



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 302 OF 2015

ALBERT TABU SHIMWAKA..... PLAINTIFF

VERSUS

NOAH ATSIANO OBIERO

THE LAND REGISTRAR, KAKAMEGA COUNTY.....DEFENDANTS

JUDGEMENT

The plaintiff's case is that, the deceased Paulo Okwangi was the first registered proprietor of land parcel No. Kisa/Wambulishe/673 and the plaintiff together with his father deceased Daniel Shimwaka who was the only son of the above mentioned first registered proprietor of the suit land both resided in their ancestral land identified as land parcel No. Kisa/Wambulishe/673. On or about 1970 the plaintiff who was residing on the suit land got a job in Nairobi hence he left his deceased father Daniel Shimwaka residing on the suit land while he was engaged in his job at Nairobi until January, 2015 when his father was hospitalized after falling sick. The plaintiff avers that in January, 2015 upon him returning to his ancestral home to attend to his sick father deceased Daniel Shimwaka, he was surprised when he found their houses on the suit land had been demolished prompting the plaintiff to make inquiries at the chief's office where he was informed that the land had been taken by someone else. Upon the plaintiff making all the necessary searches, the plaintiff discovered that the suit land had been fraudulently transferred into the name of the defendant on the basis of a succession cause done way back on 17th January, 1973 even before the demise of the deceased Daniel Shimwaka who had first priority in rank to the estate. The plaintiff prays for judgment against the defendants for:-

1. A declaration that the registration of land parcel No. Kisa/Wambulishe/673 in the name of the 1st defendant was fraudulent, illegal and it be nullified, revoked and cancelled.
2. The 2nd defendant be ordered to delete the name of the 1st defendant from the land register and title of land parcel No. Kisa/Wambulishe/673 and the same to revert back to the name of deceased Paulo Okwangi as it was before 17th January, 1973.
3. Costs of this suit with interest from the date of filing till judgment date.

PW1 produced the green card (PEx1), limited grant (PEx2) and Certificate of Succession (PEx3) as exhibits. PW2 and PW3 confirmed that the Daniel Shimwaka now deceased wanted to come back to the land when he was very sick. They did not know about the succession case.

The 1st defendant admits that the suit land Kisa/Wambulishe/673 was first registered in the name of Paulo Okwangi (deceased) but avers that his two sons namely Daniel Shimwaka and Namale sold to him the said piece of land in 1963 at Ksh. 6,000/= as the consideration which he paid and took physical possession and use of the land to date. The 1st defendant avers that the said Daniel Shimwaka and Namale then vacated the suit land to him and moved to settle at Kisoko area where the 1st defendant visited them and requested them to carry out the succession process and have the title transmitted to the name of the 1st defendant. The 1st defendant further avers that Daniel Shimwaka and Namale thereafter consented at the Khwisero Court and certificate of succession was issued by the court to the 1st defendant which certificate transmitted the suit land to the 1st defendant within the existing succession laws. The 1st defendant avers that he has and is in physical possession of the suit land since the 1963 till in April, 2015 when Daniel Shimwaka came at the area Chief's office ailing in the company of his nephew with a request that the 1st defendant allow him to settle on part of the suit land where he Daniel Shimwaka could be buried upon his demise which request was not granted by the 1st defendant. The 1st defendant avers that Daniel Shimwaka and Namale the two sons of Paulo Okwangi consented to the succession process in 1973 at Khwisero court and the proceedings of the court at Khwisero confirms this position. That the plaintiff had been sued by the 1st defendant vide Butere Civil Suit No. 97 of 2015 in which the 1st defendant has sought orders of exhumation of the remains of Daniel Shimwaka buried on Kisa/Wambulishe/673 at night by the plaintiff herein after the 1st defendant refused such burial. The 1st defendant's counter claim against the plaintiff is for a permanent injunction restraining the plaintiff or anybody acting on his behalf from entering encroaching and interfering with the 1st defendant's quiet possession of land. 1st Defendant's Counter claims for;

1. The 1st defendant prays for a permanent injunction restraining the plaintiff or his agents from entering, encroaching and interfering with the 1st defendant's quiet possession of land parcel Kisa/Wambilishe/673 the property of the 1st defendant.

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 defendant is the registered proprietor of Land parcel No. No. Kisa/Wambilishe/673. The plaintiff avers that the suit land was his ancestral home and in January, 2015 upon him returning to his ancestral home to attend to his sick father Daniel Shimwaka, he was surprised when he found their houses on the suit land had been demolished prompting the plaintiff to make inquiries at the chief's office where he was informed that the land had been taken by someone else. Upon the plaintiff making all the necessary searches, the plaintiff discovered that the suit land had been fraudulently transferred into the name of the 1st defendant on the basis of a succession cause done way back on 17th January, 1973. He produced the green card showing that the land was transferred to the 1st defendant through a succession cause way back in 1973. It is clear from the evidence that transmission was through a court order. This court order was never challenged. This suit has also been filed well after 12 years and is time barred. The plaintiff pleaded fraud in their plaint however, he did not prove the same. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. The defendant's title is indefeasible and can only be challenged if it is obtained under a fraudulent scheme which the plaintiff have failed to prove. I find the defendant has proved his counter claim on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the plaintiff or his agents from entering, encroaching and interfering with the 1st defendant's quiet possession of land parcel Kisa/Wambilishe/673 the property of the 1st defendant.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE