



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 356 OF 2013

VINCENT MILIMU ASHIONO.....PLAINTIFF

VERSUS

GEOFFREY ASHIONO LUYUNDI.....DEFENDANT

JUDGEMENT

This case is that, the deceased Alphonse Ashiono Lumasi was at all times material to this suit the registered proprietor/owner of the parcel of land known as title number Kakamega/Shivakala/799 which measures one decimal six (1.6) hectares, approximately. The plaintiff is his son and the legal representative. The deceased became the registered proprietor of the said Title Number Kakamega/Shivakala/799 on 9th July, 1973 but was issued with the title deed for the land on 24th August, 1989. As at the time of the deceased's death on 28th December, 2003, the suit property was still registered in the deceased's name. The deceased was married to two (2) wives and left behind 8 children. The defendant herein is not a biological child of the deceased but was born out of wedlock before her mother got married to the deceased. After the death of the deceased, the plaintiff, with the consent of the deceased's dependants, and after issuing to the heirs and dependants of the deceased the requisite citation under the Law of succession Act, petitioned for a grant of Letters of Administration intestate of the deceased's estate vide Kakamega High court Succession Cause No. 44 of 2005 and a grant was issued to the plaintiff on 11th January, 2007. In the course of administering the deceased's estate as the legal Representative thereof, the plaintiff came to learn, in or about September, 2011, that the defendant herein had fraudulently caused the suit property to be transferred from the deceased's name to his (the defendant's) name on 25th September, 2003. The plaintiff avers that on 31st December, 2003, only three days after the deceased's death, he conducted an official search on the status of the suit property and the official search revealed that the land was, as at 31st December, 2003, still registered in the deceased's name. Accordingly, the purported transfer of the suit property to the defendant on 25th September, 2003 could not have been lawfully done. The transfer was therefore fraudulent, irregular, null and void. The defendant is his step brother. The plaintiff prays for judgment against the defendant for:-

- (a) A declaration that the transfer of land parcel Number Kakamega/Shivakala/799 to the defendant effected on 25th September, 2003 was illegal, null and void.
- (b) An order for the rectification of the register by the cancellation of Entry No. 4 of 25th September, 2003 transferring the land comprised in title number Kakamega/Shivakala/799 to the defendant and cancellation of the title deed issued to the defendant on 27th January, 2004.
- (c) A permanent injunction restraining the defendant either by himself, his agents, servants or anybody claiming through him from disposing, alienating, selling, charging, or in any other manner howsoever dealing or with land parcel number Kakamega/Shivakala/799 in a manner inconsistent with the interests of the deceased's estate and dependants and more specifically from denying the plaintiff and other children of the deceased access to the land.
- (d) Costs of this suit.

The defendant avers that the suit land was transferred to him by the deceased before his death and the plaintiff is put to strict proof thereof. The deceased became the registered proprietor of L.R. NO. KAKAMEGA/SHIVAKALA/799 on 9/7/1973 but was issued with title deed on 24/8/1989 but denies that as at the time of the deceased's death on 28/12/2003 the suit property was registered in deceased's name as alleged or at all, avers that, the deceased transferred the land to him before his death and the plaintiff. The defendant denies that deceased was married to two wives and left 8 children as alleged or at all, further denies that he is not a biological child to the deceased as alleged or at all, denies further having been born out of wedlock before his mother was married to the deceased as alleged or at all, avers that he is a biological child to the deceased sired by him with his mother by name Jacinta Ivayo who was the only wife to the deceased and the plaintiff is put to strict proof. PW2, the defendant's brother stated that the signature on the consent form DEx2 is that of their father.

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. Hon Justice Munyao Sila 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 not in dispute that the defendant is the registered owner of No. Kakamega/Shivakala/799. He produced the title, consent to transfer and consent letter of the said suit land. I have perused the title deed and find that defendant was registered on 25th September 2003 as the proprietor and the title deed issued on the 27th January 2004. The death certificate PEx1 shows that the deceased Alphonse Ashiono Lumasi died on 28th December 2003. The green card PEx3 confirms these dates. I see no evidence that the title was obtained by fraud or through corrupt means. The defendant was registered as the proprietor of the suit land before the death of his father. I find that the plaintiff has failed to prove his case on a balance of probabilities and dismiss the same with no orders as to costs as the parties are relatives.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE