



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 224 OF 2016

JAMES BROWN MBASU.....PLAINTIFF

VERSUS

STEPHEN WERANGAI TALI

DANCAN L. MBASUDEFENDANTS

JUDGEMENT

The plaintiff claims that, at all material times relevant to this suit, the 2nd defendant was the registered owner of whole that parcel of land better known as L.R. No. S/Kabras/Bushu/941 measuring approximately 2.8 Ha and/or thereabouts. At all material times relevant to this suit, the plaintiff is a biological son to the 1st defendant. That in the year 2011, the 2nd defendant allocated the plaintiff a portion of land measuring approximately 3 acres and/or thereabouts as a gift comprised in that parcel of land better known as L.R. No. S/Kabras/Bushu/941. That on or about the 18th day of May, 2015, the 1st and 2nd defendant jointly and severally without any justifiable cause of action, permission, consent, or any colour of right and/or otherwise with intent to defraud, subdivided and/or caused to be subdivided the parcel of land better known as L.R. No. S/Kabras/Bushu/941 creating new parcels of land better known as L.R. No. S/Kabras/Bushu/4093 & 4094. The plaintiff avers that the original parcel of land better known as L.R. No. S/Kabras/Bushu/949 was acquired due to joint contributions of the plaintiff's late mother, one Joyce Nanzala Lumakasia – deceased and the 2nd defendant. The plaintiff avers that after the sub division of the original parcel of land better known as L.R. No. S/Kabras/Bushu/941, the 2nd defendant transferred one of the resultant parcels designated as L.R. No. A/Kabras/Bushu/4094 to the 1st defendant. The plaintiff further avers that the portion now registered to the 1st defendant is the portion where the plaintiff was allocated by the 2nd defendant which he has extensively developed. The 1st defendant is using the police to intimidate, harass and/or threaten the plaintiff with an eviction from the portion of land. The plaintiff's claim against the defendants jointly and severally is for an order of permanent injunction restraining the defendants by themselves, their agents, servants and/or anybody acting for and on their behalf from intimidating, harassing, threatening, interfering and/or evicting the plaintiff from the parcel of land better known as L.R. No. S/Kabras/Bushu/4094. The plaintiff's further claim against the defendants jointly and severally is for an order of cancellation and/or nullification of parcels of land better known as L.R. No. S/Kabras/Bushu/4093 and 4094 reverting back to the original parcel of land better known as Kabras/Bushu/941. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. An order of permanent injunction restraining the defendants by themselves, their agents, servants and/or anybody acting for and on their behalf from intimidating, harassing, threatening, interfering and/or evicting the plaintiff from the parcel of land better known as L.R. No. S/Kabras/Bushu/4094.
2. An order of cancellation and/or nullification of parcels of land better known as L.R. No. S/Kabras/Bushu/4093 and 4094 reverting back to the original parcel of land better known as L.R. S/Kabras/Bushu/941.
3. Costs of this suit.

PW1 the plaintiff testified that the suit land was bought by his mother and father (2nd defendant) jointly and it was allocated to him in 2011. He took possession and started farming. That the 1st defendant acquired 2 acres from there and his father has not given him an alternative parcel. That his grandfather's land is still in his name and they are eight siblings altogether. The entire parcel is 7 cares and his father sold 2 acres. PW2 the plaintiff's brother stated that the plaintiff has lived there since 1985 and that he (PW2) moved out 5 years ago to his ancestral land.

The 2nd defendant testified that he as the head of the family had a meeting with the elders on the 10th day of October, 2015, where it was unanimously agreed that the plaintiff be settled in another place far from the 2nd defendant's home for the sake of peace in the family, which was duly done. The 2nd defendant admits selling the suit land to the 1st defendant and produced the agreement. That the plaintiff after the subdivision had been allocated another piece of land being parcel number North Kabras/Malava/3720 with view of settling the plaintiff on it

as per the family resolution with the main view of advocating for peace between them. That PW1 and PW2 did not like it when he married his second wife and have became violent to her. That he has 13 children in total and his daughters also need to inherit. That the 5 acres left belong to him and his children. DW2, the 1st defendant confirms he bought the land from the 2nd defendant. They exchanged the parcels of land and he added some money. As per the agreement (DEx1) he paid in full and got his title.

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 court 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 parcel of land known as S/Kabras/Bushu/4094 is registered in the name of the 1st defendant. The plaintiff testified that the 2nd defendant his father, was the registered owner of whole that parcel of land better known as L.R. No. S/Kabras/Bushu/941. That in the year 2011, the 2nd defendant allocated the plaintiff a portion of land measuring approximately 3 acres and/or thereabouts as a gift comprised in that parcel of land better known as L.R. No. S/Kabras/Bushu/941. That on or about the 18th day of May, 2015, the 1st and 2nd defendant jointly and severally subdivided and/or caused to be subdivided the parcel of land better known as L.R. No. S/Kabras/Bushu/941 creating new parcels of land better known as L.R. No. S/Kabras/Bushu/4093 & 4094. That the original parcel of land better known as L.R. No. S/Kabras/Bushu/949 was acquired due to joint contributions of the plaintiff's late mother, one Joyce Nanzala Lumakasia – deceased and the 2nd defendant. That after the sub division of the original parcel of land better known as L.R. No. S/Kabras/Bushu/941, the 2nd defendant transferred one of the resultant parcels designated as L.R. No. A/Kabras/Bushu/4094 to the 1st defendant. The plaintiff further avers that the portion now registered to the 1st defendant is the portion where the plaintiff was allocated by the 2nd defendant which he has extensively developed. The 1st defendant is using the police to intimidate, harass and/or threaten the plaintiff with an eviction from the portion of land. The 2nd defendant on the other hand states that he sold 2 acres of his land to the 1st defendant in order to relocate the plaintiff who had become violent to his step mother. That this was agreed during a meeting with elders. I find that the suit land in this matter was not ancestral land and the 2nd plaintiff did not hold it in trust for the plaintiff. I find that the 1st defendant was a bonafide purchaser for value and his title was not obtained through any fraudulent scheme. I find that the 2nd defendant being the registered owner and sole proprietor of the original land parcel better known as L.R. No. S/Kabras/Bushu/941 measuring approximately 2.8 Ha and/or thereabouts was at liberty to sell a portion of the same to the 1st defendant. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH JULY 2021

N.A. MATHEKA

JUDGE