



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 343 OF 2013

THOMAS LUHYA SHITAMBAGA.....PLAINTIFF

VERSUS

ERNEST LUHYA..... DEFENDANT

JUDGEMENT

By a plaint dated 21st November 2013, the plaintiff and the defendant are the sons of the late Lukhia Shitambanga and the late Safina Luhya. That the late Luhya Shitambanga had also 3 sons and a girl from the first wife the late Safina Luhyia, the mother of both the plaintiff and the defendant. That in 1976 the late Lukhia Shitambanga and his brother the late Kunyanyi Shitambanga owned one hectare of land parcel Kakamega/Buluikhoba/22. That in 1981, the two Lukhia and Kunyanyi, sons of Shitambanga transferred the proprietorship of land parcel Kakamega/Bulukhoba/22 to the plaintiff, the elder son of Lukhia son of Shitambanga as a trustee. That in 1994, the land certificate was changed to a title deed with the plaintiff as a trustee. That in 1997, the plaintiff sub-divided land parcel Kakamega/Bulukhoba/22 into two equal parcels under land parcels Kakamega/Bulukhoba/1443/1442. That in the same year 1997, the plaintiff entrusted the share of the late Lukhia Shitambanga, land parcel Kakamega/Bulukhoba/1443 to the defendant as a trustee of the two families of Mr. Lukhia Shitambanga, the late Safina Lukhia with her 4 children and Mrs. Masera Lukhia with her four children. That his action left the second wife of his father with her 4 children and 4 children born of his own mother, the first wife of his father landless. That on 12th November 2012, the defendant failed to tell the Vashilima Clan meeting why he could not share his father's land parcel with his step mother Mrs. Masera Lukhia and 8 children of the late Lukhia Shitambanga. That the defendant having failed to give satisfactory reasons to Vashilima clan, the committee meeting held on 12th November 2012, authorized the plaintiff to apply to court of law for the revocation of title deeds, Kakamega/Bulukhoba/1443/1442, back to Kakamega/Bulukhoba/22. The plaintiff prays for judgment as against the defendant for:-

1. Permanent injunction restraining the defendant from unilateral utilization of land parcel Kakamega/Bulukhoba/1443/1442, as entrusted to him in 1981 by the later father Mr. Lukhia, Kakamega/Bulukhoba/22.
2. That the revocation of the two title deeds Kakamega/Bulukhoba/1442/1443 back to Kakamega/Bulukhoba/22 will enable the plaintiff as trustee of the property of the late Lukhia s/o Shitambanga, that is 0.5 ha of land in land parcel Kakamega/Bulukhoba/22 to the two wives or two families of Mr. Lukhia s/o Shitambanga equally.
3. Cost of this suit.

That the defendant avers that he is the son of the late Luhya Shitambanga and the late Mrs. Safina Luhya and the brother to Thomas Muleli Luhya at now is Thomas Shitambanga Luhya. That the late Luhya had two wives, first wife Mrs. Saphina Luhya of plot No. 22 in Bulukhoba, second wife Mrs. Masera Luhya had a plot at 127 in Sirwa. That the late Luhya had three sons and a girl from the first wife the late Mrs. Safina. That the late Luhya had three sons and three daughters from the second wife Mrs. Masera. That the late Luhya Shitambanga and Kunyanyi Shitambanga were brothers and they shared plot No. 22 Bulukhoba. To allocate this brothers in the same plot it was out of corruption and forgery which affected plot No. 21 and 20. That one of Shitambanga Luhya sons Festus Inyanje Luhya passed away leaving a male child. That the son has grown and his share is supposed to be donated from the two titles 1442 and 1443 since by the time the titles were released the son was young and his share had to be supervised by the two that is Ernest Luhya and Thomas Luhya.

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. Kakamega/Bulukhoba/1443. The plaintiff produced the search certificate. That in 1997, the plaintiff sub-divided land parcel Kakamega/Bulukhoba/22 into two equal parcels under land parcels Kakamega/Bulukhoba/1443/1442. That in the same year 1997, the plaintiff entrusted the share of the late Lukhia Shitambanga, land parcel Kakamega/Bulukhoba/1443 to the defendant as a trustee of the two families of Mr. Lukhia Shitambanga, the late Safina Lukhia with her 4 children and Mrs. Masera Lukhia with her four children. That his action left the second wife of his father with her 4 children and 4 children born of his own mother, the first wife of his father landless. However in his testimony the plaintiff stated that he registered the land in the defendant's name as he needed to get a loan as his wife was sick. I find that this is a material contradiction in the plaintiff's case. The defendant testified that he inherited the land from his father and that the second family was bought land elsewhere. I find that these third parties are not parties to this suit and if they had beneficial interest in the suit land then they should have pursued the same. These titles were issued way back in 1997. The defendant's title is indefeasible and can only be challenged if it was issued through a fraudulent scheme which the plaintiff has not proved. 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 IN OPEN COURT THIS 18TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE