



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 41 OF 2013**

**HENRY MASIKA.....PLAINTIFF**

**VERSUS**

**TIMOTHY WASWA KARANJA.....DEFENDANT**

**JUDGEMENT**

At all material times relevant to this suit the plaintiff was the proprietor of parcel No. Bunyala/Namirama/348. On or about the 8<sup>th</sup> March, 2001 the plaintiff sold to the defendant 5 acres of land which was to be excised from the above mentioned plaintiff's parcel of land LR No. BUNYALA/NAMIRAMA/348. The plaintiff avers that the original parcel No. L.R. BUNYALA/NAMIRAMA/348 was subdivided into two resultant portions L.R. Nos. BUNYALA/NAMIRAMA/1460 and 1461 respectively on the 11/1/2006. In the course of sub division the defendant without the consent and or knowledge of the plaintiff transferred to himself fraudulently 5 ½ acres instead of 5 acres as per the sale of land agreement between the plaintiff and the defendant. The particulars of fraud are that he colluded with the land surveyor and enhancing the acreage by ½ acre above what had been agreed. Presenting mutation forms for registration without explaining to the plaintiff the actual portion for each party in terms of acreage not hectares. Colluding with the surveyor by extending the boundary features thereafter and taking advantage of the ill health status of the plaintiff. The defendant has been unlawfully using and occupying the plaintiff's ½ acre from 2007 at the time of issue of the title to date. The plaintiff's claim against the defendant is therefore for surrender and or transfer of the ½ acre of land unlawfully excised from the plaintiff's portion L.R. NO. BUNYALA/NAMIRAMA/1460 back to the plaintiff and mesne profit since the year 2007. The plaintiff prays for judgment against the defendant for:-

1. Surrender and or transfer of land measuring ½ acre to be excised from L.R. NO. BUNYALA/NAMIRAMA/1461 in favour of the plaintiff and mesne profits thereof.
2. Costs of this suit.
3. Interest on b above at court rates.
4. Any other relief this honourable court may deem fit and just to grant.

The defendant denies that in the cause of sub-division, the defendant without the consent and/or knowledge of the plaintiff transferred to himself fraudulently 5 ½ acres instead of 5 acres as per the sale agreement between the plaintiff and the defendant. The defendant avers that he has been strictly using and occupying L.R. NO. BUNYALA/NAMIRAMA/1461 and has never entered the plaintiff's portion at all.

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, land parcel L.R. Nos. BUNYALA/NAMIRAMA/1461 is registered in the name of the defendant. It is the plaintiff's case that he was the registered proprietor of land parcel No. Bunyala/Namirama/348. On or about the 8<sup>th</sup> March, 2001 the plaintiff sold to the defendant 5 acres of land which was to be excised from the above mentioned plaintiff's parcel of land LR NO. BUNYALA/NAMIRAMA/348. (PEx2 is the land sale agreement). The plaintiff avers that the original parcel No. L.R. BUNYALA/NAMIRAMA/348 was subdivided into two resultant portions L.R. NOS. BUNYALA/NAMIRAMA/1460 and 1461 respectively on the 11<sup>th</sup> January, 2006. In the course of sub division the defendant without the consent and or knowledge of the plaintiff transferred to himself fraudulently 5 ½ acres instead of 5 acres as per the sale of land agreement between the plaintiff and the defendant (PEx a and b are the search certificates). Despite the hearing date having been taken by consent in court the defendant failed to attend court to offer any evidence.

I have perused the land sale in question PEx2 and indeed the defendant was to buy five acres from the defendant. Land parcel No. L.R. BUNYALA/NAMIRAMA/348 was subdivided into two resultant portions L.R. Nos. BUNYALA/NAMIRAMA/1460 and 1461 and the defendant obtained land parcel L.R. No. BUNYALA/NAMIRAMA/1461 which measures 2.2 hectares or 5.5 acres as per the search certificate PEx3a. I find that the plaintiff has proved that the defendant acquired more land than what was envisaged in the sale agreement. His evidence has not been rebutted. I find the defendant's title was obtained by fraud and or misrepresentation to this extent. Mesne profits will not be awarded as these have not been proved. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to surrender and or transfer of land measuring ½ acre to be excised from L.R. No. BUNYALA/NAMIRAMA/1461 in favour of the plaintiff.
2. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**