



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 346 OF 2014**

**ANTHONY INDUMULI MUTSAYI.....PLAINTIFF**

**VERSUS**

**CHAIRMAN MASINGA CATTLE DIP**

**ANDREA MUCHUKA ALUSAMAMBA**

**FRANCIS SIFUNA**

**FREDRICK OSANYA.....DEFENDANTS**

**JUDGEMENT**

By a plaint dated 13<sup>th</sup> June 2012, the plaintiff stated that he is the sole legal registered proprietor of the land parcel No. BUTSOTSO/ESUMEYA/3674. The 2<sup>nd</sup> & 3<sup>rd</sup> defendants are likewise the owners of L.R. NO. BUTSOTSO/ESUMEYIA/1916 registered in the name of SUFERIO OPWONDO now deceased which is purported to be a cattle dip. The 1<sup>st</sup> defendant is the chairman of the purported Masinga cattle dip situated in the aforementioned land parcel No. BUTSOTSO/ESUMEYIA/1916. That the 1<sup>st</sup> defendant through the Lurambi District Livestock Officer summoned the plaintiff to appear in the office on 5/6/2012 with intention to force the plaintiff surrender a portion on his said land to the purported cattle dip. The defendants have jointly and severally invaded and trespass onto the plaintiff's suit land with intension to construct structures related to cattle dip. This intrusion, invasion and trespass has occasioned immense anguish, anxiety and insecurity upon the plaintiff, his immediate family members. That plaintiff's claim against the defendants is for immediate restraint orders to prohibit the defendants from exercising any illegal activities as above stated and be evicted forthwith from the plaintiff's suit land parcel. The plaintiff prays that judgment be entered in her favor as against the defendants as follows:-

1. Permanent restraining order be and is hereby given and issued against the defendants, their agents, servants, assignees, and whomsoever acts through them from interfering in any manner whatsoever with the plaintiff's whole parcel of land No BUTSOTSO/ESUMEYIA/3674 and the same orders be enforced by OCS Kakamega Police station.
2. The defendants herein, their agents, servants, assignees, and whomsoever acts through them be and are hereby evicted from the plaintiff's whole parcel of land known as BUTSOTSO/ESUMEYIA/3674 and the same orders be enforced by OCS Kakamega Police Station.
3. Costs and interests.

PW1 testified that he is an innocent purchaser for value of the suit land parcel No. BUTSOTSO/ESUMEYIA/3674. He purchase the land from PW2 after due diligence. The plaintiff has produced the search, land sale agreement, application for consent, letter of consent, transfer form and title deed as PEx 1 to 6. Pw2 confirms that he sold the land to PW1. He was given the land by his uncle as a gift and the original parcel was land parcel No. BUTSOTSO/ESUMEYIA/1917. He had a dispute with the defendants and won the case as per PEx16 the verdict from the tribunal. The plaintiff confirms that there is a cattle dip on his land which was in use in1997. PW3 the Acting County Surveyor confirmed that land parcel No. BUTSOTSO/ESUMEYIA/3674 is a subdivision of land parcel No. BUTSOTSO/ESUMEYIA/1917 as per the mutation form and the former is bigger in size than land parcel No. BUTSOTSO/ESUMEYIA/1916. PW4 the County Registrar stated that land parcel No. BUTSOTSO/ESUMEYIA/1917 was transferred to PW2 through a court order PEx12 and he was issued with the title in 2008. It was later subdivide into two land parcel No. BUTSOTSO/ESUMEYIA/3529 and land parcel No. BUTSOTSO/ESUMEYIA/3530. There was a further subdivision of land parcel No. BUTSOTSO/ESUMEYIA/3529 as per the mutation dated 15<sup>th</sup> October 2008 which produced land parcel No. BUTSOTSO/ESUMEYIA/3674.

In 2<sup>nd</sup> and 3<sup>rd</sup> defendant's aver that if, which is denied, the plaintiff is the registered owner of the land parcel No. BUTSOTSO/ESUMEYIA/3674, then such registration was obtained fraudulently by the plaintiff. The plaintiff's colluding with one Arambe Keya Asmani to enter into unlawful sale transaction when the plaintiff and the said Arambe Keya Asmani knew or ought to have known that

he (Arambe Keya Asmani) was not a beneficiary to the estate of the late Suferia Opwondo. The plaintiff and one Arambe Keya Asmani colluding and conspiring with the Land Registrar to alter the acreage of land in question when they knew or ought to have known that it illegal. The plaintiff unlawful colluding with the said Arambe Keya Asmani to disinherit the lawful beneficiaries of the estate of the late Suferio Opwondo with BUTSOTSO/ESUMEYIA/1917 is being administered by the Public Trustee. DW3 states that he is the member of the cattle dip which started in 1975.

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 Nyang’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 registered owner of land parcel No. BUTSOTSO/ESUMEYA/3674 is the plaintiff. I have perused the documents adduced as evidence in great detail. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s aver that land parcel No. BUTSOTSO/ESUMEYIA/1917 belonged to one Ronald Shako and PW1 and PW2 fraudulently transferred the same. The said Ronald Shako is not a party to this suit and the defendants cannot purport to represent him. PW4 the County Registrar stated that land parcel No. BUTSOTSO/ESUMEYIA/1917 was transferred to PW2 through a court order PEx12 and he was issued with the title in 2008. It was later subdivide into two land parcel No. BUTSOTSO/ESUMEYIA/3529 and land parcel No. BUTSOTSO/ESUMEYIA/3530. There was a further subdivision of land parcel No. BUTSOTSO/ESUMEYIA/3529 as per the mutation dated 15<sup>th</sup> October 2008 which produced land parcel No. BUTSOTSO/ESUMEYIA/3674. I see no element of fraud in the subdivision and transfer to the plaintiff. Indeed all the court orders in PEx 12, 13 and 14 ruled in favour of the plaintiff, that is, in Miscellaneous Award No. 155 of 1999, Kisumu Court of Appeal No. 340 of 2015 and Kakamega High Court Civil Case No. 148 of 2009. PW4 confirmed that there was a discrepancy on the acreage on the ground and in their mutation forms and this was rectified. In the instant case I see no evidence that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. Permanent restraining order be and is hereby given and issued against the defendants, their agents, servants, assignees, and whomsoever acts through them from interfering in any manner whatsoever with the plaintiff’s whole parcel of land No BUTSOTSO/ESUMEYIA/3674 and the same orders be enforced by OCS Kakamega Police station.
2. The defendants herein, their agents, servants, assignees, and whomsoever acts through them be and are hereby to vacate from the plaintiff’s whole parcel of land known as BUTSOTSO/ESUMEYIA/3674 within the next 3 (three) months and in default eviction order to issue forthwith and the same orders be enforced by OCS Kakamega Police Station.
3. Costs 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**