



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 24 OF 2012**

**JOYCE KEMUNTO OSORO (Suing as the legal**

**representative of STEPHEN OBONYO-Deceased).....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**MOSE MOSETI.....2<sup>ND</sup> RESPONDENT**

**DATAUS MOSE.....3<sup>RD</sup> RESPONDENT**

**PETER MOSE.....4<sup>TH</sup> RESPONDENT**

**THOMAS TINEGA.....5<sup>TH</sup> RESPONDENT**

**ONGERA TINEGA.....6<sup>TH</sup> RESPONDENT**

**SAMUEL BIRUNDU TINEGA.....7<sup>TH</sup> RESPONDENT**

**SAMUEL ONGECHE TINEGA.....8<sup>TH</sup> RESPONDENT**

**BRIDGIT MAKOKHA (DISTRICT OFFICER, NYAMACHE)...9<sup>TH</sup> RESPONDENT**

**JANE YOPHES KEGOCHI (ASST. CHIEF,**

**NYOERA SUB-LOCATION).....10<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The original Petitioner (Stephen Obonyo Osoro-deceased) commenced this suit against the respondents by way of Petition dated 4<sup>th</sup> June 2012 the following reliefs:

a) A declaration be and is hereby granted that L.R NO. BASSI/BOSINGI/1420 was the property of the Petitioner where an order of eviction evicting the Respondents, their agents servants, employees or any other person whatsoever acting on behalf of the Respondent is hereby evicted therefrom hence permanently restrained from entering therein (sic)

b) The costs of this suit be granted and any compensation thereof to the Petitioner herein

2. In his Petition the Petitioner avers that he is the registered owner or all that land parcel known as L.R NO. BASSI/BOSINGI/1420 having bought the same from the 2<sup>nd</sup> Respondent's father John Nyakangi in 1968. The Petitioner avers that he took possession of the suit property immediately after he bought it and he has been in occupation thereof ever since. It is the Petitioner's case that on or about the 5<sup>th</sup> March 2012 the 9<sup>th</sup> Respondent forcefully entered the Petitioner's land, destroyed his crops and caused the Petitioner's land to be demarcated in his absence and a large portion thereof was hived off and given to the 2<sup>nd</sup> to the 8<sup>th</sup> Respondents. The Petitioner therefore claims that by reason

of the foregoing, his rights under article 40 of the Constitution were violated.

3. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 27<sup>th</sup> May 2016 on his behalf and on behalf of the 2<sup>nd</sup> to 7<sup>th</sup> Respondents. He depones that he is the administrator of the estate of John Nyakambi Mosoti who was the registered owner of Land Parcel No. KISII/BASI/BOSINGI/232 from which the suit property was allegedly derived. He denies that the Petitioner is in occupation of the suit property and states that the Petitioner's title was obtained by means of fraud. He depones that the Petition does not raise any constitutional issue of public interest and states that the same should be dismissed.

4. In addition to the Replying Affidavit, the 2<sup>nd</sup> to 8<sup>th</sup> Respondents filed a defence dated 27<sup>th</sup> May 2016 in which they deny the Petitioner's claim and aver that if the Petitioner acquired registration of the suit property, then the same was done by way of fraud as no consent of the Land Control Board was obtained. They deny that the Petitioner has ever been in possession of the suit property and state that they inherited the suit property from John Nyakambi Mosoti - deceased who was their father/grandfather respectively. They allege that they have established their homesteads on the suit property, planted coffee, tea, trees, Napier grass, bananas and other crops and they have been in occupation thereof for a period of more than 60 years. They have also buried their kin thereon. They urged the court to cancel the Petitioner's title as it had been acquired fraudulently.

5. The 1<sup>st</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents did not file any response to the Petition. The court directed that the Petition be heard by way of *viva voce* evidence and both the Petitioner, the 2<sup>nd</sup>-8<sup>th</sup> Respondents called one witness each.

#### **PETITIONER'S CASE**

6. The original Petitioner Stephen Obonyo Osoro testified on 3<sup>rd</sup> October 2017. He told the court that he was the registered owner of land parcel number BASSI/BOSINGI/1420, having bought it from John Nyakambi Mosoti in 1968. He said he paid for the land in cash and in kind in the form of 5 cows and Kshs. 12,000. He made the last payment in 1993 after which they went to Nyamache Land Control Board for consent. Thereafter the title was processed in his name. He produced a copy of the title deed and certificate of official search as Plaintiffs' exhibits 1 and 2. He testified that he bought a portion of land parcel number BASSI/BOSINGI/232. He said he had sued the Respondents because they had invaded his land accompanied by the District Officer and Assistant Chief sometime in 2003. They then proceeded to demarcate the suit property destroying his crops and trees in the process. He told the court that he was away in Nairobi when the Respondents invaded his land.

7. Upon cross-examination, he stated that he bought a portion of land parcel No. 232 from one John Nyakambi Mosoti. The said parcel was sub-divided into two portions. He said they entered into a written sale agreement although he did not produce the said agreement. He confirmed that he obtained Land Control Board Consent from Nyamache though he did not produce a copy of the letter of consent. He testified that the 2<sup>nd</sup> Respondent was the administrator of the estate of John Nyakambi Mosoti - deceased who died in 2003.

#### **RESPONDENT'S CASE.**

8. Samwel Mose Mosoti, the 2<sup>nd</sup> Respondent was the sole witness for the Respondents. He denied that he and the other respondents had invaded the Petitioner's land and caused damage thereon. He told the court that he had authority to represent his late brother's estate as he had a confirmed Grant in respect of thereof. He told the court that the original parcel was No. 232 which was sub-divided into parcel number 1419 and 1420. He pointed out the Plaintiff's title bears the number BASSI/BOSOINGI/1420 on the first page but on the registration section at page 2 of the same document it bears the number BASSI/BOSANSA/1420. He told the court that Bosingi and Bosansa are different registration sections. He stated that the mutation form for land parcel No. 232 shows that it was sub-divided into two parcels measuring 0.33 hectares and 0.56 hectares. He stated the Petitioner did not reside on the suit property as it was occupied by the Respondents. He told the court that the Petitioner was trying to defraud them of their land. After the Respondents closed their case, the parties were given time to file their submissions.

#### **PETITIONER'S SUBMISSIONS**

9. In his submissions learned counsel for the Petitioner summarized the Petitioner's evidence and stated that the 1<sup>st</sup> Respondent's action, amounted to the state taking the petitioner's property without compensation contrary to the provisions of article 40(3) of the Constitution of Kenya. The said provision states as follows:

Article 40 of the Constitution of the Republic of Kenya states as follows:

***“Protection of right to property:***

***(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property***

***(a) of any description; and***

***(b) in any part of Kenya.***

***(2) Parliament shall not enact a law that permits the State or any person—***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any***

*description; or*

*(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).*

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

10. He submitted that the Petitioner's title being a first registration, the same could not be defeated since no element of fraud had been proved against him. He cited the case of **Republic v Kisumu District Land Officer & Another (2010) eKLR** for the proposition that only the court cancels or amends title where the court is of the view that registration has been obtained, made or committed through fraud or mistake and only where it is not a first registration. He urged the court to uphold the sanctity of title and issue the orders sought in the Petition.

## **RESPONDENTS' SUBMISSIONS**

11. Learned Counsel for the Respondents submitted that the Petitioner had failed to prove his case for several reasons. Firstly, he submitted that the mutation form for Land Parcel No. BASSI/BOSINGI/232 from which Land Parcel No. BASSI/BOSINGI/1420 was created shows that parcel No. 232 measures 2.2 hectares. After sub-division of land parcel No. 232 into land parcels Nos. 1419 and 1420 measuring 0.33 hectares and 0.56 hectares, a portion measuring 1.3 hectares is unaccounted for. It is the counsel's submission that the said mutation form was manufactured and therefore it cannot be relied on.

12. Secondly, the Petitioner's title at page 1 shows that his parcel number is BASSI/BOSINGI/1420, whereas at page 2 of the said title indicates that the parcel is known as BASSI/BOSANSA/1420. Counsel asserts that Bosingi and Bosansa are two different registration sections. No explanation was given as to why the Petitioner's title bears two different registration sections. The Petitioner did not call the Land Registrar to shed light on this material discrepancy.

13. Thirdly, counsel has submitted that the Petitioner did not produce any sale agreement, consent of the Land Control Board or Transfer forms in respect of the sale and transfer of the suit property from the late Nyakambi Mosoti to the Petitioner. He submitted that the suit property being agricultural land, the Petitioner was required to obtain consent of the Land Control Board within a period of six months of the agreement in accordance with the provisions of section 6 of the Land Control Act. It was his submission that failure to do so renders the sale void for all intent and purposes. Counsel therefore contended that since the Petitioner had failed to prove that he purchased the suit property from John Nyakambi Mosoti-deceased, his title should be cancelled so that it reverts to original owner.

14. Having considered the pleadings, evidence and rival submissions the following issues arise for determination

1. Whether the Petitioner is the registered owner of Land Parcel No. BASSI/BOSINGI/1420.
2. Whether the Respondents have violated the Petitioner's rights by invading the Petitioner's property and demarcating the same without his consent
3. Whether the Petitioner is entitled to the reliefs sought
4. Whether the title to the suit property ought to be cancelled.
5. Who should bear the costs of this suit

15. The Petitioner testified that he bought the suit property from one John Nyakambi Mosoti-deceased. He produced a title deed and search certificate in respect of land parcel No. BASSI/BOSINGI/1420. He also produced mutation forms showing the suit property was a sub-division of land parcel No. 232.

*Section 26. (1) of the Land Registration Act provides as follows:*

*Section 26 (1)" The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

16. In the instant case the Respondent has challenged the authenticity of the Petitioner's title as it bears different registration sections on the page 1 and 2 thereof. Page one bears parcel No. BASSI/BOSINGI/1420, while page two in the registration section describes the title as BASSI/BOSANSA/1420. This glaring discrepancy was neither explained by the Petitioner nor did he deem it necessary to call the Land Registrar to shed light on it. The title as presented is faulty and it cannot be relied on to prove ownership. The Respondents also challenged the process of acquisition of the said title. The Petitioner did not produce the sale agreement, Consent of the Land Control Board or transfer forms to prove that he validly acquired the suit property. Since the Petitioner's case is hinged on the fact that he is the registered owner of the suit property, the onus was on him to prove that he holds a valid title. It is trite that he who alleges must prove. The Petitioner's failure to prove how he acquired the suit property by producing the necessary transfer and title documents do not bode well for his case.

17. In the case of **Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** 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. Hon. Justice Munyao Silain 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.***

***For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).***

***Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.***

18. The circumstances in the instant case fall within the provisions of section 26 (1) (b) of the Land Registration Act as the Petitioner appears not to have personally been involved in any fraud or corrupt scheme but his title is nevertheless impeachable as he unable to produce the sale agreement, consent of the Land Control Board and Transfer forms. He was also unable to explain why the registration section indicates that it is in BOSANSA registration section. In the premises, the Petitioner has failed to prove that his rights under article 40 of the Constitution have been violated. Conversely the Respondents have successfully challenged the Petitioner's title. I therefore dismiss the Petition and cancel the Petitioner's title. I direct that the register be rectified so that the title reverts to the name of John Nyakambi Mosoti – deceased for the benefit of his lawful beneficiaries. Since the widow of Petitioner is not to blame for the turn of events, each party shall bear their own costs.

**Dated, signed and delivered at Kisii this 9<sup>th</sup> day of December 2020.**

**J.M ONYANGO**

**JUDGE**