



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 61 OF 2017

JONAH OMOYOMA.....PLAINTIFF

VERSUS

BONFACE OURE

REHEMA MUSONYE

LAND REGISTRAR, KISUMU.....DEFENDANTS

JUDGEMENT

The plaintiff avers that at all material times, land parcel registration number Kisumu/dago/2554 was owned and registered in the name of the late Neddy Musonye. At all material times, the plaintiff is administrator to the estate of the late Neddy Musonye who passed away on 2nd March 2010. In 2007, the late Neddy Musonye purchased and acquired possession of the suit property herein Kisumu/Dago/2554 and she acquired a title deed. On or around 26th May, 2015, the 1st defendant purported to acquire transfer of the said land parcel into his name with assistance of the 2nd defendant as well as 3rd defendant by use of forgeries and misrepresentation. That the plaintiff as administrator to the estate of the deceased is entitled to bring this suit after having filed caution on the same register. The plaintiff's claim against 3rd defendant is for cancellation of title deed issued to 1st defendant. The plaintiff prays for:-

1. Cancellation of title deed.
2. General damages as well as exemplary damages.
3. Costs.

PW1 the plaintiff testified that he is the administrator of the estate of his sister in law one Neddy Musonye who passed away on the 2nd March 2010. PEx1 is the letter of administration and PEx2 the death certificate. That the late Neddy Musonye purchased and acquired possession of the suit property herein Kisumu/Dago/2554 and she acquired a title deed. On or around 26th May, 2015, the 1st defendant purported to acquire transfer of the said land parcel into his name with assistance of the 2nd defendant as well as 3rd defendant by use of forgeries and misrepresentation. He produced the transfer form PEx3, letter of consent PEx4, application for registration of caution PEx5 and the green card PEx7. The defendants were served but failed to attend court or file 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 1st defendant is the registered proprietor of Land Parcel No. Kisumu/Dago/2554. PW1 testified that on or around 26th May, 2015, the 1st defendant purported to acquire transfer of the said land parcel into his name with assistance of the 2nd defendant as well as 3rd defendant by use of forgeries and misrepresentation. I have perused the documents adduced as evidence and find that Neddy Musonye passed away on 2nd March 2010 as per the death certificate. The plaintiff produced the transfer form PEx3, letter of consent PEx4, application for registration of caution PEx5 and the green card PEx7 are all dated May 2015. It is clear that Neddy Musonye was long dead when the transfers were being done. I find that the suit parcel was transferred to the 1st defendant through fraud or misrepresentation. The whole exercise was illegal and unprocedural. The plaintiff's evidence remains unchallenged. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The 3rd defendant Land Registrar Kisumu is to cancel the title deed of Land Parcel No. Kisumu/Dago/2554 issued to 1st defendant.
2. The same to revert to the name of Neddy Musonye and be subject to succession proceeding.
3. No orders as to costs as the suit was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH MARCH 2021.

N.A. MATHEKA

JUDGE