

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 618 OF 2014

BENARD MACHO OMWITAKHO.....PLAINTIFF

VERSUS

THE HONOURABLE THE ATTORNEY GENERAL.... DEFENDANT

JUDGEMENT

The plaintiff avers that he was the registered proprietor of L.R. NO. E. Wanga/Isongo/2684 by then measuring 4.25 Ha before selling part of it measuring 0.06 Ha to one John Kulundu Muyula and the title was closed upon sub-division and new numbers E. Wanga/Isongo/3183 created. In the premises, the plaintiff transferred L.R. NO. E. Wanga/Isongo/3183 measuring 0.60 Ha to the said John Kulundu Muniyula and remained with L.R. NO. E. Wanga/Isongo/3182 which was registered in his name. The plaintiff avers that when he collected his title deed in respect of L.R. NO. E. Wanga/Isongo/3182 on 10th October, 2012, he discovered that the defendant had fraudulently and/or illegally, negligently recorded the size in respect of L.R. NO. E. Wanga/Isongo/3182 to be 2.77 Ha instead of 3.65 Ha leaving a whopping 0.88 Ha unregistered and/or unaccounted for. The plaintiff's claim against the defendant is an order directing him to rectify the register in respect of L.R. NO. E. Wanga/Isongo/3182 so as to have its size to read 3.65 hectares instead of 2.77 hectares as it is currently reflected. The plaintiff's further claim against the defendant is an order directing him to cancel title deed in respect of L.R. NO. E. Wanga/Isongo/3182 showing its size as 2.77 Ha and issue a new one with the correct size of 3.65 Ha.

That defendant states that the acreage on land parcel L.R. NO. E. Wanga/Isongo/3182 was not recorded negligently or fraudulently by the Land Registrar but it was recorded as per the mutation forms signed by the plaintiff when he was sub-dividing his land E/Wanga/Isongo/2684 to create two parcels E/Wanga/Isongo/3182 and 3183 which indicated that the plaintiff parcel E. Wanga/3182 of land was to be 2.77 Ha and E. Wanga/3183 was to be 0.60 ha. That if any negligence or fraud occurred then it was due to the actions of the plaintiff who presented to the Land Registrar false and misleading documents in the form of mutation form. The defendant states that the plaintiff is not entitled to the orders sought since the Land Registrar cannot alter the mutation form the plaintiff presented before the lands office which read that the plaintiff acreage on land parcel L.R. E. Wanga/Isongo/3182 was 2.77 Ha and which the plaintiff endorsed his signature as approving the sub division and the acreage.

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 Muniyao 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. L.R. NO. E. Wanga/Isongo/3182 is the defendant. The issue to be determined is whether that the defendant had fraudulently and/or illegally, negligently recorded size in respect of L.R. NO. E. Wanga/Isongo/3182 to be

2.77 Ha instead of 3.65 Ha leaving a whopping 0.88 Ha unregistered and/or unaccounted for. I have perused the documents on record and find that the plaintiff has not produced any surveyors report to prove the actual acreage of the suit land on the ground. Indeed the defendant though they did not give evidence in court annexed in their list of documents a mutation form signed by the plaintiff dated 8th June 2009 which when he was sub-dividing his land E/Wanga/Isongo/2684 to create two parcels E/Wanga/Isongo/3182 and 3183 which indicated that the plaintiff parcel E. Wanga/3182 of land was to be 2.77 Ha and E. Wanga/3183 was to be 0.60 ha. I find that the plaintiff has failed to establish his case on a balance of probabilities. He is well advised to engage a surveyor to establish the size of the land. This court cannot make orders in vain. For those reasons I find that this case is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE