



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 24 OF 2019**

**JAMES KARINGA ALUVANZE.....APPELLANT**

**VERSUS**

**KENNEDY ALUVANZE**

**BEN ICHAMINY.....RESPONDENTS**

**JUDGEMENT**

The appellant herein James Karinga Aluvanze being dissatisfied with the judgment delivered by Hon. M.L. Nabibya (Mrs) Senior Principal Magistrate on 27<sup>th</sup> day of June, 2019 in ELC No. 70 of 2018 and appeals on the following grounds;

1. That the learned trial magistrate erred in law and fact when she misapprehended the facts and arrived at a wrong decision.
2. That the learned trial magistrate erred in law and fact in holding that the widow had a right to sell/dispose of her later husband's land without letters of administration of her late husband's estate.
3. That the learned trial magistrate erred in law and fact in admitting in evidence statements purporting to defend the suit of persons (sons) of their late mother without first obtaining a limited grant to enable them have locus in the case.
4. That the learned trial magistrate erred in law and fact in holding that the purported sale of a deceased mother to the plaintiff of her deceased's husband land without full letters of administration was lawful and should be enforced.
5. That the learned trial magistrate erred in law and fact in failing to hold that the purported agreement in respect of sale of land without letters of administration by the deceased mother to the appellant and the respondents' deceased mother amounted to intermeddling into deceased's estate and was illegal and void ab initio.
6. That the learned trial magistrate erred in law and fact in failing to strike out the counterclaim as the same was instituted without locus. The defendants had no letters of either limited grant or full letters of administration of their late mother's estate.
7. That the learned trial magistrate erred in law and fact in failing to refer to the plaintiff's submissions and all pleadings.
8. That the appellant shall upon receipt of the typed proceedings file a supplementary memorandum of appeal to include other grounds and reasons that may become apparent therein.
9. That the learned trial magistrate erred in law and fact in rejecting to grant the appellants an injunction over hearsay allegations made by the respondents who had no locus standi.

That the appellant requests the honourable court for the following orders:-

1. That the appeal be allowed and the whole judgment of the lower court be set aside.
2. That the appellant be awarded costs of appeal as well as those in the lower courts.

The appellant's case is that his father one Zablon Karinga Ayubu is the registered proprietor of Land Parcel No. Kakamega/Shiru/807. That the said Zablon Karinga Ayubu died on the 28<sup>th</sup> December 1998 and no grant of letters of administration has been issued on his estate. It is

the appellant's case that the respondents without any colour of right have trespassed on the suit land claiming that their mother one Selina Muyuga Kibaya (now deceased) had purchased 1/8 of the suit land on 28<sup>th</sup> July 2010 from the appellant's mother one Dinah Muyaka Karinga now deceased. The appellant/plaintiff sought a permanent injunction from trespassing against the respondents and for the exhumation of the body of the said Selina Muyuga Kibaya.

The respondent submitted that, the trial court did not make an error in the circumstances of this matter. The appellant was well aware of the sale of the suit property as he was one of the signatories to the sale agreement which formed the same in the first place. The agreement between themselves and the appellant herein was that, they were supposed to file for Grant of Letters of Administration and the respondent herein were to be entitled to the portion sold at the time the grant is being confirmed. The filing of the grant was only for the purposes to vest title of the purchased portion to themselves. That the appellant was well aware of the legalities involved in dealing with the deceased estate and by agreeing to sell the sale without first obtaining letters of administration he should be stopped from revising the issues of legalities. All other members of the family are aware of the sale and has no problem with the said sale. That the respondent on the other had lived on the suit premises for over 12 years now; and it is the suit property where the respondent mother's remains were interred.

They further submitted that, the appellant himself filed this claim against themselves knowing very well that they were the surviving beneficiaries to their late mother's estate. One therefore wonders why he had to sue them. If they have no locus at all as insinuated by the appellant then, one would assume that there is no claim before this court.

This court has carefully considered the appeal 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.”*

I have perused the records of the lower court and it is a finding of fact the registered proprietor of Land Parcel No. Kakamega/Shiru/807 is one Zablun Karinga Ayubu. It is also in evidence that the said Zablun Karinga Ayubu died on the 28<sup>th</sup> December 1998 and no grant of letters of administration has been issued on his estate. It is the appellant's case that the respondents have trespassed on the suit land claiming that their mother one Selina Muyuga Kibaya (now deceased) had purchased 1/8 of the suit land on 28<sup>th</sup> July 2010. The plaintiff sought a permanent injunction from trespassing against the respondents and for the exhumation of the body of the said Selina Muyuga Kibaya. I have perused the land sale agreements produced as evidence by the respondents dated 28<sup>th</sup> July 2010 and indeed the appellant and his late mother appended their signatures. In another agreement dated 26<sup>th</sup> August 2013 the balance of the purchase price Kshs. 50,000/- was paid and again the plaintiff was present. In a further agreement the appellant commits himself to refund the purchase price by the 31<sup>st</sup> October 2016 failure to which Selina Muyake could sell it to someone else if she so wished. The agreements were witnessed by the Assistant Chief's office, Shiru Sub location, Tiriki. The appellant has not come to court with clean hands. Indeed the land was sold after his father had died but all the beneficiaries participated including the appellant. He even went as far as agreeing that he would refund the money which he did not. It was on the understanding that succession proceedings will be carried out and the liabilities taken into consideration. He cannot now turn round and say the transaction was illegal. Indeed the Trial Magistrate held as follows;

*“That even the balance of Kshs. 50,000/- was paid and he acknowledged receipt. Documents produced as defence exhibits also show that the plaintiff was a witness to the sale and receipt of the purchase price. He cannot turn round and claim the transaction was illegal when he participated.”*

On the issue of the respondents not having locus to defend the suit, it is the plaintiff who sued them in the Senior Principal Magistrates Court at Hamisi Case No. 70 of 2018 for trespass. I find that the appellant cannot turn round now and say they have no locus when he stated they

are the ones who trespassed! Indeed the Trial Magistrate did not grant the counterclaim as the matter would need to go through succession proceedings. I find that the respondents do have an interest on the suit land as their mother one Selina Muyuga Kibaya (now deceased) had purchased 1/8 of the suit land on 28<sup>th</sup> July 2010 from the appellant's mother one Dinah Muyaka Karinga now deceased.

In the case of *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**