



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 32 OF 2017

BENEAH KETAPLAINTIFF

VERSUS

BENARD O. NGERIDEFENDANT

JUDGEMENT

The plaintiff avers that at all material times to this suit the parties are brothers being the sons of the late Jacob Keta Oduori who passed intestate on 5th May 2001. That the late Jacob keta Oduori as the proprietor of L.P. No. N. Wanga/Kholera/753. That the deceased was succeeded by Thomas Wesonga Keta whereof L.P. No. N/Wanga/Kholera/753 was sub-divided into five portion being L.P. No. N/Wanga/4069, 4070, 4071, 4072 and 4073. That the plaintiff and the defendant being the sons of the second mother were awarded L.P. No. N/W/Kholera/4070 and 810 and the defendant was only to hold in trust L.P. No. N/W/Kholera/4070 for the plaintiff. The plaintiff avers that the defendant without his consent sold part of L.P. No. N/W/Kholera/4070 to a third party and utilized the sale price exclusive of the plaintiff and/or his family members. The plaintiff states that the defendant has now moved to L.P. No. N/W/Kholera/810 where he utilizes exclusive the plaintiff or his family member neither has he passed the title deed to the plaintiff despite his numerous and polite request to that effect. The plaintiff claim against the defendant is for an order of specific performance transferring the entire L.P. No. N/W/Kholera/4070 to him and passing the title to him and/or the executive officer of this court be empowered to sign the same on behalf of the defendant. The plaintiff prays for judgment against the defendant for;

1. An order compelling the defendant to transfer the title deed for L.P. No. N/W/Kholera/4070 to the plaintiff.
2. Alternative to prayer A above if the defendants fails to comply the an authorized officer of this court empowered to sign.
3. Costs.

The defendant states that North Wanga/Kholera/4070 was awarded to him as the sole beneficiary thereof and that LP No. North Wanga/Kholera/810 did not form part of the Estate of Jacob Keta Oduor and that it had been gifted and transferred to the defendant long before the demise of Jacob Keta Oduor. The defendant states that he has all along and even before the succession cause mentioned above been residing on land parcel No. North Wanga/Kholera/810 the same having been gifted and transferred to him by his late father. The defendant states that the plaintiff conspired with the administrator of their father's estate to sell off land parcel No. North Wanga/Kholera/4070 to a third party and which proceeds are partly being used to finance the instant suit.

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. N/W/Kholera/4070. The plaintiff produced the search certificate. PW1 testified that the land belonged to his father and the defendant was to hold it in trust for him. PW2 the administrator of the estate of Jacob Oduor corroborated the plaintiff's evidence. The defendant testified that he acquired the suit land through succession and he was not to hold it in trust for anyone. I have perused the documentary evidence in this case and indeed the green card shows that the defendant is registered as the absolute proprietor of the suit land. This court is not privy to the proceedings in the succession court nor does it have jurisdiction in matters succession. The defendant obtained the suit land legally through a court order which stands to date and has not been challenged. This title was issued way back in 2014. 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 THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE