



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 209 OF 2016

ZAINABU ETA MUSA.....PLAINTIFF

VERSUS

CONTRAD NOAH MALOBA

FLORENCE ANDENYI MACHAYO.....DEFENDANTS

JUDGEMENT

The plaintiff avers her husband one Musa Ashiko was the registered owner of Land Parcel No. N.Wanga/Kholera/1146. The plaintiff avers that the 1st defendant took advantage of his husband's ignorance and tricked and acquired the above mentioned parcel of land from her husband. The plaintiff avers that she filed a case at the Land Tribunal Case No. 75 of 2004 and the 1st defendant was summoned to this honourable court thrice but he never showed up since he knew he never used the right way to acquire the above mentioned parcel of land. The plaintiff alleges that the 1st defendant again tricked the plaintiff's son and entered into land sale agreement claiming that he is selling the suit parcel of land for a consideration of Ksh. 50,000 of which the plaintiff's son never wanted to lose their parcel of land and he agreed to sign the documents and paid the deposit of Ksh. 5,000/=. The plaintiff avers that the 1st defendant went ahead and registered Land Parcel No. N/Wanga/Kholera/1239 in her husband's name and Land Parcel No. N/Wanga/Kholera/1240 in the name of Florence Andenyi Machayo who is a stranger to her. The plaintiff avers that according to her the 1st defendant claimed that her husband Musa Ashiko had leased the suit parcel of land but the defendant claims to have bought the land of which he cannot even produce the land sale agreement and therefore he does not have a right to own the said parcel of land. The plaintiff's claim against the defendants is that sub-division of Land Parcel No. N/Wanga/Kholera/1239 and 1240 which is registered in the name of Florence Andenyi Machayo be cancelled, revoked and or nullified and the same be reverted to the original number N/Wanga/Kholera/1146. The plaintiff's claim against the defendants is for the cancellation of the sale of a portion of a plot measuring 0.3 Hectares from Land Parcel No. N/Wanga/Kholera/1146 since the 1st defendant does not have authority to sale the said parcel of land since it does not belong to him and refund the amount of Ksh. 5,000/= which he took from the plaintiff's son namely Ibrahim Oduori Washiku. The plaintiff prays for judgment for:-

1. That the sub-division of Land Parcel No. N/Wanga/Kholera/1239 and 1240 which is registered in the name of Florence Andenyi Machayo be cancelled, revoked and or nullified and the same be reverted to the original number N/Wanga/Kholera/1146.
2. The cancellation of the sale of land agreement and the 1st defendant do refund the amount of Ksh. 5,000/= paid to him and return the title deed back to the plaintiff.
3. Costs of this suit be provided for.

The defendants aver that the 2nd defendant is the absolute registered owner of Land Parcel known as N/Wanga/Kholera/1240. The defendants aver that the 1st defendant bought a portion of land parcel originally known as N/Wanga/Kholera/114 measuring 0.3 Ha or thereabouts from Musa Washiku the husband to the plaintiff Zainabu Eta Musa for a consideration of Ksh. 50,000/= reduced into a land sale agreement made in 1994 or thereabouts and took immediate vacant possession of the said portion of land in 1994. The 1st defendant attended Mumias Land Control Board for subdivision and transfer of the said portion of land measuring 0.3 Ha or thereabouts for consent together with the plaintiff's husband Musa Washiku which was approved. The 1st defendant avers that the plaintiff's husband Musa signed and executed all the transfer forms and later processed the transfer and obtained title of Land Parcel known as N/Wanga/Kholera/1240. The 1st defendant avers that upon sale and transfer of the said land parcel of land he has no claim or interest over the same and therefore the plaintiff's case should be dismissed with costs. That the plaintiff's husband Musa Washiku is still alive and has never claimed the same or raised any issue with the acquisition and or subsequent transfer of the same to the said 2nd defendant. That sometimes in 1998 after acquisition of his title of land parcel known as N/Wanga/Kholera/1240, he sold the same to the 2nd defendant in 1998 and acquired land title deed on 27th February, 1998. The 2nd defendant avers that she bought the land from the 1st defendant who was then the absolute registered owner hence an innocent purchaser for value. The 2nd defendant avers that the plaintiff herein since sometimes 2016 has been attempting to forcefully enter into, encroach and or trespass onto the Land Parcel of land known as N/Wanga/Kholera/1240 without her consent and or legal justification. The 2nd defendants seek an order permanently restraining the plaintiff, her agents, servants, workers and or any other person from forcibly

entering, encroaching and or trespassing onto the 2nd defendant's Land Parcel known as N/Wanga/Kholera/1240. The defendants prays that the plaintiff's suit be dismissed with costs and counter claim be allowed with costs.

On the 13th October 2020 the plaintiff filed a notice of withdrawal of her case and the same was adopted as an order of the court on the 4th November 2020. The matter proceeded with the counterclaim. This court has carefully considered the evidence in the counter claim 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 2nd defendant is the registered proprietor of Land parcel No. N/Wanga/Kholera/1240. DW1, the 2nd defendant testified that she bought the land from the 1st defendant who was then the absolute registered owner hence an innocent purchaser for value. The 2nd defendant states that the plaintiff herein since 2016 has been attempting to forcefully enter into, encroach and or trespass onto the suit land without her consent and or legal justification. DW2 the 1st defendant testified that he bought a portion of land parcel originally known as N/Wanga/Kholera/114 measuring 0.3 Ha or thereabouts from Musa Washiku the husband to the plaintiff Zainabu Eta Musa for a consideration of Ksh. 50,000/= reduced into a land sale agreement made in 1994 and took immediate vacant possession. The 1st defendant attended Mumias Land Control Board for subdivision and transfer of the said portion of land measuring 0.3 Ha or thereabouts for consent together with the plaintiff's husband Musa Washiku which was approved. The the plaintiff's husband Musa signed and executed all the transfer forms and later processed the transfer and obtained title of Land Parcel known as N/Wanga/Kholera/1240. That sometimes in 1998 after acquisition of his title of land parcel known as N/Wanga/Kholera/1240, he sold the same to the 2nd defendant. From the evidence before me I find that the 2nd defendant is the absolute and indefeasible owner of the suit land and she acquired the suit land legally. I find that the defendants have proved their counter claim on a balance of probabilities and I grant the following orders;

1. An order permanently restraining the plaintiff, her agents, servants, workers and or any other person from forcefully entering, encroaching and or trespassing onto the 2nd defendant's Land Parcel known as N/Wanga/Kholera/1240.
2. Costs of this suit to be borne by the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE