



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 30 OF 2015**

**SAMON AMWAI ATOLO.....PLAINTIFF**

**VERSUS**

**JOHN JULIUS MALALU.....DEFENDANT**

**JUDGEMENT**

The plaintiff sought and obtained limited grant of letters of administration Ad litem to the estate of the late Samuel Amwai Atoro who was his father vide Kitale HCC Succession Cause No. 302 of 2014 and had the same granted on 3<sup>rd</sup> February, 2015. The said Samuel Amwai Atoro was the lawful and/or legal owner of land parcel No. E/BUNYORE/EBUBAYI/1781 measuring 0.7 acres or thereabouts having purchased the same from one Aggrey Atolo (now deceased) in the year 1978. The defendant is not a beneficiary of the estate of the late Samuel Amwai Atoro and is not qualified to be regarded as such. That upon purchase of the said land parcel the said Samuel Amwai Atoro took immediate possession of the same whereby he planted several eucalyptus trees and Napier grass. That the said Aggrey Atolo died in May 1990 before transferring the title deed of the said land parcel to the late Samuel Amwai Atoro. That the said Samuel Amwai Atoro also passed on in April, 2010 before securing the title to the said land parcel sold to him by the late Aggrey Atolo. That on or about 23<sup>rd</sup> October, 2013 the defendant herein unlawfully fraudulently transferred the title to the said land parcel No. E/Bunyore/Ebubayi/1781 to himself thus intermeddling with the estate of the late Samuel Amwai Atoro. The plaintiff prays for judgment against the defendant for:-

1. A declaration that the title deed issued in favour of the defendant in respect of land parcel No. EAST/BUNYORE/EBUBAYI/1781 was fraudulent and the same be cancelled by the County Land Registrar forthwith.
2. A declaration that land parcel No. EAST/BUNYORE/EBUBAYI/1781 belongs to the estate of the late Samuel Amwai Atoro.
3. An order of permanent injunction restraining the defendant, his agent, workers or anybody acting for him or through him from trespassing upon land parcel No. EAST/BUNYORE/EBUBAYI/1781.
4. Costs of this suit plus interest at court rates.

PW2 testified that Samuel bought land from Late Aggrey Sirali Atolo but delayed payment and late paid. PW3 said the sale existed though he was not there.

DW1 the defendant states that he purchased and obtained the suit land from the family of the Late Aggrey Sirali Atolo comprising the family members namely Rose Mukhwana Sirali, Kennedy Sirali, Patrick Sirali, Phaniel Sirali, Wellington Sirali, Enock Sirali and Richard Sirali. By the agreement dated 12<sup>th</sup> February, 2012 and further to the grant of letters of administration interstate to Rose Mukhwana Sirali issued by the High Court on the 12<sup>th</sup> April, 2011, parties ratified the same and indeed proceeded to execute relevant documents to effect transfer of the same to the defendant as per the laid down procedures. Accordingly, the defendant carried out a search and established that indeed the suit land was registered in the name of Aggrey Sirali Atolo and noticed there was a caution placed on it and a restriction by one Rose Mukhwana Sirali Atolo and Samuel Amwai Atolo respectively. Rose Mukhwana Sirali applied to withdraw the caution and indeed it was withdrawn while the restriction was also lifted pursuant to a letter by the area assistant chief after summoning Samuel Amwai Atolo several times without success. DW2 the said Rose Mukhwana Sirali Atolo stated that the land belonged to her husband Aggrey Sirali Atolo and she is the one who planted trees on it. Samuel Amwai Atolo her husband's brother was cultivating it. DW3 and DW4 who are neighbours stated that the land belonged to Aggrey Sirali Atolo and Samuel Amwai Atolo removed the boundary and started cultivating it.

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 defendant is the sole registered owner of land parcel No. E/Bunyore/Ebubayi/1781. The issue for determination is whether the title held by the defendant is good. The defendant states that he purchased and obtained the suit land from the family of the Late Aggrey Sirali Atolo comprising the family members namely Rose Mukhwana Sirali, Kennedy Sirali, Patrick Sirali, Phanael Sirali, Wellington Sirali, Enock Sirali and Richard Sirali. By the agreement dated 12<sup>th</sup> February, 2012 and further to the grant of letters of administration interstate to Rose Mukhwana Sirali issued by the High Court on the 12<sup>th</sup> April, 2011, parties ratified the same and indeed proceeded to execute relevant documents to effect transfer of the same to the defendant as per the laid down procedures. There was caution placed on it and a restriction by one Rose Mukhwana Sirali Atolo and Samuel Amwai Atolo respectively. Rose Mukhwana Sirali applied to withdraw the caution and indeed it was withdrawn while the restriction was also lifted pursuant to a letter by the area assistant chief (DEX 5) after summoning Samuel Amwai Atolo several times without success. In a letter dated 23<sup>rd</sup> November 1987 written by the Late Aggrey Sirali Atolo to the Chief (DEX 10) it would appear he did intend to sell the land to his brother Samuel Amwai Atolo but the latter did not fulfill his part of the agreement. I find that the defendant was an innocent purchaser for value and his title is good. The plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. There will be no orders as to costs as the parties are neighbours and relatives.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**