



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 23 OF 2019**

**ZEPHANIA NGAIRA ANGWEYE.....PLAINTIFF**

**VERSUS**

**1. RODGERS SENAJI MULEMI**

**2. BARCLAYS BANK OF KENYA LIMITED..... DEFENDANTS**

**JUDGMENT**

1. This suit was commenced by a plaint dated 15/11/2010 and amended on 27/1/2015 where the Plaintiff sought the following injunctive reliefs and declaratory orders against the Defendant;

**a) A declaration that the Plaintiff is the rightful owner of property referred to as Title Number Isukha/Shitoto/1492 and Title Number Isukha/Shitoto/1529.**

**b) A declaration that the conveyance in favour of the 1<sup>st</sup> Defendant registered on 25/2/2002 is void ab initio.**

**c) A declaration that the mortgage created in favour of the 2<sup>nd</sup> Defendant, registered on 29/10/2008 is created through fraud and misrepresentation on the 1<sup>st</sup> defendant and is null and void ab initio.**

**d) An order directing the defendant to deliver to the registrar of lands Kakamega land registry for cancellation on 1<sup>st</sup> defendant original title deed and issued on 25/2/2002.**

**e) A permanent injunction restraining the defendant whether by themselves, agents, servants or otherwise whomsoever from trespassing upon, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning or dealing with property Isukha/Shitoto/1492 and Isukha/Shitoto/1529**

**f) General damages for fraudulent misrepresentation against the 1<sup>st</sup> Defendant**

**g) An order compelling the 1<sup>st</sup> Defendant to pull down all the structures erected by him on the land known as Isukha Shitoto/1492 and Isukha/Shitoto/1529**

**h) Costs and interest**

**i) Eviction of the 1<sup>st</sup> defendant from L.R. Isukha/Shitoto/1529**

**j) Mesne profits**

**k) Any other or further relief this court deems fit to grant.**

**Plaintiff's Case**

2. The Plaintiff's case is that it is the lawful owner of the suit property being Title No. Isukha/Shitoto/1492 (the first suit property) measuring approximately 0.045 Ha being a sub division of plot 316 pursuant to a transfer registered on 4/10/1996 and was duly issued with a Title Deed on 4/10/1996. The Plaintiff had purchased the property for valuable consideration from one Dickson Mutola Jumba. The Plaintiff states that he is also the proprietor of Land Title Reference No. Isukha/Shitoto/1529 (the second suit property) which the Defendant, upon unlawfully acquiring the first suit property, fenced off thereby denying the Plaintiff access thereto, and built thereon a septic tank.

3. The Plaintiff avers that the 1<sup>st</sup> Defendant fraudulently had the property registered to his name, and then did a mortgage of the first suit property to the 2<sup>nd</sup> Defendant to secure bank credit facility. The Plaintiff avers that the action of the 1<sup>st</sup> Defendant was fraudulent, particulars of fraud and misrepresentation were itemised in paragraph 8 of the plaint as follows:

- (a) Obtaining, possession and custody of the Plaintiff's title to the property without the Plaintiff's knowledge, authority or consent.
- (b) Misrepresenting that the Plaintiff had sold the first suit property to the 1<sup>st</sup> Defendant.
- (c) Fraudulent holding himself out to be genuine registered owner of the Plaintiff's property.
- (d) Fraudulently benefiting from the Plaintiff's property without any consideration being paid to the Plaintiff.
- (e) Fraudulently mortgaging the property to the 2<sup>nd</sup> Defendant without valid title thereto.
- (f) Fencing off and constructing septic tanks on L.R. Number Isukha/Shitoto/1529 thereby combining it with and purporting it to be part of the first suit property. This is inconsistent with an innocent error on his part.
- (g) The 1<sup>st</sup> Defendant and the Plaintiff grew up together on adjacent lands and the 1<sup>st</sup> Defendant knew that the land he was purportedly buying belonged to the Plaintiff who was out of the county. No inquiry was made why a person who was not an immediate family member of the Plaintiff could sell the Plaintiff's property.
- (h) The 1<sup>st</sup> Defendant being a person who knows very well the area (Khayega) where the lands are situated knew well or reasonably ought to have known that LR Number Isukha/Shitoto/1492 and Isukha/Shitoto/1529 belonged to the Plaintiff.

4. The Plaintiff further avers that by reason of the foregoing matters, registration of the property in the name of the 1<sup>st</sup> Defendant and the subsequent creation of the mortgage are null and void ab initio and the same cannot vest any interest adverse to that of the Plaintiff as the legal owner thereof; that the purported mortgage in favour of the 2<sup>nd</sup> Defendant does not constitute any security over the property and thus it is null and void ab initio for the following reasons:

- (a) In the absence of the valid title to the property the 1<sup>st</sup> Defendant lacked the contractual capacity to mortgage the property than he himself had.
- (b) The 1<sup>st</sup> Defendant could not pass to the 2<sup>nd</sup> Defendant any better title to the property than which he himself had.
- (c) The 2<sup>nd</sup> Defendant failed to carry out any or sufficient due diligence to establish the legality or otherwise of the 1<sup>st</sup> Defendant purported title.
- (d) The Plaintiff has not at any time received any benefit and/or consideration from the Defendants and is a stranger to the lending transaction of the 2<sup>nd</sup> Defendant.

5. In view of the foregoing matters the Plaintiff is generally apprehensive that unless restrained by an order of the Court the

Defendant will continue to trespass over the Plaintiff's property and may take steps aimed at alienating the property and may proceed to adverse, offer for sale, auction, sell, transfer. Assign and/or otherwise deal with the property and thereby defeat the interests of the Plaintiff.

### **The Defence**

6. The 1<sup>st</sup> Defendant denies the allegations in paragraphs 4 and 5 of the plaint and specifically avers the Plaintiff is not the owner of the suit land herein as the land was transferred from the Plaintiff to Laban Ngaira Mulinya who further legally transferred it to Josphat S. Shichenje from whom the 1<sup>st</sup> Defendant exchanged it with parcel No. Isukha/Shitoto/1489 hence the Plaintiff is invited to strict proof thereof. The 1<sup>st</sup> Defendant states that the suit land was lawfully registered in its name on exchange with the registered owner one Josphat S. Shiroko. The 1<sup>st</sup> Defendant denies the particulars of fraud set forth in the plaint and states that:

(a) 1<sup>st</sup> Defendant obtained title from Josphat S. Shiroko who was the registered owner at the time of transaction.

(b) 1<sup>st</sup> Defendant refutes allegations of misrepresentation.

(c) The 1<sup>st</sup> Defendant is the legally registered owner.

(d) Legally mortgaged the property to the 2<sup>nd</sup> Defendant and the Defendant is invited to strict proof thereof.

7. The 1<sup>st</sup> Defendant states that at the earliest opportune time shall raise a preliminary objection on point of law that the suit is time barred and it disclosed no reasonable cause of action to be struck out and/or the suit is incompetent and non-starter.

8. The 2<sup>nd</sup> Defendant did not participate in these proceedings.

### **The Trial**

9. The Plaintiff provided evidence of 3 witnesses while the Defendant also provided 3 witnesses as follows:

**PW1 Zephania Ngaira Angweye** stated that he bought the property Isukha/Shitoto/1492 measuring 0.045Ha from one Diction Mutola Chumba in the year 1996 and bought land parcel Isukha/Shitoto/1529 measuring 0.018Ha and which was adjacent from the first parcel from one Anthony Chumba who was a brother to the first vendor. That he fenced both parcels and has never at any one time transferred the said parcels to another person. He adopted the list of documents dated 8/5/2012 as his bundle and further his witness statement dated 15/5/2012. It was the plaintiff's testimony that only parcel 1492 had been transferred to the defendants and that it is the construction by the defendant that had transcended to parcel no 1529. That he could only access parcel no 1529 through 1429 and that was the reason he bought both parcels.

10. On cross examination it was his testimony that he had left the country for the USA in 1999 and on coming back in 2010 he found a building on the suit parcels. That by the time he sought for injunctive orders on 17/11/2010 the building which at first was just a basic structure had now been further developed and hence the order was overtaken by events. He stated that the documents transferring the land to the Defendant were forged as his original title had not been cancelled to date. On re-examination he stated that the Defendant could not be an innocent purchaser for value as he was aware that the land belonged to the Plaintiff. The witness stated that he had never signed any transfer documents, giving the land to anybody.

11. **PW2 Naftali Mutsotso** testified that he was an Assistant Chief, Savane sub-location in Kakamega. That the Plaintiff and one Laban Mulinya hailed from the said location and had an employer and employee relationship. Sometime in 2008 there was a quarrel between the Plaintiff's mother and the mother to the said Laban Mulinya over allegations that Laban had sold the plaintiff's land. The dispute went before him for resolution but Laban did not honour the summons to attend the meeting and he was forced to advice one Dickson Angwenye who is a brother to the Plaintiff to place a caution over the suit parcels. On cross examination the witness stated that the Defendant had bought the land from Laban who is now deceased.

12. **PW3 Anthony Muhatia Jumba** adopted his statement dated 15/5/2012 and stated that he had sold land parcel Isukha/Shitoto/1529 and his father had sold parcel no 1492 to the Plaintiff who had paid the full purchase price. That they had both

presented themselves before the land control board and the land was then transferred to the Plaintiff. On cross examination, the witness stated that he had sold a different parcel to the Defendant and who had erected a petrol station on the said land. That the plot sold to the Defendant was not among the suit properties listed for determination before court.

### **Defendants Case**

13. **DW1 Rodgers Senaji Mulemi** relied on his statement dated 28/5/2012 and further his list of documents filed on 30/5/2012 and a copy of the register in respect of title no Isukha/Shitoto/1492 from the lands office Kakamega which had earlier on been produced by the Plaintiff. He referred the court to entry no 10 of the said register dated 25/2/2002 when he became the owner of the said land. He further pointed out that entry no 4 indicated the Plaintiff as being the owner as at 4/10/1996. Entry no 6 further indicated the owner of the said parcel as Laban Mulinya as of 1/11/2001. Entry no 8 had Josphat Shijenje Shiroko as the registered owner from 26/11/2001. It was the 1<sup>st</sup> Defendant's evidence that he was initially the owner of Parcel No Isukha/Shitoto/1489 and he exchanged the same with one Josphat who owned parcel No. 1492. That he then became the rightful owner of the land. The defendant urged the Court to dismiss the suit.

14. On cross examination the witness stated that he purchased the suit property from Josphat Shijenje Shiroko; they exchanged their property, there was no sale agreement, and money did not exchange hands. It was his evidence that the plot was 0.045Ha in size, that they went to the land control board and a consent dated 16/1/2002 was obtained. The witness denied having any knowledge of the consideration of Kshs 50,000/- quoted in the transfer documents. He stated that he did not carry out any valuation of the property and paid stamp duty of Kshs 1,775/-. The witness testified that he was not aware that the original title had not been cancelled, that it was Josphat who applied to the Land Control Board and that he had taken a loan from the bank using the said title and which had already been cleared.

15. **DW2 Josphat Sijenje Shiroko** stated that he exchanged his plot with the Defendant herein. That he had bought the said plot from one Laban Ngaira. His plot was no 1492 and which he exchanged with the defendant. On cross examination the witness stated that no money was involved in the exchange of the plot on 26/11/2011. That he did not know the plaintiff and that the documents he had brought before the court were not forgeries.

16. **DW3 Monica Bor**, the Land Registrar Kakamega County, referred to defence exhibit 3 which was a title deed for Isukha/Shitoto/1492 which she stated had been surrendered to the land's office. That the same was registered in the plaintiff's name and had been surrendered to facilitate transfer of the same. She further referred to transfer of land forms dated 1/11/2001 and letter of consent dated 15/8/2001 issued by the Shinyalu Land Control Board. According to DW3 the documents showed that the land had been transferred from the Plaintiff to one Laban Ngaira Mulinya, then to Josphat Sijenje Shiroko and finally to the Defendant. That the present registered owner of the land was the defendant. On cross examination DW3 stated she was not the one who signed the transfer document; that as per the records at the lands office the title deed had been surrendered and that she was not aware of any forgeries or fraudulent entries on the said title.

### **Submissions**

#### **Plaintiff's Submissions**

17. Mr Khaminwa learned senior counsel for the Plaintiff in his submissions dated 2/6/2021 submitted that the Plaintiff herein had not at any given time sold the suit land parcels to one Laban Mulinya. That the plaintiff had annexed in his documents before court, copies of the title deeds for ownership of the suit land in confirmation of lawful possession of the same. It was submitted that the transfer of the land to the said Laban and the documents produced as evidence of the said transfer were a forgery and that the transfer was fraudulent. It was prayed that this court should not allow the plaintiff to be deprived off ownership of his land by fraudulent means as was emphasised in **Alice Chemutai Too v Nicholas Kipkirui & 2 Others [2015] eKLR.**

18. Counsel submitted that Laban Mulinya took advantage of the fact that the Plaintiff was not residing in the country and irregularly changed ownership of the land to the defendant. That the septic tank and building erected on the suit property had been done wrongfully. Counsel submitted that equity only exempts a purchaser who acquired title on wrongful impression that they had made a genuine purchase. In the present case the Defendant was aware that the land belonged to the Plaintiff. It was further submitted that the allegations by the Defendant and his witnesses over purchase and transfer of the suit land defeated the provisions of Section [3] of the Contract Act which provides that any agreements on sale of land should be reduced into writing and the same is emphasised under section 44[1] of the Land Registration Act. Counsel submitted that the evidence presented by the Defendant was

contradictory and so the title shall be cancelled. Reliance was placed on Section 26[1] of the Land Registration Act on a title being conclusive evidence of ownership as long as it is not a fraudulent one. Dr. Khaminwa submitted that the said section was to protect real title owners from fraudulent people and transactions as was echoed in **ELC No 417 of 2017 Samuel Odhiambo Odeny v Jubilee Jambo Hardware & 1 Other**. The Plaintiff also prayed for costs and interest of the suit and an award of mesne profits as the defendant had erected a commercial building on the suit property and was continually benefiting from the rent acquired from the same.

### **Defendant's Submissions**

19. The defendant's submissions filed on 27/7/2021 highlighted that this Court has no jurisdiction to determine the suit before it. Reference was made to the classic case of **Owners of Motor Vessel Lilian S v Caltex Oil[K] Ltd [1989]**, and **Article 162[2]** of the Constitution on the mandate of the Environment and Land Court. It was further submitted that the defendant was the current absolute owner of the suit property as it had been confirmed by DW3 that it was the defendant who held title of the suit property. Mr. Ondieki, learned counsel for the Defendant submitted that the Plaintiff had not proved allegations of fraud and a report had not been made to the relevant authorities over the same. That the suit land had been procedurally and legally transferred to the Defendant and therefore no fraud and illegality had been undertaken on the part of the Defendant. Counsel submitted that the reliefs sought were not available for the Plaintiff and that the case had not been proved on a balance of probability and the same ought to be dismissed.

### **Issues for Determination**

20. I have carefully considered the suit before court, the submissions of counsel in this matter and in my view the following issues arise for determination by this Court.

- a) **Whether or not this court has jurisdiction over this suit**
- b) **Whether or not the suit property was illegally or fraudulently transferred to the defendant**
- c) **Whether or not the plaintiff is entitled to the reliefs sought.**

### **Whether or not this court has jurisdiction**

21. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** where the Court of Appeal held as follows:

***"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

22. This suit was filed on 15/11/2010 during which time the High Court was seized of jurisdiction herein. The constitution provided under Article **162(2)(a) & (b)** that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title to land. Article **162(3)** of the Constitution provided that Parliament shall determine the jurisdiction of the courts contemplated in clause (2). Later Parliament enacted the Environment and Land Court Act to give effect to Article **162(2)(b)** of the Constitution. The preamble to the act reads: - "to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes." The act received presidential assent on 27<sup>st</sup> August 2011 and its commencement date was 30<sup>st</sup> August 2011. By this time the suit was already before court and being handled by the High Court.

23. The Defendant did bring several applications to have the matter transferred but the court before which the said applications were heard rejected such argument. On 20/2/2012 Justice G. K. Kimondo dismissed the Defendant's application for transfer of the suit to the Kakamega ELC Court. That decision was never appealed. The issue of jurisdiction was therefore already considered, save for

further emphasis that on the date the current suit was filed the High Court had the jurisdiction to hear and determine the suit.

**On whether or not the suit property was illegally or fraudulently transferred to the defendant.**

24. The Plaintiff led evidence to show that he was the bona fide owner of Land Parcels No Isukha/Shitoto/1492 and 1529. Original title deeds to the said suit properties were annexed to the Plaintiffs pleadings as proof. The land was left in the care of one Laban Mulinya as the caretaker as the plaintiff was working overseas at that time. These sentiments were corroborated by the evidence of PW2 who knew both the plaintiff and the said Laban and confirmed that the nature of their relationship was that of employer-employee. The defendant has on the other hand stated that he exchanged the suit land with one Josphat Shiroko who owned the land parcel before him. What had not been clearly demonstrated before this court is how the land was transferred from the Plaintiff, got registered in the name of his caretaker Laban Mulinya and further to another person, who later sold it to the Defendant. The transfer process from the Plaintiff to Laban Mulinya was clearly marred in irregularities and forgery. The Plaintiff claimed that the signature appended upon the transfer forms was clearly not his and at no particularly point in time had he engaged in any activities to have the land transferred to another party. The Defendant stated that he conducted a land search at the lands office that showed the suit land belonged to Laban Ngaira Mulinya as the registered owner. However, from the evidence adduced before court, it is clear that the Defendant had initially bought part of the original parcel of land from which subdivision was carried out to produce new numbers which include the suit land. The Plaintiff gave evidence to the effect that the land had been bought by several people who included the Defendant herein. The same was bought from the initial owner of the mother parcel one Anthony Muhati Jumba. In that case, the Defendant was not new to the locality and the individuals involved in the transaction. In fact the Defendant and the Plaintiff grew up as neighbours so the Defendant could not feign ignorance that the land belonged to the Plaintiff. The Defendant took advantage of the Plaintiff's absence from the country to fraudulently take the Plaintiff's land. He either intentionally or negligently failed to perform due diligence as he would have known that Laban Mulinya could not have owned the land. Cases of fraudulent transfers and acquisition of land parcels by forgery have become rampant in the country. It is unfortunate that even at the land registries where proper documentation and procedures ought to be followed in all land transactions, the same is not possible as they have become hubs notorious in aiding fraudulent transactions. It is therefore incumbent upon an individual interested in any transaction with regard to land to the extra mile in due diligence. A search is just one proof of ownership of land or transactions that have been undertaken in relation to the said land. Due diligence would require even a visit to the parcel physically, ascertain the boundaries and occupation of the same. It is clear that the title obtained by the Defendant was fraudulent. The particulars of fraud and misrepresentation outlined by the Plaintiff were not rubbished by the Defendant. It is the duty of this Court to protect lawfully acquired properties. **Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 Others (supra)**, the Court held that: -

**“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.**

25. Further, Section 23(1) of the Registration of Titles Act (now repealed) and repeated in Section 26(1)(a) &(b) of the Land Registration Act 2012, provides: -

**“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:-**

**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.**

26. In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR** Justice Sila Munyao held that:

**“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or**

**misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”**

27. I fully agree with the learned judge. It is clear that Section 26 is meant to protect the real title holders from corrupted individuals whose intention is to reap where they have not sown. The Plaintiff herein having led evidence that they neither sold nor transferred the suit land to the Defendant, it is prima facie clear that the proceeding and transactions leading to the denial of the Plaintiff's land right were fraudulent. This is so because the Plaintiff to date retains the original title deed which, in a lawful transaction ought to have been surrendered to the Land Registry. Further, the Plaintiff did not participate in the fraud, so this Court cannot ask him where he was when his land was being taken. This Court can only protect his right.

**On whether or not the plaintiff is entitled to the reliefs sought.**

The principles of injunction as enunciated in **Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR**, where the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief are:

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

- a. establish his case only at a *prima facie* level,**
- b. demonstrate irreparable injury if a temporary injunction is not granted, and**
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

**These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”**

28. This Court is satisfied that the Plaintiff has established a *prima facie* case. He has a legal right to the suit land and the same was cemented by his title deed which was produced before this Court. The Defendant did not provide convincing reasons leading to his alleged ownership of the suit property. No sale agreement was provided to show the real intention of the transaction. Further, even if, for a fleeting moment this Court were to assume that the 1<sup>st</sup> Defendant was innocent, that alleged innocence is not enough to deprive the Plaintiff of what is lawfully his. Documentation in support of the subsequent transfers from the Plaintiff were not availed and no proper explanation was given as to the legality of the process.

29. As to whether the plaintiff will suffer irreparable damage/harm, the court in **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** stated the following with regard to what amounted to irreparable harm;

***“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.***

30. The Plaintiff provided evidence that the defendant has constructed a storey building in the suit land; that the building is being used for commercial purposes and generates rent every month which is paid to the defendant. It is clear that it is the Defendant who

is the beneficiary from the proceeds of the building erected on the suit land. The Plaintiff is as of now deprived of the use of the same, hence is entitled to mesne profits. The same has been satisfactorily proven. The Court in the above Pius Kipchirchir Kogo case further pronounced itself on balance of convenience as follows:

*“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.*

*In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”*

31. I believe the Plaintiff when he states that he has so far suffered greater harm than that which will be occasioned to the Defendant if the orders sought are not granted. Since the year 2002, the Defendant has had the privilege to use the land an action which has denied the Plaintiff of its use. The Plaintiff has pleaded for general damages for fraudulent misrepresentation, which I am satisfied this Court can grant.

32. In the end I find and hold that the Plaintiff has proved his case to the required standard and grant I Orders as follows:

**a. A declaratory order is hereby issued that the Plaintiff herein is the rightful owner of land Title Number Isukha/Shitoto/1492 and Title Number Isukha/Shitoto/1529.**

**b. A declaration is hereby made that the conveyance in favour of the 1<sup>st</sup> Defendant registered on 25/2/2002 is void ab initio.**

**c. A declaration is hereby made that the mortgage created in favour of the 2<sup>nd</sup> Defendant, registered on 29/10/2008 is created through fraud and misrepresentation on the 1<sup>st</sup> defendant and is null and void.**

**d. An order is hereby made directing the defendant to deliver to the Registrar of Lands Kakamega Land Registry for cancellation of the 1<sup>st</sup> defendant's original title deed, issued on 25/2/2002.**

**e. A permanent injunction is hereby given restraining the defendants whether by themselves, agents, servants or otherwise whomsoever from trespassing upon the land, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning or dealing with property Isukha/Shitoto/1492 and Isukha/Shitoto/1529 in any way.**

**f. An order is hereby made evicting the defendant from the suit properties being parcel Nos. Isukha/Shitoto/1492 and Isukha/Shitoto/1529.**

**g. Mesne profits are hereby granted to the Plaintiff of Kshs. 20,000/= per month with effect from 1/3/2002 upto the time of vacant possession of the suit property by the plaintiff.**

**h. An order directing the 1<sup>st</sup> Defendant to remove all the structures erected by the 1<sup>st</sup> Defendant on the property referred to as Title Number Isukha/Shitoto/1492.**

**i. Kshs. 1,000,000/= being general damages for fraudulent misrepresentation.**

**j. Costs of the suit to the Plaintiff.**

**SIGNED AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021.**

**E. K. OGOLA**



**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF OCTOBER, 2021.**

**JOHN MATIVO**

**JUDGE**



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