



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 11 OF 2012

ALBERT NYONGESA.....PLAINTIFF

VERSUS

ALLOYS MELTUS OKINDA.....1ST DEFENDANT

DAMARIS KATIE KITONYO.....2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff vide a plaint filed 6th of November, 2012 impleaded the Defendants in this suit and sought for judgement against the Defendants that:

- a) **An order of cancellation of the title held by the 2nd Defendant and a declaration of the same as null and void; and**
- b) **Costs of this suit and interests.**

2. The Plaintiff avers that he was the registered owner of L.R No. Bukhayo/Matayos/3573 and on or about the 11th of November, 2009, the 1st Defendant fraudulently and without the Plaintiff's knowledge and consent transferred the same into his names and shortly thereafter caused the transfer and registration of title in the name of his daughter in law, the 2nd Defendant.

3. He listed the particulars of fraud on the 1st Defendant's part as:

- a) *Transferring of the Plaintiff's title into his names without the Plaintiff's knowledge and or consent;*
- b) *Transferring the suit title into his names without consent of the Land Control Board;*
- c) *Causing the transfer into his names without the Plaintiff signing the transfer form;*
- d) *Obtaining ownership documents to a title to which he had not interest and for which no consideration; was agreed upon nor paid to the Plaintiff; and*
- e) *Falsifying information to the Lands Office in order to obtain registration of the title in their names.*

4. He listed the particulars of fraud on the 2nd Defendant's part as:

- a) *Accepting to be registered as an owner or new owner of a title that she never paid any consideration for;*
- b) *Accepting to be registered as an owner of a title that was dubiously and or fraudulently obtained;*
- c) *Purporting to accept to be registered as owner of a title that the father-in-law fraudulently held;*
- d) *Obtaining registration of a title without consent of the owner and or the relevant Land Control Board;*
- e) *Colluding with the 1st Defendant to alienate the Plaintiff's title.*

5. The Defendants filed their joint statement of defence on the 11th of December, 2012. They denied the contents of the Plaint and stated that the registration in the 1st Defendant's name and subsequent registration and transfer in the 2nd Defendant name were not fraudulent at all. They denied all the particulars of fraud against them. He urged this Court to dismiss the suit with costs.

6. The hearing commenced on the 28th of February, 2021 with the Plaintiff relying on his sole testimony. He stated that he is a farmer and hails from Murende village within Matayos division. He adopted his affidavit evidence dated 22nd May, 2014 as his evidence-in-chief and produced the documents enumerated in his list of documents as the documents he relied on to support his claim.

7. In his evidence affidavit, PW1 stated that his father owned L.R Bukhayo/Matayos/766 which he sold 4 acres to Chrispinus Nyongesa. That 766 had been subdivided into 1307 registered in his father's name and 1308 registered in Chrispinus' name. That after subdivision, Chrispinus took more than the 4 acres and he filed suit to challenge this SRMCC No. 74 of 1998 in which an order was made that resulted in the subdivision of parcel number 1308 into two portions. The number 3071 was registered in Chrispinus' name and 3072 which was registered in the plaintiff's name. The plaintiff further stated that he subsequently sold two acres out of parcel number 3072 to Emily Milkwambo hence subdivision 3072 that produced parcels Nos. 3572, 3573 and 3574 respectively.

8. That it was during the process of transfer of parcel number 3573 Emily Milkwambo that he discovered that the 1st Defendant had cautioned his land because he owed the 1st Defendant a sum of KShs. 54,000/-. That he lodged the complaint with the D.O after he discovered that the Defendants had registered themselves as owners of his land and the D.O wrote the letter produced as PEx 2. That the Nambale Land Control Board also wrote him a letter which he produced as PEx 3 confirming he never gave consent of transfer to the 1st Defendant. The plaintiff denied signing any documents for the transfer of the land to the 1st Defendant. He produced the mutation form as PEx 4, sale agreement as PEx 5, letter of consent as PEx 6 and green card as PEx 7. He concluded his evidence stating he never sold the land to the Defendants and prayed for the cancellation of the 2nd Defendant's title and costs of the suit.

9. The Defendants case was marked as close for want of attendance and the Plaintiff was asked to file submissions. The Plaintiff filed his submissions on the 28th of October, 2021. He reiterated his evidence during trial and submitted that he did not enter into any sale agreement with the 1st Defendant and neither did he attend any L.C.B meeting for obtaining consent to transfer land parcel number 3573 in the name of the 1st Defendant. That it is not the Defendants who are using the land. He relied on the case of **Peter Kaguny Kiragu vs. Anne H.G Muchunku (2021) eKLR.**

10. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

a) Whether the plaintiff has proved that the Defendants irregularly acquired Land Reference No. SOUTH BUKHAYO/MATAYOS/3573;

b) Whether the Defendants' title to the Suit Land should be cancelled and the same revert to the Plaintiff; and

c) Who bears the costs of this suit?

11. This matter is generally undefended as the Defendants statement of defence comprised paragraphs 1 & 2 as descriptive parts, paragraph 3 was an admission by the 1st Defendant that he transferred the land to the 2nd Defendant, and 4 denied the fraud alleged against them. Paragraphs 5 & 6 admitted demand having been issued and no case pending between the parties. There was no document filed in support of the defence neither did any of them file written witness statement. Despite this general denial by the defendants, the plaintiff was still under an obligation to prove his case.

12. In discharging the burden of proof, the plaintiff's uncontroverted testimony was that he did not transfer the said parcel of land to the 1st Defendant and neither did he attend the Land Control Board for the approval for the consent to transfer hence the transfer to the 1st Defendant and subsequently to the 2nd Defendant is fraudulent. He produced a letter from the land board that confirmed no application for consent was made to the land board in favour of the 1st Defendant. He also produced a copy of the green card to prove that the title was registered in the 1st Defendant's name on 11th Nov 2009 before it was transferred to the 2nd Defendant 14th Feb 2010.

13. The letter from the District Officer Nambale to the Land Registrar dated 11th December, 2009 and produced as PEx 3 confirms that no Land Board meetings were held for the transaction involving the 1st Defendant. The letter stated in part that:

"This is to inform you that the above piece of land has had no transaction save for the month of June, 2009 where the owner Mr. Albert Nyongesa Buluma was transferring 0.80Ha to Emily Milkwambo. Since then, there has been no any transaction of the same piece of in the Nambale Control Board..."

14. Fraud is an allegation that has to be proved as held in the **Paul Muira & Another vs. Jane Kendi Ikinyua & 2 others (2014) eKLR** where the court cited with approval the Court of Appeal case of **Musonga vs. Nyati (1984) KLR 425** and in **Koinange and 13 Others (1986) eKLR 23** where it was observed that:

"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud."

15. In light of the foregoing, it is evident that the registration of the 1st Defendant was devoid of any of the necessary supporting documents including but not limited to the sale agreement, the transfer and Land Control Board consent. The registration of the 1st Defendant was thus fraudulent and so was the subsequent transfer to and registration of the 2nd Defendant as proprietor of the suit land.

16. On question of whether the 2nd Defendant's title should be cancelled, the Land Registration Act empowers this Court to order the rectification of the register under Section 80 which provides that,

1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

17. The Plaintiff has levelled sufficient evidence against both Defendants to warrant the revocation of the 2nd Defendant's title as the title having been obtained fraudulently and or illegally, cannot be protected by section 24 of the Land Registration Act.

18. In view of the above analysis and observations, I am satisfied that the Plaintiff has proved his case on the balance of probabilities. Accordingly, I enter judgment in his favour as follows:

a) An order be and is hereby issued for the cancellation of the title held by the 2nd Defendant and the register be rectified to reflect the name of the plaintiff ALBERT NYONGESA BULUMA as the owner of the suit title BUKHAYO/MATAYOS/2570.

b) The costs of this case to be borne by the Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF MARCH, 2022.

A. OMOLLO

JUDGE