



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 18 OF 2020**

**ALEXANDER PHILIP LIKAMI :::::::::::::::::::: APPELLANT**

**VERSUS**

**CHRISTOPHER MANGWELI LIKONO :::::::::::::::::::: RESPONDENT**

**JUDGEMENT**

Alexander Philip Likami the appellant herein being dissatisfied and aggrieved with the judgment and orders made by the Senior Resident Magistrate delivered on the 21<sup>st</sup> July, 2020 in Kakamega MCE & L Case No. 51 of 2019 appeals to this Court on the following grounds inter alia:-

1. That the learned magistrate erred in his evaluation of the evidence given in support of the plaintiff's case and therefore reached a decision that is not supported by evidence.
2. That the learned magistrate erred in law and fact by not appreciating the evidence adduced by the defence witness.
3. That the judgment given by the magistrate ignored the evidence on record and was against the weight thereof.
4. That the trial magistrate erred in law in holding that the plaintiff had proved his case as there was no proof on a balance of probabilities or at all.
5. That the learned magistrate failed to analyse, appreciate and apply and/or have due regard to the defendant's submissions.

The appellant prays for the following orders;

1. That the judgment of the trial magistrate be reversed and an appropriate judgment be entered in favour of the appellant against the respondent.
2. That the respondent be condemned to pay the costs of this appeal.

The appellant submitted that the respondent subdivided Land Parcel No. Isukha/Shitochi/1329 after acquiring the title as the legal representative of the estate of his late father Clement Likono Wiraka into several portions and transferred one portion to the appellant Land Parcel No. Isukha/Shitochi/3085 in the year 1998 measuring 0.4 HA. He produced the sale agreements, transfer form and letter of consent. The parties are neighbours and he has been in actual possession for 22 years. His wife was buried on the suit land and the plaintiff/respondent attended the funeral and did not object to the same. That no evidence has been adduced to prove that the title was acquired illegally and or fraudulently. He relied on the authorities of Samuel Samita Namuyu vs Phimon Machina Ndiwa & 3 Others eKLR and Njuwangu Holdings Ltd vs Langata KPA, Nairobi & 5 Others (2014) eKLR

The respondent submitted that he is the registered proprietor of subdivided Land Parcel No. Isukha/Shitochi/1329 which he obtained through succession from his late father. That the appellant did not obtain a valid title from the respondent and the particulars of fraud have been proved. He relied on the authorities of Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others (2015) eKLR and Kibiro Wagoro Mukami vs Francis Nduati Macharia & Another (2018) eKLR.

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. Land Parcel No. Isukha/Shitochi/3085 is the appellant. The issue for determination is whether or not the said title was obtained illegally or irregularly. The plaintiff/respondent in the lower court stated that he was the registered proprietor of subdivided Land Parcel No. Isukha/Shitochi/1329 which he obtained through succession from his late father Clement Likono Wiraka. The defendants then tricked him into returning the title to the Land Registrar and they caused the subdivision of the same into four titles and registered themselves as the owners. The appellant/1<sup>st</sup> defendant was registered as the proprietor of Land Parcel No. Isukha/Shitochi/3085 without his consent. The appellant/1<sup>st</sup> defendant testified that he bought the suit parcel from the respondent and was legally registered. The 2<sup>nd</sup> defendant testified that he bought Land Parcel No. Isukha/Shitochi/3085 from Mulama Mmboyi and obtained the title on the 11<sup>th</sup> November 1996. That he facilitated the succession proceedings but was never listed as a beneficiary. Thereafter he brought a surveyor and caused the subdivision. DW3 Mulama Mmboyi confirms that he sold land to the 2<sup>nd</sup> defendant and that he purchased the land from the father of the plaintiff. However he states that he sold Land Parcel No. Isukha/Shitochi/1330. It is not in dispute that the appellant did purchase a portion of the suit land from the respondent and the same is also confirmed by documentary evidence. It is also not in dispute that he has been in possession of the same for over 20 years. On perusal of the appellant’s exhibits produced in court it is clear from the sale agreements that he was purchasing a portion of Land Parcel No. Isukha/Shitochi/1329 which he subsequently took possession. However, the transfer documents and consents talk of Land Parcel No. Isukha/Shitochi/3085 and no mutation forms were produced to confirm when this was done. On a closer look at the title register or green card it shows that Land Parcel No. Isukha/Shitochi/1329 was subdivided on the 29<sup>th</sup> October 1996 into Land Parcel No. Isukha/Shitochi/3063 and Land Parcel No. Isukha/Shitochi/3064. This means that the suit land, Land Parcel No. Isukha/Shitochi/1329 was not in existence at the time the appellant and the plaintiff entered the sale agreement on the 6<sup>th</sup> November 1996. There is no evidence to show how the said Mulama Mmboyi acquired title of part of the suit land Land Parcel No. Isukha/Shitochi/3064 to be able to sell the same to the 2<sup>nd</sup> defendant. I find that even though the appellant maybe a bonafide purchase the process of acquiring his title was irregular and the subdivision of the suit property was obtained by fraud and misrepresentation. Indeed the Trial Magistrate held as follows;

*“From the above I am convinced the 2<sup>nd</sup> defendant was the author of the irregularity visited on land parcel Isukha/Shitochi/1329. It is unfortunate that the 1<sup>st</sup> defendant was looped in despite his clear interest which due process would easily have seen him be registered for what rightly belonged to him. The plaintiff seems to acknowledge the interest of the 1<sup>st</sup> defendant. All in all the resultant titles are tainted and the process must commence on a clean slate.”*

I find that the subdivision of land parcel No. Isukha/Shitochi/1329 was irregular. The appellant is well advice to follow the proper channels to obtain a clean and fresh title and I see no reason to overturn the judgement by the Trial Magistrate in this matter.

In the case of Mwanasokoni vs 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 23<sup>RD</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**