



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 13 OF 2016

OCHAMI OPINDI.....PLAINTIFF

VERSUS

WILFRED LUKONGO LIBOYI.....DEFENDANT

JUDGEMENT

The plaintiff avers that he had two brothers namely Wellington Liboyi Opindi and one Francis Mango Opindi. The plaintiff left and went to live in Londian for gain for a long period and upon his return to his ancestral home, he found one Wellington Liboyi Opindi and his brother Francis Mango Opindi had sold his portion of land on assumption that the plaintiff was dead. The plaintiff together with his brothers agreed that a portion measuring 1 ½ acres would be transferred to him from the portion of Wellington Liboyi Opindi the brother at a consideration sum of Ksh. 75,000 which amount the plaintiff paid in full in the year 1996 and built and settled on the land in the year 1997 to date. Before transfer of the said portion of 1 ½ acres of land would be transferred to the plaintiff by his brother Wellington Liboyi Opindi, the said Wellington Liboyi Opindi died living behind his son the defendant herein who succeeded him and even acquired the title deed for the whole of land parcel registration number Marama/Shikunga/1604 in his name. The plaintiff avers that he has tried to persuade the defendant to transfer the said portion of 1 ½ acres of land to the plaintiff but the same has fallen on deaf years. The plaintiff's claim against the defendant is for an order that the defendant be compelled to transfer the said portion measuring 1 ½ acres of land to the plaintiff. The plaintiff prays for judgment against the defendant for:-

- (i) An order that the defendant be compelled to transfer the said portion measuring 1 ½ acres of land to the plaintiff
- (ii) Costs and
- (iii) Interest.

The defendant admits that Wellington Liboyi Opindi and Francis Mango Opindi were the plaintiff's brothers. The defendant denies that Wellington Liboyi Opindi together with Francis Mango Opindi sold the plaintiff's portion of land. The defendant denies that Wellington Liboyi Opindi sold a portion of his land measuring 1 ½ acres to the plaintiff at a sum of Ksh. 75,000/=. The defendant avers that the plaintiff has forcibly remained on his parcel of land without any color of right and his continued stay has amounted to trespass incurring great loss and damage to the defendant and the defendant counter claims for an order of eviction against the plaintiff.

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 number Marama/Shikunga/1604. The plaintiff produced the search certificate in court. The plaintiff testified that he left the suit land and went to live in Londian for gain and upon his return to his ancestral home, he found one Wellington Liboyi Opindi and his brother Francis Mango Opindi had sold his portion of land on assumption that the plaintiff was dead. The plaintiff together with his brothers agreed that a portion measuring 1 ½ acres would be transferred to him from the portion of Wellington Liboyi Opindi the brother at a consideration sum of Ksh. 75,000 which amount the plaintiff paid in full in the year 1996 and he built and settled on the land in the year 1997 to date. He was refunding money for the land which his brother had sold. Before transfer of the said portion of 1 ½ acres of land would be transferred to the plaintiff by his brother Wellington Liboyi Opindi, the said Wellington Liboyi Opindi died living behind his son the defendant herein who succeeded him and even acquired title deed for whole of land parcel registration number Marama/Shikunga/1604 in his name. PW2 and PW3 both relatives of the litigants corroborated the plaintiff's evidence.

DW1 the defendant confirms that the plaintiff lives on ¼ acre and has planted crops and has a house there. He states that he inherited the land from his father and the plaintiff should be evicted. He however confirms that the plaintiff buried his wife and daughter on the suit land. DW2 corroborated the defendant's case and states that their father invited the plaintiff there and he never left.

It is a finding of fact that the suit land is ancestral land and the plaintiff had two brothers one being the defendant's father. It is also a finding of fact that the plaintiff returned from Londiani in 1997 and settled there with his family. It is not disputed that his wife and daughter were buried there. This is not a case of enforcing a contract as the plaintiff was merely refunding money to a potential buyer of his ancestral land. I find that the plaintiff has beneficial interest in the suit land the same having belonged to his father and has been living there from 1997. The defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss the same. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order that the defendant be compelled to transfer the said portion from land parcel registration number Marama/Shikunga/1604 measuring 1 ½ acres of land to the plaintiff of which he occupies within the next 90 (ninety) days in default the Deputy Registrar to sign the transfer forms.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE