

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT NO.108 OF 2004

BENJAMIN KOCHWE NANGELEKA.....PLAINTIFF

VERSUS

FWAMBA NANGELEKA.....1ST DEFENDANT

COLLINS WERE JOSEPH.....2ND DEFENDANT

JUDGEMENT

[1] The plaintiff Benjamin Kochwe Nangeleka filed this suit against Fwamba Nangeleka and Collins Joseph Were. He claims that he was registered together with his half brother the first defendant as owners of land parcel No. W. Bukusu/S. Mateka/1097 measuring approximately 9.4 hectares. That subsequently the 1st defendant herein moved away from the suit premises and settled at Myanga where his father was staying. That on diverse dates in the year 1985 the 1st defendant without the knowledge consent and / or authority of the plaintiff herein secretly applied for partition of the said parcel of land and subsequently created new title Numbers namely W. Bukusu/S. Mateka/2059 and W. Bukusu/S. Mateka/2060. That he registered himself as the owner of land parcel W. Bukusu/S. Mateka/2059 measuring 4.90 hectares and left Title No. W. Bukusu/S. Mateka /2060 measuring approximately 4.50 hectares allegedly for the plaintiff though no title was issued.

[2] The plaintiff contends that at the time of partition the 1st defendant had no proprietary right or interest in LR No. W. Bukusu/S. Mateka/1097 as he had been settled elsewhere by his parents and that consequently the purported partition was effected fraudulently and was a nullity for all purposes. The plaintiff set five grounds of fraud. That pursuant to that fraud he sold the land W. Bukusu/S. Mateka/2059 to the 2nd defendant who in perpetuation that fraud charged the land to Barclays Bank of Kenya Ltd. The particulars of fraud on the part of the second defendant are set out in paragraph 8 of the plaint.

[3] The plaintiff's claim is for an order against the defendants jointly and for cancellation of entry No.2 on the Register of land parcel No. W. Bukusu/S. Mateka/1097 made on 3/5/85 and subsequent registration curved therefrom the same having been obtained fraudulently. The plaintiff finally prays for the rectification of the register and cancellation of titles W. Bukusu/S. Mateka/2059 and W. Bukusu/S. Mateka/2060 plus costs of the suit.

The 2nd defendant filed his defence on 1st November 2004. He generally denied the allegations of the plaintiff. He averred that W. Bukusu/S. Mateka/2059 was duly registered in the name of the first defendant and that there were no encumbrances in the register. He contended that there was no objection to the sale. He alleged that he is in possession of the suit land and that he did not act fraudulently in charging the land to M/s Barclays Bank Ltd.

[4] When this case came for hearing on 28th September 2005 Mr. Omukunda who appeared for 1st defendant said he could not see his client in Court. He said that he had written to him about the hearing date. He further said that he had not seen him since last year. He said that at one time he was served physically. The 2nd defendant also did not appear though he was served. The case proceeded for hearing

at 12.45p.m.

[5] The plaintiff said he knows the 1st defendant. He is his brother from same mother but by a different father. He said that he does not know the 2nd defendant. He relied on his statement filed in Court. He explained how the land was initially registered in his name and his brother. He explained how his brother had the land subdivided while he was in Uganda with his father, how he filed Case No.5 of 1982 in the Magistrate's Court and how his mother came to Court and explained about the case. He produced her affidavit sworn on 17/5/82. It was produced as P. Exhibit No.2. He explained how the case went to the elders and he was awarded the land (P. exhibit No.3). He said he was not involved in the subdivision when two numbers were created No.2059 and 2060. He denied being involved in the mutation forms preparation PW exhibit No.5. He produced the Green card the registrations therein. He said land parcel No.2059 was sold to Joseph Were by the 2nd defendant. He said that in Criminal Case No.316 of 1991, he was charged with trespass with intention to annoy contrary to section 51(a) of the trespass Act Cap 294 and he was acquitted. He produced the proceedings as P. Exhibit 8. He said that there was a mistake on registering these lands. He averred that the last time the 1st defendant lived on this land was in 1981. He said that he is the one who uses the land. He said he wanted land parcels 2059 and 2060 be cancelled and the land reverts to 1097.

[6] Mr. Murunga learned Counsel for the plaintiff prayed that the defence be deemed as offering no defence since the 1st defendant was served and since Mr. Omukunda appeared for the 2nd defendant and requested for a date for judgement. The Court obliged and gave a date for judgement.

[7] Having heard the case for the plaintiff, and having perused all the documents produced by the plaintiff herein, I am convinced on balance of probabilities that the plaintiff has proved his case. I grant judgement in his favour as prayed in the Plaint with costs.

It is so ordered.

DATED at BUNGOMA this 2nd day of December, 2015

S.N. MUKUNYA

JUDGE