



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 28 OF 2019**

**TRUTEA MISANYA MUNYENDO.....APPLICANT**

**VERSUS**

**GRACE MASAKWE MALIEM**

**ALI MAKOKHA.....RESPONDENTS**

**JUDGEMENT**

The appellant being dissatisfied with the judgment of Hon. T.A. Odera (SPM) delivered in MUMIAS ELC NO. 54 OF 2018 on the 21<sup>st</sup> June 2019 do hereby prefer this appeal and puts forth the following grounds of appeal:-

1. That the trial magistrate erred in law in applying wrong principles of procedure and evidence thereby arriving at a wrong decision.
2. That the trial magistrate erred in law by insinuating fraud on the part of the appellant when none was pleaded.
3. That the trial magistrate erred grossly by doubting the authenticity of the exhibits produced when basis was laid for production and the same court allowed such production.
4. That the trial magistrate erred grossly by putting up a defence on behalf of the defendants who never filed any defence.
5. That the trial magistrate erred in law and fact by finding against an undisputed title holder in the wake of evidence before her.
6. That the trial magistrate erred in law and fact in awarding costs to the respondents when they filed no pleadings whatsoever on record.
7. That the trial magistrate was out rightly not focused when writing her judgment and therefore delivering an unsound and jumbled judgment.

The appellant prays for the judgment of the lower court to be set aside and judgment to be entered in her favour as follows:-

- (a) Eviction of the 2<sup>nd</sup> respondent from the suit land.
- (b) Costs of the appeal and lower court.

This court has carefully considered the appeal 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.”*

I have perused the records of the lower court and it is a finding of fact the plaintiff now appellant is the registered proprietor of Land parcel No. S/Wanga/Lureko/3862. I have perused the lower court records and proceedings. All the documents produced by the plaintiff were photocopies with a police abstract stating that the originals were stolen. The agreements are handwritten and one dated 29<sup>th</sup> December 2011 states that the plaintiff is buying land 50ft by 100ft for Kshs.200,000/- and paid a deposit of kshs.3000/- and another sale agreement dated 18<sup>th</sup> February 2012 states the plaintiff is buying land 50ft which is cancelled and indicated 25ft by 100ft for kshs.100,000/- again to be paid by installments. The description of the land being purchased is not indicated. The 2<sup>nd</sup> defendant who was a minor at the material time appears to have signed the agreements. It is unclear to me what land was being purchased and what size. Indeed no evidence has been produced of the transfer process to assist the plaintiff's case if at all. The defence maintains that the plaintiff bought one plot only. I find material contradictions in the plaintiff's case and that the plaintiff failed to establish her case on a balance of probabilities. The trial magistrate held as follows;

*“On the 22.2.2019 Miss Omar for the plaintiff told this court that her client had misplaced the original documents between Nairobi and Mumias. This contradicts the police abstract which indicates that the documents were lost in a burglary incident. I find the story of PW1 does not add up and it is possible that the husband to PW1 added the size of plots to 21/2 from 1 and that even the price of the one plot was not paid in full.”*

On ground 6 of the appeal that the Learned Magistrate erred in law and fact in awarding costs to the respondents when they filed no pleadings whatsoever on record I find that the award of costs is discretionary and the defendants did attend court and gave oral evidence

In the case of Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JULY 2020.**

**N.A. MATHEKA**

**JUDGE**