



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 244 OF 2014**

**DAVES ZADOCK MAGINA.....PLAINTIFF**

**VERSUS**

**RUTH LIBOYI**

**BENJAMIN MAKHALABAI LIBOYI**

**DANIEL ANEKEYA LIBOYI**

**GEOFFREY OMBANGO LIBOYI**

**JOHN MAKOKHA LIBOYI.....DEFENDANTS**

**JUDGEMENT**

By a plaint dated 22<sup>nd</sup> March, 2011, the plaintiff is the registered owner of Land Parcel No. Butso/Esusemyia/3403 measuring approximately 0.605 hectares having purchased it for value from one Salome Elijah which value he paid in full and final settlement. The plaintiff avers that before the said purchase/sale the seller aforementioned one Salome Elijah had not carried out succession and it is the plaintiff's money that was used to file succession. The 1<sup>st</sup> defendant's husband and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants' father respectively (now deceased) bought land from one Lazaro who is a brother in-law to Salome and after distribution it turned out that the defendant's father one Liboyi had been shown Salome Elijah's share portion sold to the plaintiff. The defendants have refused to move to the land allocated to them and adamantly remain on a portion of the plaintiff's land parcel No. Butso/Esusemyia/3403. The plaintiff's land measures 0.605 hectares and the portion occupied by the defendant is approximately  $\frac{1}{4}$  acre while the plaintiff utilizes the rest. The 1<sup>st</sup> defendant's husband and 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant's father one Isaac Libwoyi now deceased referred a case at Lurambi Land Disputes Tribunal which tribunal ruled in favour of the plaintiff and being dissatisfied with the said ruling filed an appeal at Western Province Appeals Committee which also upheld the tribunal's ruling, which was adopted as the judgment of the court in Kakamega Chief Magistrate's Court Miscellaneous Award No. 153 of 2007. The plaintiff's claim against the defendants jointly and severally is for eviction from the plaintiff's portion occupied by the defendants. The plaintiff prays for eviction against the defendants severally and jointly for:-

(a) Eviction from the plaintiff's portion of Land Parcel No. Butso/Esusemyia/3403 occupied by the defendants jointly and severally.

(b) Costs of this suit.

The plaintiff testified and called two (2) witnesses. He stated that he bought the suit land from one Salome Elijah who testified as PW2. A sale agreement was produced as evidence of sale. He purchased  $1 \frac{3}{4}$  acres. He later processed title which was produced in court as evidence. It is worth noting that at the time of signing the sale agreement between the plaintiff and his seller (PW2) the husband of the 1st defendant and father of the 2nd-5th defendant was a witness who signed on the Agreement as No. 5 (Isaac Libwoyi Makhalabasi and his I/D. No. is indicated thereon). That the husband of the 1st defendant and father of the 2nd-5th defendant was aware of the sale and consented thereto. The said agreement and the signature of the 5th witness is not disputed. The plaintiff and the aforesaid Isaac Libwoyi attended Lurambi Land Disputes Tribunal and Tribunal ruled in favour of the plaintiff. The proceedings were produced in court. The members present at the tribunal page one among others were the 1<sup>st</sup> defendant and her husband who was the claimant. In submissions the plaintiff relied on the following Authorities; Nairobi HC ELC No. 490 of 2010. Sophie Wanjiku John vs. Jane Mwihaki Kimani and Nairobi ELC No. 436 of 2009. Sammy Leonard Asanda Ogetto & 2 others vs. Nuria Abdi Nur & 3 others.

The defendants aver that the land parcel number Butso/Esusemyia/3403 belonged to one Mayeya Indimuli and the same was bought by their father one Isaack Liboyi (deceased) upon which the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were born and have resided to date complete with

homes, families and other properties. In the premises, the defendants aver that the plaintiff's claim, if any which is denied, is false and statute barred in any event and any succession or transfer by transmission in respect to the parcel of land number Butso/Esimeyia/3403 was done in disregard of the defendants interests and amounts to fraud. The defendants pray that the plaintiff's suit be dismissed with costs.

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. The Judge 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 the plaintiff is the registered proprietor of Land parcel No. Butso/Esimeyia/3403. The plaintiff filed suit vide a plaint dated 22<sup>nd</sup> March, 2011 seeking for Eviction of the defendants jointly and severally from a portion of Land parcel No. Butso/Esimeyia/3403 and costs. The plaintiff testified and called two (2) witnesses. He stated that he bought the suit land from one Salome Elijah who testified as PW2. A sale agreement was produced as evidence of sale. He purchased 1 ¼ acres. He later processed title which was produced in court as evidence. The said PW2 obtained the suit land through succession. This court has noted that at the time of signing the sale agreement between the plaintiff and his seller (PW2) the husband of the 1<sup>st</sup> defendant and father of the 2<sup>nd</sup>-5<sup>th</sup> defendant was a witness who signed on the Agreement as No. 5 (Isaac Libwoyi Makhalabasi and his I/D. No. is indicated thereon). The husband of the 1<sup>st</sup> defendant and father of the 2<sup>nd</sup>-5<sup>th</sup> defendant was aware of the sale and consented thereto. Therefore, time started running on the date of the agreement as against the plaintiff i.e. on 22<sup>nd</sup> October, 2002 and the suit cannot be said to be time barred. The said agreement and the signature of the 5<sup>th</sup> witness is not disputed. The plaintiff and the said Isaac Libwoyi attended Lurambi Land Disputes Tribunal and Tribunal ruled in favour of the plaintiff. The proceedings were produced in court. The members present at the tribunal page one among others were the 1<sup>st</sup> defendant and her husband who was the claimant. The defendants never appealed against this decision and the same remains a court order to date. The defendant filed their joint statements of Defence on 8<sup>th</sup> October, 2012 and in their defence, they did not deny that they live on the suit land. They further pleaded that the suit land belonged to Mayeya Indimuli and they bought the same through their father Isaack Liboyi (now deceased). Even though the defendant pleaded purchaser's interest; they did not produce any evidence of purchase to this honourable court. They pleaded fraud in their defence and they did not state the particulars of fraud nor did they prove the same. The plaintiff title is indefeasible and can only be challenged if it was obtained through a fraudulent scheme which the defendants have failed to prove. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendants, their servants, agents and relatives are to vacate the suit Land Parcel No. Butso/Esimeyia/3403 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. Each party to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**