



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 300 OF 2015

DAVID A. ANEKEYA.....PLAINTIFF

VERSUS

DANIEL ANEKEYA

HUMHREY NJIRIMANI MUKABI..... DEFENDANTS

JUDGEMENT

The plaintiff avers that the original land parcel No. Butso/Ingotse/747 was during land adjudication registered in the name of the 1st defendant in trust for himself and other family members. The plaintiff further avers that the 1st defendant further sub-divided land parcel No. Butso/Ingotse/747 into three portions and in particular obtained the registration of land parcel No. Butso/Ingotse/1869 which he was to hold in trust as family land. Family members the plaintiff included reside on the said land and till it for their livelihood. The plaintiff states that in breach of the said trust the 1st defendant without the authority of all concerned family members fraudulently caused the said land parcel No. Butso/Ingotse/1869 to be sub divided into land parcel No. Butso/Ingotse/2944 and 2945 which he further without authority and breach of the said trust transferred into his name and the 2nd defendant respectively. As a result the plaintiff and other family members complained to the Land Registrar who subsequently placed a restriction on both parcels of land aforesaid. In the premises the subdivision of land parcel No. Butso/Ingotse/1869 is wrong and unlawful and as such the said sub division and transfers effected on the said land should be nullified and reverted to the original land parcel No. Butso/Ingotse/1869. The plaintiff prays for judgment against the 1st and 2nd defendants jointly and severally for:-

- a. A declaration that the first defendant was registered as the proprietor of land parcel No. Butso/Ingotse/1869 in trust as family land.
- b. An order that the sub-division and transfer effected on the original land parcel No. Butso/Ingotse/1869 be nullified, cancelled and reverted to the original title of the said parcel.
- c. An order that the said land parcel No. Butso/Ingotse/1869 be allocated to the plaintiff and other family members.
- d. Costs of this suit be provided for.

The defendant denies the allegations that L.R. Butso/Ingotse/1869 is registered in his name in trust for the plaintiff's family. The 1st defendant avers on 7th October 1968 he became the first registered owner of the suit land. That there is no proof of trust availed to this court. The plaintiff has never been the owner of the suit land hence the claim for trust on behalf of his family cannot succeed. The 1st defendant avers that he is not legally obligated to transfer land to the plaintiff who he deems a stranger. The 1st defendant states that the prayer sought by the plaintiff to cancel the subdivision of LR. Butso/Ingotse/1869 is legally unattainable. The 1st defendant testified that the land belonged to his father and then he was registered. That the plaintiff's father is not his brother as he has a different father. He however confirms that the plaintiff's father was buried on the suit land and the plaintiff has lived there from 1968. That he was just helping them but now the plaintiff has refused to move out.

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. Butso/Ingotse/1869. The plaintiff testified that the 1st defendant further sub-divided land parcel No. Butso/Ingotse/747 into 3 portions and obtained the registration of land parcel No. Butso/Ingotse/1869 which he was to hold in trust as family land (PEX1 and 2 are the green cards). Family members the plaintiff included reside on the said land and till it for their livelihood. The plaintiff states that in breach of the said trust the 1st defendant without the authority of all the family members fraudulently caused the said land parcel No. Butso/Ingotse/1869 to be sub divided into land parcel No. Butso/Ingotse/2944 and 2945 which he further without authority and breach of the said trust transferred to his name and the 2nd defendant respectively (PEX5 and 6 are the search certificates). The plaintiff was born there in 1970 and produced a cane farming contract PEX7. The 2nd defendant went and destroyed his sugar cane and PEX8 is the assessment of the damage. The 1st defendant testified that the land belonged to his father and then he was registered. That the plaintiff’s father is not his brother as he has a different father. He however confirms that the plaintiff’s father was buried on the suit land and the plaintiff has lived there from 1968. That he was just helping them but now the plaintiff has refused to move out. I find that the plaintiff’s father one Alex Taabu Anekeya was a beneficiary of the estate of Anekeya Buliba the father of the 1st defendant. I also find that the suit land is ancestral land and that the original land parcel No. Butso/Ingotse/747 was during land adjudication registered in the name of the 1st defendant in trust for himself and other family members the plaintiff included. I find that the 1st defendant further sub-divided land parcel No. Butso/Ingotse/747 into 3 portions and obtained the registration of land parcel No. Butso/Ingotse/1869 which he was to hold in trust as family land. Consequently, I find that in breach of the said trust the 1st defendant without the authority of all family members fraudulently caused the said land parcel No. Butso/Ingotse/1869 to be sub divided into land parcel No. Butso/Ingotse/2944 and 2945 which he further without authority and breach of the said trust transferred into his name and the 2nd defendant respectively. Indeed the 1st defendant testified that the land belonged to his father and then he was registered. He confirms that the plaintiff’s father was buried on the suit land and the plaintiff has lived there from 1968. That he was just helping them but now the plaintiff has refused to move out. For these reasons, 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 1st defendant was registered as the proprietor of land parcel No. Butso/Ingotse/1869 in trust as family land.
2. An order that the sub-division and transfer effected on the original land parcel No. Butso/Ingotse/1869 be nullified, cancelled and reverted to the original title of the said parcel.
3. An order that the said land parcel No. Butso/Ingotse/1869 be allocated to the plaintiff and other family members.
4. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE