



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 315 OF 2015

JOSECK MUSOGA MUKALAN..... PLAINTIFF

VERSUS

GEORGE MILIMU SAHANI.....DEFENDANT

JUDGEMENT

By a plaint dated 15th December 2015, the plaintiff stated that he opted to seek assistance on how to get his land parcel No. ISUKHA/SHITOCHI/3143 from the Land disputes Tribunal Court or sometimes in the year 2001. The plaintiff avers that indeed the tribunal court awarded him the land parcel No. ISUKHA/SHITOCHI/3143 which is registered in the name of the defendant herein. The plaintiff avers further that the matter was brought back to the subordinate court and same was heard and determined gave him the said parcel of land No. ISUKHA/SHITOCHI/3143 by empowering the executive officer to sign all the relevant documents in respect of transfer farms. The plaintiff avers that the land in question initial was in the name of Fabian Sahani Milimu the father to the defendant who sold a portion thereof to his father Charles Mukalani Ashivaka alias Amuganya (deceased). The plaintiff avers that the said subordinate court adopted the decision of the tribunal court and awarded him the parcel of land No. Isukha/Shitochi/3143. The plaintiff prays for judgment against the defendant for;

1. An order that this honourable court do cancel and/or a null the land title deed No. Isukha/Shitochi/3143 bearing the name of the defendant herein and the same be registered in the name of the plaintiff herein.
2. An order that basing on the report given by the Land Registrar Kakamega and District Land Surveyor dated 13/9/2013 be adopted by this honourable court.
3. Costs of this suit.
4. Any other and further relief that this honourable court deem fit to grant in the honourable court.

PW1 testified that his case was heard before the tribunal and the award adopted by the Kakamega Chief's Magistrates Court through Miscellaneous Application No. 226 of 2001 PEx1. It was ordered that the defendant's name be expunged and replaced by him. His father was the party to that dispute and he produced a power of attorney PEx4. The plaintiff also produced the surveyors report PEx2.

The defendant avers that the tribunal had no jurisdiction to cancel any land title and the claim is therefore misdirected and unavailable. The defendant testified in open court that he inherited the suit land from his father. The defendant produced the copy of official search DEx1, the certificate of confirmation of grant DEx2 and his father's death certificate DEx3.

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 registered owner of land parcel No. Isukha/Shitochi/3143 is the defendant. The plaintiff now wishes to have this court enforce the order of Shinyalu Land Disputes Tribunal and adopted by the court which ordered that;

1. *The Shinyalu Land Dispute verdict is hereby adopted as judgement of this court.*
2. *The claimant Amugaya Ashivaga Amukuvia is the owner of land parcel No. Isukha/Shitochi/3143.*
3. *The defendant is to transfer the plot in dispute to the plaintiff*

The fundamental question this court needs to determine is whether the tribunal had jurisdiction to determine this matter and issue the said order before the same can be enforced by this court. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.”

In this case, the tribunal meandered beyond its boundaries. In *M’Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR the court held-

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

The tribunals in the present case dealt with title or ownership to property. The Shinyalu Land Disputes Tribunal and adopted by the court which ordered that;

1. *The Shinyalu Land Dispute verdict is hereby adopted as judgement of this court.*
2. *The claimant Amugaya Ashivaga Amukuvia is the owner of land parcel No. Isukha/Shitochi/3143.*
3. *The defendant is to transfer the plot in dispute to the plaintiff*

The dispute between the parties before the Shinyalu Land Disputes Tribunal was essentially a claim to ownership over the land.

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Shinyalu Land Disputes Tribunal. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of *Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & Another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR. In that case, Odunga J held as follows-

“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.

The provisions of section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 are very clear on what matters these tribunals had jurisdiction over claims of title to registered land is not one of the matters that can or could be laid in this tribunal and the Shinyalu Land Disputes Tribunal was wrong to register, hear and pass judgment and make orders against the defendant on the title to the suit land. This

court cannot enforce and or adopt a decision which is a nullity. No evidence of fraud or misrepresentation has been adduced on the part of the defendant. On the issue of whether the plaintiff has locus to prosecute this matter I find he does not. He cannot rely on a power of attorney long after his father is deceased. I find that plaintiff has failed to establish his case on a balance of probabilities and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE