



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 398 OF 2017**

**WILSON AMWAYI ROGE .....PLAINTIFF**

**VERSUS**

**PRISCILLAH SULWE**

**CATHERINE JENDEKA**

**ELPHAS ODERO .....DEFENDANTS**

**JUDGEMENT**

The plaintiff avers that the late Johnson Elavisa Boge passed on in the year 1973, leaving behind Sofia Busaka Elavisa and eight (8) children. The plaintiff further avers that Sofia Busaka Elavisa (now deceased) was his mother and upon her death in the year 2014 she left behind beneficiaries including the plaintiff. The plaintiff avers that prior to her demise, Sofia Busaka Elavisa and the plaintiff's other siblings and beneficiaries to the estate of the deceased agreed to give the suit property Plot No. 34 Lumakanda Market to the plaintiff herein at a consideration to be made to offset the AFC loan which had encumbered parcel No. 88. The plaintiff took possession and made improvements to the property including erecting structures in the suit property. The plaintiff avers that on subsequent dates after the family agreeing to give possession of the suit property to the plaintiff and after the plaintiff taking possession of the suit property, and upon request from the 1<sup>st</sup> and 2<sup>nd</sup> defendants agreed to offer temporary occupation of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff avers that he only allowed the temporary occupation of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants in good faith and solely on the basis that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had been left as widows by the plaintiff's brothers, Nicholas Eboye and Aggrey Odari and had no place to reside at the time. The plaintiff avers that he had not and has no intention of giving up ownership of the suit property to the defendants, jointly and/or severally. The plaintiff avers that the property is located at Lumakanda Market which is at the headquarters of the vast Lugari sub-county and which is an area most suitable for business and he had incurred huge losses in business as a result of the defendants continued illegal occupation of the suit premises. That prior to instituting this claim and on various occasions during the pendency of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' occupation of the suit property, the plaintiff had the intention and communicated his intention to begin construction and to put up a business within the suit property for the benefit of himself and the estate of the deceased. The plaintiff avers that he has made several attempts from January, 2010 to have the defendants vacate the suit premises. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have fragrantly ignored the plaintiff's calls to have them vacate the suit property and have with the assistance of the 3<sup>rd</sup> defendant vowed not to vacate the premises and/or suit property. It is in view of the defendants continued trespass to the suit property that the plaintiff has moved to this court to seek appropriate remedies. The plaintiff's claim against the defendants is for general damages and unremitted rent from the year 2000 to date. The plaintiff prays for judgment against the defendants jointly and severally for:-

- a. Eviction order upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the suit property namely Plot No. 34 Lumakanda market.
- b. Special damages.
- c. General damages.
- d. Unremitted rent from the year 2000 to date.
- e. Costs of this suit.
- f. Interests on (b), (c) and (d) above.
- g. Any other relief that the honourable court may deem fit to grant.

PW1, the plaintiff produced an agreement and documents from AFC showing that he paid off a loan on parcel No. 88. He produced a construction contract and also land sale receipts of the suit plot. PW2 and PW3 his brothers corroborated the evidence and stated that it was agreed he be given the plot.

The defendants state that the plaintiff herein is the 7<sup>th</sup> born child to the late Johnstone Elavisa Boge and the late Sofia Busaka Elavisa. That the late Johnson Elavisa Boge and Sofia Busaka Elavisa also known as Sofia Vusaka Elavisa had the following children; Elphas Odera Ipinito Amwayi Jenifer Kadeya Pius Mwai Boge Nicholas Eboyi Amwayi (deceased) Beatrice Afandi Wilson Amwayi Aggrey Odari Boge (deceased)

That the late Johnson Elavisa Boge died on or about 21/12/1973 while Sofia Busaka Elavisa also known as Sofia Vusaka Elavisa died on or about 24/4/2014. That the plaintiff is therefore one of the beneficiaries to the estate of the deceased alongside other beneficiaries. That after the demise of the Johnson Elavisa Boge the family of the deceased to wit their mother in law and some of her sons instituted the process of administration to the estate of the deceased and indeed took out letters of administration to the estate of the deceased. That the estate of the late Johnson Elavisa Boge was distributed. That the late Johnson Elavisa Boge had the following properties, Parcel of land known as Lumakanda 88 scheme and Plot No. 34 Lumakanda situated at Lumakanda market measuring approximately 50 by 100 (the suit property herein). That for some reason either inadvertently and/or deliberately the land/plot No. 34 LUMAKANDA situated at Lumakanda market (the subject suit property) was not included in the Succession Cause to the estate of Johnston Elavisa Boge which distributed the property of the late Johnstone Elavisa Boge and therefore the property was left out and was never distributed and it is the reason why it is still in the name of the late Johnson Elavisa Boge to date. That the other property to wit; Lumakanda 88 was distributed and each member got their respective shares including (Sofia Busaka Elavisa widow now also deceased) and respective titles were processed. That not all of the deceased properties were distributed in the lifetime of Sofia Vusaka Boge also known as Sofia Busaka Boge as plot No. 34 Lumakanda was never distributed. The defendants contend that the plaintiff and the two defendants have been utilizing and/or renting out a room each on the suit property as agreed having contributed to the construction of the same pending distribution and/or agreement on the same. The defendants contend that the plaintiff has no right over the entire suit property and that the entire family of the late Johnson Elavisa Boge should do succession to distribute the property in accordance with the law. The defendants state that the three (3) rooms on the suit property have been in use with the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendant having leased out the same to their respective tenants. That the plaintiff has been receiving rent from the tenant in his assigned room on the property.

DW3 Elphas Odera who is the plaintiff's brother corroborated the defense. He states the suit land is in the name of their father. The plaintiff, DW1 and DW2's husband helped develop the same.

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 in dispute that the registered owner of land parcel No. Lumakanda Township/34 is one Johnson Boge now deceased. The litigants are all beneficiaries of the estate of the deceased. The plaintiff avers that prior to her demise, his mother Sofia Busaka Elavisa and other of the plaintiff's siblings and beneficiaries to the estate of the deceased agreed to give the suit property Plot No. 34 Lumakanda Market to the plaintiff herein at a consideration made to offset of the AFC loan which had encumbered on parcel Lumakanda 88. I have perused the agreement is question PEx1 and find that not all the beneficiaries were represented. This poses a challenge as the property was and is still registered in the name of the deceased. Indeed the defendants are in occupation and the 1<sup>st</sup> and 2<sup>nd</sup> defendants maintain that they contributed towards the construction. I find that this property ought to have been subjected to succession proceedings for all these issues to be ironed out. For these reasons I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss the same with no orders as

to costs as the litigants are relatives.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 2<sup>ND</sup> JULY 2019.**

**N.A. MATHEKA**

**JUDGE**