



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 4 OF 2012

SHABAN ODUKI WANYAMA PLAINTIFF

VERSUS

MUMIAS SUGAR CO. LTD

IDI WECHULI..... DEFENDANTS

JUDGEMENT

The plaintiff alleges that he is the administrator of the L.P. No. BUNYALA/NAMBACHA/213 having filed succession cause in the High Court vide Succession Cause No. 51/2012 and was issued with a grant of letters of administration. The plaintiff further alleges that he is the administrator of the L.P. No. BUNYALA/NAMBACHA/213 and has occupied the same for several years since it is ancestral land. The plaintiff avers that the defendant who is a stranger to him fraudulently sub-divided the L.P. No. BUNYALA/NAMBACHA/213 into L.P. Nos BUNYALA/NAMBACHA/724 and 725 and further to L.P. No. 133 without his consent and or knowledge. The plaintiff further avers that he wanted to carryout land transaction on his L.P. No. BUNYALA/NAMBACHA/213 i.e. transfer forms and registering grant but was unable to do so since the land parcel is not existing and has been sub-divided. The plaintiff alleges that the defendant illegally and without his consent and or knowledge contracted sugar cane on the sub-divided L.P. No. BUNYALA/NAMBACHA/133. The plaintiff's prayer to this court against the defendant is for an order of cancellation deregistration, nullification and or revocation of the title for L.P. No's BUNYALA/NAMBACHA/724, 725 and 133 and the same be reverted back to original L.P. No. BUNYALA/NAMBACHA/213. The plaintiff prays for judgment to be entered against the defendant for:-

- a. An order for cancellation, deregistration, revocation and or nullification of the L.P. No's BUNYALA/NAMBACHA/724, 725 and 133 and the same be reverted back to original to land parcel No. 213.
- b. Costs.
- c. Relief/Remedy.

The 2nd defendant denies that he fraudulently subdivided land parcel No. BUNYALA/NAMBACHA/213. The 2nd defendant avers that his father Gripso Wechuli Sitati (deceased) lawfully purchased the 21/2 acres of land from Jacob Wanyama (deceased) in 1971 and immediately took possession ever since until his demise on 28/11/2012. The defendant further states that the plaintiff's father did apply to the Lurambi Land Control Board on or about 16/7/1971 for consent to sub divide land registration No. BUNYALA/NAMBACHA/213 and which consent was duly granted. Land parcel No. BUNYALA/NAMBACHA/213 was sub-divided and the title ceased to exist way back in 1973 as land title No. BUNYALA/NAMBACHA/213 was closed on sub-division resulting to land Parcel No. BUNYALA/NAMBACHA/724 in the plaintiff's father name and BUNYALA/NAMBACHA/725 in the 2nd defendant's father's name. The plaintiff has been alive to the defendant's family occupation and use of land parcel No. Bunyala/Nambacha/725 since 1971 and that the defendant's father had for all that period planted sugarcane contracted to Mumias Sugar Co. Ltd. The 2nd defendant states that it is his father (the late Gripso Wechuli Sitati) who planted the sugarcane on the suit parcel as he is the registered proprietor and contracted the same to Mumias Sugar Co. Ltd. The 2nd defendant states that it is the plaintiff's father who lawfully transferred the suit property to the defendant's father culminating into the closing of title No. BUNYALA/NAMBACHA/213 and resultant title numbers BUNYALA/NAMBACHA/724 and 725. The 2nd defendant states that his late father is the lawful owner of the latter. The 2nd defendant prays that the plaintiff's suit be dismissed with costs and judgment be entered on the counterclaim as follows:-

- a. A declaration from this honourable court that No. BUNYALA/NAMBACHA/725 is the property of the deceased father of the 2nd defendant.
- b. An order of eviction of the plaintiff, his family and or anyone claiming through him from the said property.

c. Mesne profits as may be assessed by this honourable court.

d. Costs.

DW2 and DW3 corroborated the 2nd defendant's evidence.

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 a finding of fact that the suit land parcel No. Bunyala/Nambacha/725 is registered in the name of 2nd defendant father the late Grispo Wechuli Sitati. He produced an application for consent and a letter of consent dated 1971. He also produced sugar cane contracts with Mumias Sugar Company. He produced letters of administration of his fathers' estate DEx11. It is in evidence that the 2nd defendant's family occupation and use of land parcel No. Bunyala/Nambacha/725 has been since 1971 and that the 2nd defendant's father had for all that period used to plant sugarcane contracted to Mumias Sugar Co. Ltd. I see no evidence of fraud or corruption in the 2nd defendant's title. The plaintiff merely states that the land was grabbed and the survey map does not show any subdivision. That in 1973 there was a caution placed on the land. I find that plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. The 2nd defendant has proved his counterclaim on a balance of probabilities. However, the claim for mesne profits was not established and the same will not be awarded. I therefore grant the following orders;

1. A declaration from this honourable court that land parcel No. BUNYALA/NAMBACHA/725 is the property of the deceased, father of the 2nd defendant.
2. The plaintiff, his family and or anyone claiming through him are to vacate the suit land parcel No. BUNYALA/NAMBACHA/725 within the next six (6) months from the date of this judgement and in default eviction order to issue forthwith.
3. Each party is to bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE