



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CIVIL SUIT NO. 806 OF 2012

ALICE JEPTANUI.....PLAINTIFF

VERSUS

SAMMY ATUGAH AYORO.....DEFENDANT

JUDGMENT

Alice Jeptanui (*hereinafter referred to as the Plaintiff*) avers that they leased out a family **Plot No. Nandi/Kaspengere/1092** to Sammy Atugah Ayoro (*Hereinafter referred to as the defendant*) in the year 2003. According to the Plaintiff the plot belonged to them with her sister Eunice Chemaiyo and that they intended to utilize the same for settling and other family use having been given as a gift by one Omonde Matara (deceased). That it is the Plaintiff contention that the Defendant during demarcation period in the year 2003, secretly and without the consent of the Plaintiff nor her family members secretly registered himself as the absolute owner of the above parcel and has gone ahead and obtained title of the same.

That the Plaintiff has been subjected to untold suffering in view of the Defendant unlawful acts. The plaintiff has given the **particulars of fraud on the part of the defendant as:- *secretly registering himself as the absolute owner of land parcel No. Nandi/Kapsengere/1092 , conning the late Elly Nyangweso to sign an agreement on 18.05.2005, on the strength that he was selling the parcel to him. Taking out a title deed, while having knowledge that his actions were shoved with controversy.*** As a result of the defendant's action above, the plaintiff and other family members have been disinherited and have continued to suffer loss and damage.

That Plaintiff's claim against the defendant is for a declaration that the suit parcel herein belongs to the Plaintiff and an order for cancellation of the title deed issued on 27.05.2011 and an order to have the said parcel registered in the name of the plaintiff. He further prays for an order of permanent injunction restraining the defendant from entering, encroaching in any way interfering with the plaintiff's quiet and lawful use and occupation of the suit land herein designated as NANDI/KAPSENGERE/1092.

The defendant denied the contents of paragraph 3,4,5,6,7,8 and 9 of the Plaintiff and stated that he never leased land parcel number Nandi/Kapsengere/1092. He averred that he legally bought land parcel number Nandi/Kapsengere/1092 from Elly G. Nyangweso Omonde in 1990.

The defendant denied contents of paragraph 6 of the Plaintiff and specifically denied all the particulars of fraud as outlined in paragraphs a-c and put the plaintiff to strict proof thereof. The defendant denied having received any notice of intention to sue and defendant averred that this suit is bad in law and an abuse of the process of court and that he would apply at the appropriate stage that this suit be struck out with cost.

When the matter came up for hearing on the 25th of September 2015, the plaintiff was present in

court with a witness and ready to proceed whereas the defendant was absent. The court proceeded with hearing after ascertaining that the defendant was served. The plaintiff testified that parcel No. Nandi/Kapsengere/1092 was given to them as gift by one Omonde Matara and that they leased it out to the defendant who has been tilling the same as they trusted him. However, the defendant abused the trust and forged an agreement with Elly Nyangweso purporting to buy the land. That in the year 2003, he connived with the Land Adjudication Officers and registered himself as the first owner.

The plaintiff called **PW1, Willy Kipsongok Arap Morogo** who stated on oath that the parcel of land belonged to Elly Nyangweso Omonde, deceased. The deceased had sold the land Albert Okelo Ngolo who later died and that the deceased wife sold to PW1. He is the neighbour to Nyangweso who is a brother to Alice Jeptanui. When Albert bought the land, he brought an agreement that was to be confirmed by the area chief that there was no dispute. He signed the agreement which he produced as P.Ex.1.

When Eli Nyangweso went for the title deed, it was established that it had been taken by one Sammy Ayoro Atugah. Before, he died out of shock because he found the land had been transferred, Elly Nyangweso had placed a caution on the register. Sammy Ayoro Atuga had no agreement that he bought the land from the deceased.

The current area chief asked him to bring the original agreement but he said he did not have the same. The original title was **Plot No. Nandi/Kaspenger/ 52**. After subdivision, 1092 was created and that is what is being denied by the plaintiff. He produced the sketch map as P.Ex.3. The plaintiff closed her case and therefore the court retired to chambers to make a decision.

The un-controverted facts on record are that though the suit parcel of land is registered in the names of the defendant the said parcel **No. Nandi/Kapsengere/1092** was given to the plaintiff as gift by one Omonde Matara and that they leased it out to the defendant who has been tilling the same as they trusted him. However the defendant abused the trust and forged an agreement with Elly Nyangweso purporting to buy the land. That in the year 2003, he connived with the Land Adjudication Officers and registered himself as the first owner.

The main issue to be determined by this court is whether fraud has been proved beyond balance of probabilities but not beyond reasonable doubt on the part of the defendant in being registered as the proprietor of the land. It is trite that fraud is a conclusion of law and therefore must be proved. The facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent. The plaintiff has set out the fraudulent acts of the defendant and testified that the defendant forged the agreement with Elly Nyangweso purporting to buy the land. Moreover that the defendant connived with the land Adjudication Officer and registered himself as the first owner. Moreover that he did not obtain family consent to sell the land.

allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt. See the case of Gudka-V- Dodhia [Civil Appeal No. 21 of 1980] where Law, JA (*as he then was*) stated:

“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in RG Patel Lalji Makanji [1957] EA 314.”

In Central Bank of Kenya Limited -V- Trust Bank Limited & 4 Others [Civil Appeal No. 215 of 1996] (UR), this Court stated, on allegations of fraud:-

*“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of **prima facie** proof was much heavier on the appellant in this case than in an ordinary civil case.”*

This court is not oblivious of the provisions of sections 25 and 26 of the Land Registration Act.

Section 25 of The Land Registration Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

Section 26 provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.*** I have considered the evidence on record and especially the agreement dated 18/5/2005 and do find that the plaintiff's allegations of fraud by the defendant are proved beyond a balance of probabilities that the defendant's obtained registration as the proprietor of the parcel of land fraudulently and or illegally and or unprocedurally. The agreement appears to ratify an illegality as it purports to confirm an earlier agreement that appears to be non-existent and does not refer to a known parcel of land. Moreover, the agreement appears to have been made after the defendant was registered as proprietor in 2003. The import of the aforesaid agreement is that the deceased was being paid Ksh.500 per month from 18/5/2005 for a period of two years just to confirm that he had sold the land in dispute as opposed to leasing the same to the defendant. Last but not least in the agreement it is confirmed that Mr Nyangweso was at one time beaten to admit that the land was leased as opposed to bought.

The defendant did not attend hearing and therefore did not offer any evidence. The upshot of the above is that the suit succeeds a declaration that the suit parcel herein belongs to the Plaintiff and an order for cancellation of the title deed issued on 27.05.2011 and an order to have the said parcel registered in the name of the plaintiff. He further prays for an order of permanent injunction restraining the defendant from entering, encroaching in any way interfering with the plaintiff's quiet and lawful use and occupation of the suit land herein designated as NANDI/KAPSENGERE/1092.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE