



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 117 OF 2016

MARY OMBIKWA ODUORPLAINTIFF

VERSUS

CAROLYNE AUMA

PETER AKAMA MUDIWO

MARTIN MUKHOLI SHIKUKU DEFENDANTS

JUDGEMENT

The plaintiff avers that at all material times prior to 12th October 2007 parcel of land known as S. Wanga/Bukaya/624 was registered in the name of Stephen Malala Ondongu who died on 12th October 2007. That the deceased (Stephen Malala Ondongu) was father to the plaintiff and the plaintiff being a dependent has locus standi to bring this suit in the interest of the other siblings of the deceased. That the plaintiff herein is entitled to a share of the property known as land parcel No. S. Wanga/Bukaya/624 together with the other dependents of the deceased who died intestate. That, the plaintiff avers that the deceased Stephen Malala Ondongu died before distributing his property being land parcel No. S. Wanga/Bukaya/624 and issue of distribution of the same called for succession which would bring all the deceased's defendants on board for a just process through the court as required by the law of succession. That the plaintiff further avers that the 1st and 2nd defendants herein in collaboration with the 3rd defendant deliberately and fraudulently short circuited the process of succession and caused the transfer and sub-division of land parcel No. S. Wanga/Bukaya/624 into their names and creating new numbers, S. Wanga/Bukaya/1433 & 1518 in the name of 1st defendant, S. Wanga/Bukaya/1434 in the name of 2nd defendant and S. Wanga/Bukaya/1519 in the name of 3rd defendant respectively. That the plaintiff further avers that the registration of the above parcels of land into the name of the 3 defendants was done fraudulently as they were done after the death of Stephen Malala Ondongu and they should be restored back into the names of the deceased so that succession may be carried out and properly distribution undertaken among the deceased siblings. That the plaintiff prays for cancellation and deregistration of defendants names from land parcel No. S. Wanga/Bukaya/1518, 1433, 1434 and 1519 and restoration of land parcel No. S. Wanga/Bukaya/624 into the name of the deceased Stephen Malala Ondongu so the succession cause into the estate of the deceased may be undertaken and proper distribution carried out.

Reasons wherefore plaintiff prays for:-

- (a) Cancellation and deregistration of land title Nos. S. Wanga/Bukaya/1518, 1433, 1434 and 1519 respectively from the names of the 1st, 2nd and 3rd defendant so that the same reverts back to the original land parcel No. S. Wanga/Bukaya/624 into the name of Stephen Malala Ondongu now deceased.
- (b) Declaration that the registration of the above parcel of land into the names of the defendants was fraudulent and unlawful.
- (c) Costs to this suit.
- (d) Any other relief/orders this Hon. Court may seem fit to grant.

The defendants were served by registered post and failed to enter any defence. This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 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.

This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is a finding of fact the defendants are the registered proprietor of Land parcel. Nos. S. Wanga/Bukaya/1518, 1433, 1434 and 1519 being the subdivision of land parcel No. S. Wanga/Bukaya/624. The plaintiff produced the search certificates in court. PW1 testified that the deceased (Stephen Malala Ondongu) was father to the plaintiff and the plaintiff being a dependent has locus standi to bring this suit in the interest of the other siblings of the deceased (PEX1). That the plaintiff herein is entitled to a share of the property known as land parcel No. S. Wanga/Bukaya/624 together with the other dependents of the deceased who died intestate. That, the plaintiff avers that the deceased Stephen Malala Ondongu died before distributing his property being land parcel No. S. Wanga/Bukaya/624 and issue of distribution of the same called for succession which would bring all the deceased’s dependants on board for a just process through the court as required by the law of succession. I have carefully perused the documents on record. PEX3 the green card of land parcel No. S. Wanga/Bukaya/624 shows that the land was registered in the name of Stephen Malala Ondongu. On the 24th October 2012 it was transferred to the name of the 1st defendant Carolyn Auma Akhutu. PEX2 the death certificate of Stephen Malala Ondongu shows that he died on the 12th October 2007. The defendants offered no defence and no evidence of succession proceedings having been conducted. I find that the title was fraudulently passed on to the defendants in 2012 long after the passing away of Stephen Malala Ondongu leaving out some of the beneficiaries. The defendants’ title has been challenged and I find it was issued through a fraudulent scheme. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. Cancellation and deregistration of land title Nos. S. Wanga/Bukaya/1518, 1433, 1434 and 1519 respectively from the names of the 1st, 2nd and 3rd defendant so that the same reverts back to the original land parcel No. S. Wanga/Bukaya/624 into the name of Stephen Malala Ondongu now deceased and the same to be subjected to succession proceedings.
2. Declaration that the registration of the above parcel of land into the names of the defendants was fraudulent and unlawful.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE