



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 264 OF 2017

ROSILAH AMISI ATWOLI

WILSON MUKHWANA ATWOLI (*suing as legal representatives of the
estate of Atwoli Mukhwana Namelo*)..... **PLAINTIFFS**

VERSUS

ALFESTUS MUKWALE MATIKA..... **DEFENDANT**

JUDGEMENT

In this case, the plaintiffs state that the deceased Atwoli Mukhwana Namelo had interests in all that property/parcel of land known as W/Bunyore/Emusire/998 forming part of his matrimonial property he has lived in and utilized entirely with his family even before the Land Adjudication and Registration of 1964. The plaintiffs aver that the deceased had over the years tilled and utilized the said parcel of land known as W/Bunyore/Emusire/998 for farming/planting crops until the defendant brutally attacked the deceased and chased him from the plot threatening to harm the deceased. The plaintiffs aver that the deceased instituted proceedings before the Luanda Land Disputes Tribunal and at the Principal Magistrate's Court at Vihiga in an effort to reclaim his portion of land that is consolidated in the defendant's parcel of land known as W/Bunyore/Emusire/998 and registered in his (defendant's) name. The tribunal noted well that the deceased portion was consolidated in the defendant's parcel W/Bunyore/Emusire/998 and declared subdivision of the same between the deceased and the defendant. The defendant instead, in the course of the proceedings, fraudulently caused the said parcel of land to be registered in his name. The plaintiffs aver that the actions by the defendant to register the whole portion in his name were fraudulent and included non-disclosure of facts to the registrar as there was a valid decision to have the parcel in dispute surveyed and subdivided into two equal halves between the deceased and himself. The plaintiff's claim against the defendants is that the honourable court to declare that the estate of the deceased is entitled to a portion of land known as W/Bunyore/Emusire/998 and registered in the defendant's name and that an order do issue directing the Land Registrar Vihiga to survey and subdivide the said parcel into two equal halves between the estate of the deceased and the defendant and subsequently issue the parties with separate title deeds. The plaintiffs pray for judgment to be entered against the defendant for:-

1. A declaration that the estate of Atwoli Mukhwana Namelo – deceased, is entitled to a half portion in all that parcel of land known as W/Bunyore/Emusire/998 registered in the defendant's name and that an order do issue directing the Land Registrar Vihiga to survey and subdivide the said parcel into two equal halves between the estate of the deceased and the defendant and subsequently issue the parties with separate title deeds.
2. Costs and interest of the suit.
3. Any other relief this honourable court may deem fit to grant.

PW1 testified that the deceased Atwoli Mukhwana Namelo inherited the land from his father and she was his wife. She produced proceedings from the Luanda Land Disputes Tribunal PEx2 to corroborate her evidence. PW2 her son corroborated her evidence. Their evidence is that they had been cultivating the suit land from 1964.

The defendant denies the fact and averments that LR. W/Bunyore/Emusire/998 was sold to the plaintiff by his deceased father. The defendant denies the averments and facts that the plaintiff is entitled to a half portion in all that parcel of land known as W/Bunyore/Emusire/998 registered in his name. DW1 the defendant testified that he inherited the land from his father. He produced the title deed as DEx3. DW2 the defendant's brother corroborated the defendant's evidence. He stated that the plaintiffs have never cultivated the suit land.

This court has carefully considered the evidence and submissions therein. The defendant submitted a preliminary objection on a point of law that the suit herein be struck out or dismissed with costs for reasons that the plaintiff who appears to be claiming for land from the defendant on behalf of the estate of the late Atwoli Mukhwana Namelo does not have the locus or legal capacity to bring this suit. I have perused the court file and find that the plaintiff's did file letters on administration as administrators of the estate of the late Atwoli Mukhwana Namelo. During the hearing of this matter the 1st plaintiff (PW1) passed away and the 2nd plaintiff opted to proceed on his own and the 1st plaintiff

was removed. I therefore find that the 2nd plaintiff does have locus standi to bring this suit. 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. W/Bunyore/Emusire/998. PW1 testified that the deceased Atwoli Mukhwana Namelo inherited the land from his father and she was his wife. She produced proceedings from the Luanda Disputes Tribunal PEx2 to corroborate her evidence. PW2 her son corroborated her evidence. Their evidence is that they had been cultivating the suit land from 1964. I have perused the documents adduced as evidence and find that indeed this matter was before the Luanda Division Land Disputes Tribunal in 2001 and 2006. The claimant therein was Atwoli Mukhwana Namelo and both times the tribunal awarded him a portion of the suit land. They found that Atwoli Mukhwana Namelo had purchased the land which was registered in the name of Ochieng Mulwale Matika and has been using it since 1964. The first proceedings of 2001 were dismissed since the tribunal was not properly constituted. It is clear from documentary evidence produced DEx3 copy of the title deed that the same was issued on the 11th October 2006. I find that the suit parcel was transferred to the defendant through fraud and/or misrepresentation. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the estate of Atwoli Mukhwana Namelo – deceased, is entitled to a half portion in all that parcel of land known as W/Bunyore/Emusire/998 registered in the defendant’s name.
2. That the defendant transfers half the suit land parcel of land known as W/Bunyore/Emusire/998 to the estate of Atwoli Mukhwana Namelo – deceased within the next 90 days from the date of this judgement and in default the Land Registrar Vihiga to survey and subdivide the said parcel into two equal halves between the estate of the deceased and the defendant and the Deputy Registrar to sign the transfer forms.
3. No orders as to costs as the parties are neighbours.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22ND JUNE 2021.

N.A. MATHEKA

JUDGE