



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 51 OF 2018**

**HENRY KAFUMA.....PLAINTIFF**

**VERSUS**

**HEZRON KAYUGIRA ELONDO**

**MUHINDI OLENDO**

**BETTY OLENDO**

**EPHRAIM OLENDO**

**KALORY M. OKWARO**

**THE LAND REGISTRAR VIHIGA DISTRICT**

**MANOAH ESOLLO**

**ELIJAH MWAVALI**

**HEZEKIAH BULIVA .....DEFENDANTS**

**(ALL SUED AS REGISTERED TRUSTEES AND/OR OFFICE BEARERS OF THE  
CHAVAKALI MEETING OF FRIENDS (QUAKERS) CHURCH**

**JUDGEMENT**

The plaintiff is the registered owner of all that parcel of land known as North/Maragoli/Chavakali/679 measuring approximately 0.34 hectares having purchased the same in the year 1970 from one Stephen Mbone. Immediately after purchasing the suit property, the plaintiff allowed a certain Mr. Elondo Lyagala to be cultivating the land as a licensee. Mr. Elondo Lyagala now deceased was the father of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The above stated Elondo Lyagala passed away some time in the year 1976 and from then on there have been disputes between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants on one side and the plaintiff on the other over the suit property with the defendants insisting that the land actually belonged to their late father. It is the plaintiff's case that the defendants have never been in occupation of the suit property and that their late father was only allowed to cultivate the suit premises as a licensee of the plaintiff. On or about 1<sup>st</sup> August, 2009, members of the 6<sup>th</sup> Defendant's church in the company of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants attempted to erect a fence on a portion of the suit property upon which the plaintiff was informed of the goings on and sent his representative to the suit property and upon enquiry the plaintiff's representative was informed by the members of the 6<sup>th</sup> defendant church that the church had actually purchased a portion of the suit property. The plaintiff then requested his advocates on record to conduct a search on the premises. The plaintiff's advocates on record conducted a search and found that a portion measuring 0.5 acres had actually been hived from the suit premises, given a new parcel number North/Maragoli/Chavakali/5, allegedly registered in the name of the late Elondo Lyagala and subsequently transferred to the 6<sup>th</sup> defendant on 4<sup>th</sup> August, 2009. The 5<sup>th</sup> defendant also confirmed the above occurrence insisting that the registration of part of the suit property in the name of the late Elondo Lyagala and subsequent transfer to the 6<sup>th</sup> defendant was in order. The plaintiff is aware that parcel North/Maragoli/Chavakali/5 ceased to exist sometime in the year 1970 when it was sub divided into parcel numbers North/Maragoli/Chavakali/625 and the suit property. It is the plaintiff's contention that the hiving off from his land of parcel number North/Maragoli/Chavakali/5 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in cahoots with the 5<sup>th</sup> defendant and subsequent transfer to the 6<sup>th</sup> defendant was illegal and fraudulent and renders the title subsequently issued by the 5<sup>th</sup> defendant to the 6<sup>th</sup> defendant null and void.

It is the plaintiff's contention that if the 6<sup>th</sup> defendant hold a valid title to parcel number North/Maragoli/Chavakali/5, the same having been illegally and fraudulently hived off the suit property which is denied, the same was irregularly, unprocedurally and fraudulently obtained. In view of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's fraudulent acts, the plaintiff is under threat of being denied use of his property. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) A declaration that the sub division and subsequent title issued to the 5<sup>th</sup> defendant over parcel number North/Maragoli/Chavakali/5 is null and void.
- (b) A declaration that the sub division creating parcel number North/Maragoli/Chavakali/5 be cancelled and the land revert back to the plaintiff as part of parcel number North/Maragoli/Chavakali/679.
- (c) A permanent injunction does issue preventing the defendants from interfering with the plaintiff's quite possession of parcel number North/Maragoli/Chavakali/679.
- (d) Costs of this suit.
- (e) Such further relief as this honourable court may deem fit and just to grant.

DW1, the 5<sup>th</sup> defendant testified that he is a Senior Assistant Land Registrar Vihiga County. He received a court order directing him to visit the suit land and make a report. He did so with the District Surveyor Vihiga and made a report DEx3. The parcel of land known as North/Maragoli/Chavakali/679 belonged to the plaintiff and the parcel of land known as North/Maragoli/Chavakali/5 is registered in the name of Chavakhali Yearly Meeting of Friends (quakers). DEx1 and DEx2 are the green cards. The parcels of land are separate and distinct and parcel of land known as North/Maragoli/Chavakali/5 was not hived out of Parcel of land known as North/Maragoli/Chavakali/679

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. Hon Justice Munyao Sila 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 not disputed that the plaintiff is the registered proprietor of the suit land parcel registration number North/Maragoli/Chavakali/679. The issue for determination is whether or not land parcel number North/Maragoli/Chavakali/5 was hived off the plaintiff's land parcel North/Maragoli/Chavakali/679. DW1, the 5<sup>th</sup> defendant testified that he is a Senior Assistant Land Registrar Vihiga County. He received a court order directing him to visit the suit land and make a report. He did so with the District Surveyor Vihiga and made a report DEx3. The parcel of land known as North/Maragoli/Chavakali/679 belonged to the plaintiff and the parcel of land known as North/Maragoli/Chavakali/5 is registered in the name of Chavakhali Yearly Meeting of Friends (Quakers). I have carefully perused the documents adduced as evidence before me. DEx3 states that both plots Land parcel No. North/Maragoli/Chavakali/679 and Land parcel No. North/Maragoli/Chavakali/5 exist on the ground and they occupy portions larger than in their certificates of registration. Land parcel No. North/Maragoli/Chavakali/679 is 0.34 Ha or 0.842 acres in the title and 0.996 acres on the ground. Land parcel No. North/Maragoli/Chavakali/5 approximate area in the green card is 0.5 acres and on the ground is 0.57 acres. Each parcel has more than what is registered and no subdivision was done to create the two parcels of land (DEx3). I find that the plaintiff has failed to establish that land parcel number North/Maragoli/Chavakali/5 was hived off his land parcel North/Maragoli/Chavakali/679. If there is any fraud in the registration of land parcel number North/Maragoli/Chavakali/5 and this has not been established than it would not concern him as this is a different and distinct parcel of land which he holds no proprietary interest. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss the same. Each party will bear its

own costs as the parties are neighbours.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 3<sup>RD</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**