not report to the police about the transactions by 1st and 2nd Defendants even though they were fraudulent. He stated that the copy of the register indicated the first restriction was filed on 12th November 2008 while the 2nd Defendant got registered as proprietor of the suit land on 19th December 2008. PW2 produced the power of attorney documents registered as number 216/10 on the 12th February 2010 in favour of the Plaintiff as exhibit. He also produced a copy of the green card dated 23rd April 2009 for the suit land as exhibit. During cross examination PW2 confirmed that the green card showed the land was registered in the name of 2nd Defendant on 19th December 2008 and that the previous registered proprietor was the 1st Defendant.

b. 2ND DEFENDANT'S EVIDENCE;

That she bought the suit land from 1st defendant on 11th October 2008 after conducting due diligence and obtaining a copy of a certificate of official search. She produced a copy of the certificate of official search, title and sale agreement as exhibits.

That the land transactions were done through her advocate. She produced a copy of the application to the land control board and letter of consent as exhibits. She also produced copies of the transfer document dated 29th November 2008, receipts for stamp duty and transfer, charge with 4th Defendant among others as exhibits. She denied having obtained the title to the suit land fraudulently or being in control of the documents kept by the 3rd Defendant. During cross examination DW1 stated that the sale agreement was done through Aboge & Co. Advocate and that the advocates never told her of any disputes over the suit land. She confirmed that the copy of the register shown to her by counsel for the Plaintiff indicated that the land was first owned by Omwamba Opala. That it was later transferred to Berendes and Husna. That a restriction was registered on 26th July 1989 before being removed by Aboge & Co. advocates on the 5th December 2008 after which the land was transferred to her. The 2nd Defendant testified that she had bought a piece of land from one Oremo and when she indicated to him that she was looking for another parcel of land to buy, Oremo introduced her to the 1st Defendant. That the 1st Defendant took her to the suit land which had an old house where he lived. That after due diligence she approached the 4th Defendant for a mortgage facility and all along she had had no doubt that 1st Defendant was the owner of the land.

c. 4TH DEFENDANT'S EVIDENCE:

That DW1 approached the bank in 2008 for a mortgage. That the bank certified her payslips for six months and concluded she was eligible for a facility. DW2 produced copies of the application for mortgage made by DW1 on 13th October 2008, valuation report for the suit land, with a certificate of official search, charge document, and a signed letter of offer as exhibits. Answering questions, DW2 stated that the copies of the register and certificate of official searches in respect of the suit land that the bank relied on did not contain any restrictions. That the copy of the register DW2 was shown in court indicated a restriction was registered on 12th November 2008 while the one the bank had used had by then been issued on 6th May 2008 and hence had no restriction.

5. At the close of the oral evidence, the counsel were granted timelines to file and exchange written submissions. The counsel for the Plaintiff filed their submissions dated 18th March 2016 on the 21st March 2016. The counsel for the 2nd Defendant filed their submission dated 21st April 2016 on the 26th April 2016 while the 4th Defendant's counsel filed theirs dated 31st May 2016 on the same date. The 3rd Defendant did not call any witnesses and not file written submissions.

6. The court has carefully considered the pleadings filed by the parties, the oral and documentary evidence tendered, the submissions by counsel and come to the following conclusions;

a. That the copies of the register for the suit land, **Kisumu/Korando/3796** produced as exhibits by the parties herein confirmed that the suit land was first registered on 6th September 1989 in the names of Omwanda Opala.

b. That whereas the copy of the title deed for the suit land issued on 6th September 1989 and produced by the Plaintiff as exhibit indicates that Berendes and Husna got registered as joint proprietors of the land on the 6th September 1989, the copy of the register for the said land indicates that the two were registered with the suit land on the 26th July 1989. That if the court was to take the correct date of the suit land registration to be the one on the register, then that would mean that Berendes and Husna become the registered proprietors of the suit land before Omwamba Opala, from whom they allegedly acquired it from. That it would also mean that Berendes and Husna got registered as proprietors before the land was itself registered. That would not only be absurd but impossible as the land had to be registered first before Omwamba Opala, Berendes and

others could transact in it. That if the court was to take the date of registration to be the one on the title deed, then its entry cannot be based on the register that were availed in court by the parties. That the Plaintiff did not attempt in any way to offer any explanation on when Berendes and Husna actually entered into the sale agreement with Omwamba Opala and when they become the registered proprietors. That had the Plaintiff availed the copies of the relevant documents like sale agreement, land control board application for consent, letter of consent, transfer documents and the receipts for payments of statutory dues, the court would have had some reliable source documents on which to refer to.

c. That a restriction is shown on the register to have been registered by Berendes on the 26th July 1989 that was removed by the Land Registrar. That as observed in (b) above about the date Berendes and Husna got registered with the suit land, the date of the restriction also appear to be before the first registration of the land. That none of the parties counsel questioned PW2, the Land Registrar, on whether or not the restriction was procedurally removed in accordance with the applicable law or how it was registered before the date of registration of the suit land.

d. That the copies of the register also indicate at entry 4 that Abdalla Apondi Abdalla become the registered proprietor of the suit land on the 10th April 2002. That even though the said Abdalla Apondi Abdalla, the 1st Defendant, did not enter appearance or file defence, the Plaintiff still had the legal obligation to prove his allegations of fraud against the 1st Defendant so as to impugn his title as the registered proprietor. That there was no attempt by the Plaintiff counsel to seek details of how 1st Defendant got registered with the suit land from PW2, who appear to have been called as a witness to only produce the power of attorney and green card.

e. That unlike the Plaintiff who did not avail copies of documents through which Berendes and Husna got their title to the said land, the 2nd Defendant availed copies of her land sale/purchase with the 1st Defendant. That it is clear that a sale agreement was made before Aboge and company Advocates dated 11th October 2008. That the sale agreement is duly witnessed, in accordance with the Law. That the 2nd Defendant also availed copies of the application for land control board consent, consent letter, receipts for payment of stamp duty and transfer form all of which goes to show that she followed the due process in getting the land transferred to her name. That though the Plaintiff had alleged that the 1st and 2nd Defendant had obtained the suit land registered in their names fraudulently, he did not discharge his duty of availing evidence to prove those particulars of fraud. That as properly submitted by counsel for the 2nd Defendant, the 2nd Defendant title to the suit land is protected under **Article 40** of the Constitution 2010 and **Section 26** of the Land Registration Act, **No.3 of 2012** and the decisions in the following three decided cases on similar matters are relevant;

i. Fletcher –V- Peck 10 U.S. 87 (1810) cited in **Eunice Grace Njambi Kamau & another –V- Attorney General & 5 others** [2013] eKLR

ii. Joseph Karisa Mutsonga –V – Johnson Nyati [1984] eKLR

iii. Koinange & 13 others –V- Charles Karuga Koinange [1986] eKLR

f. That having found as in (e) above, and considering that the 1st Defendant has not challenged the 2nd Defendant's title to the suit land, then the court is satisfied that the transaction leading to the charging of the suit land as security for the mortgage facility with 4th Defendant cannot be faulted. That indeed, had the said Berendes or the Plaintiff herein had evidence of fraud attributable to the 2nd and 4th Defendant, they would have reported the matter to the police for investigations and necessary criminal action, in addition to moving to this court.

g. That from the evidence adduced by the Plaintiff, he got to know about the transfer of the suit land to the names of 1st Defendant and then the 2nd Defendant and the registering of the charge

after he obtained a copy of the register and search certificate. The copy of the register he annexed to his documents and which he had produced as exhibit was issued on 23rd April 2009. That in February 2010, the Plaintiff had the power of attorney donated by Berendes in 2009 registered with the Land Registrar's office. That the pleadings filed by the Plaintiff, specifically paragraph 8 of the plaint dated 11th May 2010, shows that by the year 2002, Berendes was aware the suit land had been transferred to the 1st Defendant and he reportedly filed a restriction. That though the register does not show any restriction having been filed in 2002, there is one shown to have been filed which was later removed on the 5th December 2008 through Aboge & Co. Advocates. That the court notes that the Plaintiff do not appear to have sought any explanation from the said advocate, and no party sought to have the said advocate called as a witness. That the court can only conclude that the parties had no quarrel with the role played by the said advocate in the lifting of the caution.

h. That further to the finding in (g) above the provision of **Section**

3(1) of the Public Authorities Limitations Act of Kenya (Act No.5 of 1974) requires actions based on tort to be brought against the Government (3rd Defendant) before the end of twelve months from the date on which the cause of action occurred. That the Limitation of Action Act **Chapter 22** of Laws of Kenya, provides at **Section 4 (2)** that actions based on tort be filed before a period of three (3) years from the date of the cause of action. That the pleadings herein show that Berendes had got to know that the suit land had been transferred to the name of the 1st Defendant as far back as 2002. That as the said Berendes had not allegedly been involved in the transfer, the court can only conclude that was the year he got to know of the alleged fraud. That in terms of **Section 26** of the Limitation of Action Act, the period within which Berendes was expected to take action started to run in the year 2002. That by the time this suit was filed in 2010 a period of about eight (8) years had lapsed and the suit had become statute barred.

7. That in view of the foregoing the Plaintiff has failed to proof his case against the Defendants and the suit is dismissed with costs to the 2nd to 4th Defendants.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2016

In presence of;

Plaintiff ABSENT

Defendants ABSENT

Counsel ABSENT

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016

23/11/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Counsel absent

Court: The judgment dated and delivered in open court in absence of all the parties and counsel. The Deputy Registrar to notify the parties and counsel of the delivery of the judgment.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016