



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 105 OF 2017

REUBEN SAMSON OMBISI.....PLAINTIFF

VERSUS

WILLIAM OMBISI OGUTU.....DEFENDANT

JUDGEMENT

By a plaint dated 23rd March 2017, the plaintiff avers that, at all material time relevant to this suit, the land parcel number East Bunyore/Ebubayi/79 is family land owned by the plaintiff's late father Julius Ogutu Ombisi. The suit land herein was registered in the name of the defendant to hold in trust since at the time of land adjudication their father was working in Uganda. When the plaintiff's father came back from Uganda sometimes in the year 1971, he sub-divided the said land between the plaintiff and the defendant and they have been staying peacefully until the year 2015 when the defendant herein processed the title deed for whole piece of land to his name. The plaintiff and the defendant were then summoned by the District Land Registrar, Vihiga Lands Registry on 22nd May, 2015 together with the area Assistant Chief and they all agreed that the suit land was given to both of them by their late father but the defendant refused to sign the sub-division forms for his brother, the plaintiff herein. The surveyor carried the subdivision which was supposed to be registered in Vihiga Lands Registry but the defendant has refused to surrender the title so that the said sub-division can be registered even after numerous summons by the Land Registry and the Deputy County Commissioner. The defendant has since threatened to evict the plaintiff from the portion he is staying on claiming that he is the registered owner of the whole parcel of land and the plaintiff does not have any beneficial interest on the said land. It is the plaintiff's claim as against the defendant that the suit land was registered in the name of the defendant to hold in trust for himself and the plaintiff herein and should thus be compelled to transfer the portion the plaintiff was awarded since this is the only land the plaintiff depends on as a means of livelihood. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) A declaration that the defendant holds the suit parcel No. EAST/BUNYORE/EBUBAYI/79 in trust for himself and the plaintiff herein and the plaintiff is entitled to half a share of the suit land.
- (b) An order directing the defendant to surrender the title deed and execute all the necessary documents to enable the sub-division and transfer of a half share of land parcel number EAST BUNYORE/EBUBAYI/79 into the name of the plaintiff failure to which the Deputy Registrar execute the said documents.
- (c) Cost of this suit and interest thereon.
- (d) Any other relief that this honourable court may deem fit to grant.

The defendant avers that since time memorial his family has occupied, settled and cultivated land parcel number East Bunyore/Ebubayi/79 and the same is not a family land. The defendant avers that he was the first registered owner of the land parcel number East Bunyore/Ebubayi/79 and the same has never been owned by the late father of the parties herein. The defendant avers that the land adjudication was done when their father one Okutu Ombisi was in Kenya. That one Okutu Ombisi who was the father of the parties herein was registered owner of the land parcels number E. Bunyore/Ebubayi/22, 66 & 319 and he is still the registered owner even after his death and that is where the plaintiff has got his land to inherit. The defendant avers that there is no time when the surveyor carried any subdivision of the land in dispute and if the same was done which is denied then it was done without the knowledge of the defendant.

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.”

Pursuant to provisions of **section 28 of the Land Registration Act**

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (b) trusts including customary trusts”.

It is not disputed that the defendant is the registered proprietor of the suit land parcel number East Bunyore/Ebubayi/79. The issue first for determination is whether or not he holds the same in trust for the plaintiff. It is a finding of fact that the litigants are brothers and the plaintiff reside on the said land with his family. The plaintiff has produced numerous letters from the chief and land registrar that the land be divided to the two of them as it belongs to their father. In **MERU HC.CC NO. 146 OF 2000- Peter Gitonga vs Francis Maingi M’ikiara** it was stated that :-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.

It is the plaintiff’s evidence that during the adjudication their father was away in Uganda and hence the same was registered in the name of the defendant. The defendant admits that the plaintiff has lived there for over 10years and adjudication was in 1966 and the land belonged to their grandfather. Their father died in 1989 and he obtained his title in 2015. His father has three other parcels still in his name and the plaintiff should move there. I find that Plaintiff is entitled to the portion of land he is claiming.

Justice Khamoni in Gathiba vs Gathiba Nairobi HCCC No. 1647/84 stated that;

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary law has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as trustee”.

In the case of **Mbui Mukangu v. Gerald Mutwiri Mbui, C.A No. 281 of 2000** the Court stated as follows;

“that for one to establish a claim in customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land.”

I find that the plaintiff is and has been in possession of half of the suit land and the same is ancestral land. The defendant is registered in trust for the plaintiff who is his blood brother. Parties are advice to file succession on the estate of their father if they have any interest in the remaining parcels of land. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the defendant holds the suit parcel No. EAST/BUNYORE/EBUBAYI/79 in trust for himself and the plaintiff

herein and the plaintiff is entitled to half a share of the suit land.

2. An order directing the defendant to surrender the title deed and execute all the necessary documents to enable the sub-division and transfer of a half share of land parcel number EAST BUNYORE/EBUBAYI/79 into the name of the plaintiff failure to which the Deputy Registrar execute the said documents.

3. No orders as to costs as the parties are siblings.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE