



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 29 OF 2017

JEREMIAH IMBUSI PLAINTIFF

VERSUS

ASITIBA IMBUSIDEFENDANT

JUDGEMENT

By a plaint dated 21st September, 2012, the plaintiff and the defendant are sons of the Late Imbusi Esivere. Prior to his death, he owned the parcel of land known as West Bunyore/Ebusiekwe/1867 as ancestral land. Before registration of the land, the late Imbusi Esivere showed his two sons their respective shares and by then the plaintiff was still in school. The plaintiff avers that land parcel number W. Bunyore/Ebusiekwe/1867 was allocated to them in equal shares. The plaintiff further avers that when the registration exercise was being carried out, the defendant registered himself as the owner of the whole parcel while the plaintiff was away. The plaintiff has resided on his share of land parcel No. W. Bunyore/Ebusiekwe/1867 for the last 60 years. The plaintiff has put up his houses, planted trees, plants subsistence crops and has also settled his sons on his portion. The plaintiff avers that the defendant holds half of land parcel No. W. Bunyore/Ebusiekwe/1867 in trust for him. The plaintiff and the defendant have peacefully stayed on their respective portions. The plaintiff was surprised to discover that the defendant had secretly sub-divided the land into four portions namely W. Bunyore/Ebusiekwe/2048-2051 on 10th October, 1985. Without the plaintiff's knowledge, the defendant went ahead to have the 4 sub-divisions of land parcel No. W. Bunyore/Ebusiekwe/1867 transferred as follows:-

- (a) Land parcel No. W. Bunyore/Ebusiekwe/2048 – Herbert Asitiba Imbusi.
- (b) Land parcel No. W. Bunyore/Ebusiekwe/2049 – Astiba Imbusi and Alexander Asituha Astiba.
- (c) Land parcel No. W. Bunyore/Ebusiekwe/2050 – Astiba Imbusi and Chasa Okwomi Astiba.
- (d) Land parcel No. W. Bunyore/Ebusiekwe/2051 – Asitiba Imbusi.

That physically on the ground the plaintiff occupies a portion that comprises land parcels No. W. Bunyore/Ebusiekwe/2050 and W. Bunyore/Ebusiekwe/2051. The plaintiff avers that the defendant has all along held half of land parcel No. W. Bunyore/Ebusiekwe/1867 in trust for him. The plaintiff prays for:-

- (i) A declaration that half (1/2) of land parcel No. W. Bunyore/Ebusiekwe/1867 is held in trust for the plaintiff by the defendant.
- (ii) An order that the sub-division of land parcel No. VI867 into W. Bunyore/Ebusiekwe/2048, 2049, 2050 and 2051 and their subsequent transfers be cancelled and the same revert back to W. Bunyore/Ebusiekwe/1867 be sub-divided into two equal portions and a half share be transferred to the plaintiff.
- (iii) Costs of the suit.

PW1, the plaintiff produced the green cards and sketchmap as exhibits. PW2 testified that the litigants are her brothers and that the plaintiff is entitled to a share of that land.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to adduce oral evidence. 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 court 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 registered owner of land parcel LR No. West Bunyore/Ebusiekwe/1867 was originally the defendant. This was later subdivided and transferred to third parties. The issue is whether or not they hold good titles by virtue of the plaintiffs’ claim of land held in trust.

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

In the present case, the plaintiff and the defendant are sons of the Late Imbusi Esivere. The plaintiff testified that prior to his death, he owned the parcel of land known as West Bunyore/Ebusiekwe/1867 as ancestral land. Before registration of the land, the late Imbusi Esivere showed his two sons their respective shares and by then the plaintiff was still in school. The plaintiff avers that land parcel number W. Bunyore/Ebusiekwe/1867 was allocated to them in equal shares. The plaintiff further avers that when registration exercise was being carried out, the defendant registered himself as the owner of the whole parcel while the plaintiff was away. The plaintiff has resided on his share of land parcel No. W. Bunyore/Ebusiekwe/1867 for the last 60 years. The plaintiff was surprised to discover that the defendant had secretly sub-divided the land into four portions namely W. Bunyore/Ebusiekwe/2048-2051 on 10th October, 1985. Without the plaintiff’s knowledge, the defendant went ahead to have the 4 sub-divisions of land parcel No. W. Bunyore/Ebusiekwe/1867 transferred them to his sons as follows;

- (e) Land parcel No. W. Bunyore/Ebusiekwe/2048 – Herbert Asitiba Imbusi.
- (f) Land parcel No. W. Bunyore/Ebusiekwe/2049 – Astiba Imbusi and Alexander Asituha Astiba.
- (g) Land parcel No. W. Bunyore/Ebusiekwe/2050 – Astiba Imbusi and Chasa Okwomi Astiba.
- (h) Land parcel No. W. Bunyore/Ebusiekwe/2051 – Asitiba Imbusi.

This court has taken note that prior to the institution of this case, the suit land was already in the name of third parties. The same were not joined as parties during the hearing of this matter. I find that this is a preliminary issue of law which this court has to determine before going into the merit and demerits of this case. Order 1 Rule 9 and 10. These two provisions stipulate as follows: -

Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without

his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

In the case of *Zephir Holdings Ltd Vs Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR*, the court held that:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

This is further supported by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice. The said article stipulates that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles (d) justice shall be administered without undue regard to procedural technicalities.”

In the case of *Republic Vs District Land Registrar, Uasin Gishu & Anor (2014) eKLR* where the Judge held that:

“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”

Be that as it may, the above authorities must be distinguished as the plaintiff never amended the pleadings to enjoin the proprietor of Land parcel No. W. Bunyore/Ebusiekwe/2048 – Herbert Asitiba Imbusi, the joint proprietor of Land parcel No. W. Bunyore/Ebusiekwe/2049 – Alexander Asituha Astiba and the joint proprietor of Land parcel No. W. Bunyore/Ebusiekwe/2050 Chasa Okwomi Astiba. during the trial. The plaintiff seeks to have these titles cancelled. The matter is now at judgement stage. The third parties mentioned above where registered proprietors of the suit parcels way back on 1993 before this suit was filed, PEx2 to PEx5 are the green cards. This court cannot consider and determine the matter in the absence of and/or the participation of the said third parties who own or co-own the suit land parcels. This court cannot also issue adverse orders if at all against third parties who have not been enjoined and/or heard in this matter. This procedural technicality goes to the substance of the case. Having found this there will be no need to go into the merit and demerits of this case. The plaintiff ought to file a suit against all the parties involved to enable the court *determine the real matter in dispute and/or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.* I find this suit is not merited by reason of this non joinder of the proprietors of the suit land parcels and I strike it out with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE