



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 496 OF 2014

CATHERIN REHEMA *suing as the administrator of*

***the estate of Samson Matotosi Ashikolwa*PLAINTIFF**

VERSUS

OLIVA LUNGAZO LAKANO.....DEFENDANT

JUDGEMENT

It is the plaintiff's case that, on or about the 12th December, 2002, the plaintiff sold to the defendant a portion measuring 51 metres by 20 metres out of the said land parcel Isukha/Shinyalu/1412. That land parcel No. Isukha/Shinyalu/1412 was sub divided by the defendant without the plaintiff's consent giving rise to new numbers Isukha/Shinyalu/1522, 1523 and 1524. That during the sub division the defendant colluded with the surveyors and she was allocated plot No. Isukha/shinyalu/1523 which plot measures 19 meters by 84 metres (0.16 Ha) and this was not as per their agreement dated 12th December, 2002 particulars whereof are within the defendant's knowledge. That the plaintiff's claim against the defendant is for an order for cancellation of the entire sub divisions that is Isukha/Shinyalu/1522, 1523 and 1524 as per the records at the registry and that the said land reverts back to the original No. Isukha/Shinyalu/1412 in the name of the plaintiff for purposes of proper sub division as per the agreement of the plaintiff and the buyer. The plaintiff also prays that the defendant surrenders to the Land Registrar all title deeds relating to the above sub-division numbers Isukha/Shinyalu/1522, 1523 and 1524 which are in her possession for cancellation as prayed. The plaintiff prays that judgment be entered against the defendant for:-

- (a) An order for cancellation of sub-divisions that is Isukha/Shinyalu/1522, 1523 and 1524 and the land reverts to its original number Isukha/Shinyalu/1412 in name of the plaintiff.
- (b) An order directing the defendant to surrender all title deeds in respect of Isukha/Shinyalu/1522, 1523 and 1524 to the Land Registrar for cancellation.
- (c) Costs of this suit.
- (d) Any other relief the court deems fit to grant.

The defendant avers that vide the agreement referred to by the plaintiff dated 12th December, 2002 the defendant bought from the plaintiff a portion of land measuring 51 meter, by 20 meter out of the parcel of land known as Isukha/Shinyalu/1412, at an agreed purchase price of Ksh. 70,000/= which the defendant paid in full. The defendant avers that before the plaintiff could process title in favour of the defendant, the plaintiff fell ill and was admitted for a long time in hospital wherein the defendant at the request of the plaintiff paid a sum of Ksh. 10,000/= towards the plaintiff's hospital bill. The defendant further states that the defendant also incurred all the expenses attendant to the sale transaction which included application to the Land Control Board, Survey charges and stamp duty for registration of the three (3) parcels of land namely Isukha/Shinyalu/1522, Isukha/Shinyalu/1523 and Isukha/Shinyalu/1524 created out of the parcel of land originally known as Isukha/Shinyalu/1412, which amounted to a sum of Ksh. 50,000/=. The defendant states that at the time of the survey exercise the plaintiff pointed out where the boundary would be fixed in which case a portion larger than what was stated in the initial agreement was allocated to the defendant as re-imburement in kind to cover the hospital bills settled by the defendant on behalf of the plaintiff, and all the expenses that had been settled by the defendant on behalf of the plaintiff on account of Land Control Board expenses, survey charges and stamp duty and registration fees. The defendant avers that she then obtained title to the portion of land she had bought being Isukha/Shinyalu/1523 and has occupied the same since 2002.

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 on or about the 12th December, 2002, the plaintiff sold to the defendant a portion measuring 51 metres by 20 metres out of the said land parcel Isukha/Shinyalu/1412. The plaintiff submitted that, land parcel No. Isukha/Shinyalu/1412 was sub divided by the defendant without the plaintiff’s consent giving rise to new numbers Isukha/Shinyalu/1522, 1523 and 1524. That during the sub division the defendant colluded with the surveyors and she was allocated plot No. Isukha/shinyalu/1523 which plot measures 19 meters by 84 metres (0.16 Ha) and this was not as per their agreement dated 12th December, 2002 (PEx1). The defendant avers that vide the agreement referred to by the plaintiff dated 12th December, 2002 the defendant bought from the plaintiff a portion of land measuring 51 meter by 20 meter out of the parcel of land known as Isukha/Shinyalu/1412, at an agreed purchase price of Ksh. 70,000/= which the defendant paid in full. The defendant avers that before the plaintiff could process title in favour of the defendant, the plaintiff fell ill and was admitted for a long time in hospital wherein the defendant at the request of the plaintiff paid a sum of Ksh. 10,000/= towards the plaintiff’s hospital bill. The defendant further states that the defendant also incurred all the expenses attendant to the sale transaction which included application to the Land Control Board, Survey charges and stamp duty for registration of the three (3) parcels of land namely Isukha/Shinyalu/1522, Isukha/Shinyalu/1523 and Isukha/Shinyalu/1524 created out of the parcel of land originally known as Isukha/Shinyalu/1412, which amounted to a sum of Ksh. 50,000/=. The defendant states that at the time of the survey exercise the plaintiff pointed out where the boundary would be fixed in which case a portion larger than what was stated in the initial agreement was allocated to the defendant as re-imbusement in kind to cover the hospital bills settled by the defendant on behalf of the plaintiff. DW2 confirms the defendant bought land from the plaintiff but does not know the size. The defendant has not adduced any agreement to show that she was to get a bigger portion than what was in the agreement nor any evidence that she paid the hospital bills. I find that the defendant obtained her title through fraud and misrepresentation and the same cannot stand. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order for cancellation of sub-divisions that is Isukha/Shinyalu/1522, 1523 and 1524 and the land reverts to its original number Isukha/Shinyalu/1412 in the name of the plaintiff and the same to be subjected to succession proceedings.
2. An order directing the defendant to surrender all title deeds in respect of Isukha/Shinyalu/1522, 1523 and 1524 to the Land Registrar for cancellation.
3. No orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE