



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 77 OF 2016

LABAN WANYAMA MUVIA

ALFAYO KOFIA MUVIAPLAINTIFFS

VERSUS

REUBEN MUBIA MASIKA

MARGARET OYEDA MUVIA

TOLI H. MUVIA

ZACHARIA MUVIA

AGGREY MASIKE MUVIA

PETER NGALA MUVIA

SOLOMON NYANGWESO MUVIADEFENDANTS

JUDGEMENT

The plaintiffs aver that, they are the sons to the 1st defendant who was the registered owner of land parcel No. S/Kabras/Chemuche/508 which was measuring about 21 acres. The plaintiff avers the 1st defendant is a polygamous man who had two wives namely Jeridah Nechesa Muvia 1st wife (now deceased) and Margaret Oyeda Muvia 2nd wife still alive. The plaintiff avers that their mother died leaving behind 9 children 6 sons and 3 daughters and was buried on the above mentioned parcel of land. That in the year 2002 the 1st defendant summoned a baraza which was led by the assistant chief one J Musa Bateta to go and help him sub-divide his land among his two wives and their families. That the 1st defendant caused the said land to be sub-divided into two equal portions after measuring and removing three (3) acres of land which was solely to be owned by the 1st defendant and the other two equal pieces of land to be owned by the 1st wife and 2nd wife with their families respectively. That after the said sub-division which was attended and chaired by the assistant chief and several village elders each wife and her children moved into their respective portions where they have been staying todate. That the plaintiff's mother who was the 1st defendant's 1st wife later died and was buried in her portion of land. That the 1st wife had 9 children in toto six (6) being male and three (3) being female. That the said six (6) sons went ahead with the help of the 1st defendant who is their father and sub-divided the said land which is their portion measuring about 9 acres among themselves and that each of them has fully developed their respective piece of land extensively. That the children of the 1st wife who is now deceased were never taken to school by the 1st defendant who only took the children of the 2nd defendant who are all working class employed by the government in various positions as such the plaintiffs only rely on the said land for subsistence farming for their survival. The plaintiff avers that the 1st defendant in conjunction with the 2nd defendant and their children without justifiable cause and without the plaintiffs' knowledge with intent to defraud them of their portion of land did sub-divide the original parcel of land No. S/Kabras/Chemuche/508 into other portions of land which include S/Kabras/Chemuche/2315, 2316 and 2317. That the 1st defendant further in conjunction with the 2nd defendant went ahead and sub-divided land parcel No. S. Kabras/Chemuche/2907 into several parcels of land which include parcel No. S. Kabras/Chemuche/3586, 3587, 3588 and 3589. That land parcels No. S. Kabras/Chemuche/2316, 2317, 2908 and 2909 are registered in the name of the 1st defendant. That land parcel No. S. Kabras/Chemuche/3589 is registered in the name of the 2nd defendant while 3588 is registered in the name of the 7th defendant, 3587 is registered in the name of the 6th defendant, 3586 is registered in the name of the 5th defendant and the rest in the name of 3rd and 4th defendant. That the plaintiffs herein and their four brothers are in occupation of part of land parcels No. S. Kabras/chemuche/2908, 2909, 2316, 2317 and in toto occupation of 3586, 3587 and 3588. The plaintiffs aver that the 3rd to 7th defendants are threatening to evict them from their land which action unless stopped will make the plaintiffs and their families homeless. That the plaintiffs were born in that land

before the 2nd defendant was married by the 1st defendant and before the 3rd to 7th defendants were born and have no other home apart from where they are staying now. The plaintiffs' prayers against the defendants jointly and severally is for;

1. A declaration that the defendants are holding those titles in respect of plaintiffs portion of land in trust for the plaintiffs herein and there other four brothers.
2. A permanent injunction against the defendants jointly and severally from interfering with the plaintiffs' peaceful occupation and enjoyment of their portion of land.

The defendant submit that the 1st defendant is the biological father to the plaintiffs and the stated Jeridah Nechesa Muvia was his first wife but currently deceased. The 1st defendant was the original proprietor of the whole of parcel No. Kakamega/Chemuche/508 and the 2nd defendant is his wife while the 3rd to 7th defendants are his children and he has transferred and subdivided the parcels of land to them upon their request. The 1st defendant avers that he has not denied he plaintiff any land as they are staying on the same land and further states that he has been subdividing and transferring the land upon request and the plaintiffs have not requested so. The defendants aver that in the alternative the plaintiffs have turned violent on their father frustrating every process as further as even assaulting him over the same property. The defendants further aver that the defendants are staying on the same parcels and the father has only subdivided the parcels according to how they are staying on the parcels and the remaining portions being in his name are for the plaintiffs who are uncooperative. In view of the foregoing the defendants aver that the plaintiff is not entitled to the orders sought in the plaint or any remedy at all as already the contention herein has been before the area authorities and ruled in our favour fact which is undeniable by the plaintiff. The defendants counter claims for;

1. An order of permanent injunction against the plaintiffs restraining them from cancelling the titles and in any other manner interfering with their peaceful uses of their parcels of land number South Kabras/Chemuche/2909, 2317, 2908, 3586, 3587, 3588 and 3589.

DW1, the 1st defendant states that he has divided his land to his children and the plaintiffs are occupying their portions. DW2 his wife corroborate his evidence. DW4 and DW5 state that the plaintiffs are cultivating on their land.

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 1st defendant who was the registered owner of land parcel No. S/Kabras/Chemuche/508. The plaintiffs aver that the 1st defendant in conjunction with the 2nd defendant and their children without justifiable cause and without the plaintiffs' knowledge with intent to defraud them of their portion of land did sub-divide the original parcel of land No. S/Kabras/Chemuche/508 into other portions of land which include S/Kabras/Chemuche/2315, 2316 and 2317. That the 1st defendant further in conjunction with the 2nd defendant went ahead and sub-divided land parcel No. S. Kabras/Chemuche/2907 into several parcels of land which include parcel No. S. Kabras/Chemuche/3586, 3587, 3588 and 3589. That land parcels No. S. Kabras/Chemuche/2316, 2317, 2908 and 2909 are registered in the name of the 1st defendant. That land parcels No. S. Kabras/Chemuche/3589 is registered in the name of the 2nd defendant while 3588 is registered in the name of the 7th defendant, 3587 is registered in the name of the 6th defendant, 3586 is registered in the name of the 5th defendant and the rest in the name of 3rd and 4th defendant. That the plaintiffs herein and their four brothers are in occupation of part of land

parcels No. S. Kabras/chemuche/2908, 2909, 2316, 2317 and in toto occupation of 3586, 3587 and 3588. The plaintiffs avers that the 3rd to 7th defendants are threatening to evict them from their land which action unless stopped will make the plaintiffs and their families homeless. I find that the plaintiffs have been in occupation of the said portions from birth and the same is ancestral land. They have put up their homesteads and the 1st defendant cannot now throw them out or unilaterally move them to another site. They pleaded fraud in their case and they have stated the particulars of fraud. This family needs to sit down and through mediation come up with an amicable solution. The counterclaim has not been proved and the same is dismissed. I find the plaintiff have proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the defendants are holding those titles in respect of plaintiffs' portion of land in trust for the plaintiffs herein and there other siblings.
2. A permanent injunction against the defendants jointly and severally from interfering with the plaintiffs' peaceful occupation and enjoyment of their portion of land.

It is so ordered.

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

N.A. MATHEKA

JUDGE