



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 40 OF 2017**

**ALFRED NYONGESA WAKHUNGU.....PLAINTIFF**

**VERSUS**

**GABRIEL MAKOKHA WAKHUNGU**

**FRANCIS AMWAYI MAYABI.....DEFENDANTS**

**JUDGEMENT**

By a plaint dated 8<sup>th</sup> February, 2017, the plaintiff avers that he was the registered proprietor of L.R. No. North Wanga/Matungu/235 (Plot 235) measuring approximately 4.79 Ha at all material times. That the Matungu Land Disputes Tribunal vide claim No. 15 of 2008 did issue a decision on the 10<sup>th</sup> day of July, 2008 to the effect that plot 235 be split between the defendant (5 acres) and the plaintiff (7 acres). That the above decision of the tribunal was adopted as a judgment of the Resident Magistrate's Court vide Kakamega Chief Magistrate's Misc. Award No. 342 of 2008. That citing this decision of the tribunal the defendant has caused plot 235 to be sub-divided into L.R. Nos. North Wanga/Matungu/2799 and 2800 in the name of the plaintiff and 1<sup>st</sup> defendant respectively on the 14<sup>th</sup> day of January, 2016. That the sub-division of plot 235 into plots 2799 and 2800 was null and void since the tribunal had no jurisdiction whatsoever to determine title to land. That further, the sub-division as pointed out above was without due process since the plaintiff still holds the original title to plot 235 and the sub-division was illegally undertaken to justify prosecution of the plaintiff's children with respect to Mumias Criminal Case No. 185 of 2015. That the 1<sup>st</sup> defendant has subsequently purportedly disposed of part of plot 2800 to the 2<sup>nd</sup> defendant although none of them has ever resided on plot 235. That despite notice and intention to sue in default the defendants have declined to acknowledge liability for the unlawful sub-division of plot 235. That the plaintiff avers that there have been various causes in relation to the subject matter herein, viz, Claim No. 15 of 2008 before the Matungu Land Disputes Tribunal; and Kak Misc. Award No. 342 of 2008. The plaintiff prays for judgment against the defendant for:-

1. Cancellation of L.R. Nos. North Wanga/Matungu/2799 & 2800 in order to restore the former L.R. No. North Wanga/Matungu/235.
2. Costs of this suit.

The 1<sup>st</sup> defendant further avers that Land parcel No. N/Wanga/Matungu/235 belonged to the 1<sup>st</sup> defendant's father who died long before the land adjudication a time when the 1<sup>st</sup> defendant was still of very young age. That the now deceased, 1<sup>st</sup> defendant's father one Musa Wakhungu hence left the said parcel of land to the plaintiff herein, who is also an elder step brother to the 1<sup>st</sup> defendant, to hold the said parcel of land in trust for the family. The 1<sup>st</sup> defendant avers that the plaintiff's suit is res-judicata and shall raise a preliminary objection on this and other points, notice of which is hereby given. The 1<sup>st</sup> defendant avers that the plaintiff's suit is time barred under the Limitation of Actions Act Cap 22 Laws of Kenya. The 1<sup>st</sup> defendant avers that since adoption of the decision of the Land dispute Tribunal by Kakamega Chief Magistrate's Court, the plaintiff has never preferred an appeal from the same and further that the Land Dispute Tribunal had jurisdiction to determine the said land dispute. The 1<sup>st</sup> defendant avers that during the sub-division process, the plaintiff was present and that the Deputy Registrar proceeded to sign forms on behalf of the plaintiff who had refused to sign the same to enable the creation of N. Wanga/Matungu/2799 and N. Wanga/Matungu/2800 of seven (7) and five (5) acres respectively. The 1<sup>st</sup> defendant avers that he sold 1 ½ acres of land out of land parcel No. N. Wanga/Matungu/2800 to the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant currently resides on the same piece of land. The 1<sup>st</sup> defendant further avers that he has been staying on this land parcel No. N. Wanga/Matungu/2800 and he had initially instituted boundary dispute proceedings to determine the boundaries between the plaintiff's land and the 1<sup>st</sup> defendant's land. The 1<sup>st</sup> defendant denies that notice of intention to sue was issued, and further avers that the plaintiff instead became greedy to the detriment of the 1<sup>st</sup> defendant, and that due to his acts the 1<sup>st</sup> defendant moved to the tribunal and the court to have the matter settled. The 1<sup>st</sup> defendant avers that on 30<sup>th</sup> March, 2012, the plaintiff together with his sons trespassed onto his land and ruthlessly ejected him from his home. The 1<sup>st</sup> defendant further avers that, he has since been homeless, being forced to rent premises in Mumias town where he is currently residing. That the 1<sup>st</sup> defendant is the sole absolute registered proprietor of the whole of that parcel of Land Known as N. Wanga/Matungu/2800. The 1<sup>st</sup> defendant counter-claim is for the following relief:-

(a) The plaintiff's suit be dismissed with costs.

(b) An order of permanent injunction restraining the plaintiff, his agents, servants and/or employees from laying claim, occupying, cultivating or dealing in any way with land parcel No. N. Wanga/Matungu/2800.

(c) An order of eviction of the plaintiff from Land Parcel No. N. Wanga/Matungu/2800.

(d) Costs of this suit.

(e) Any other relief this honourable court deems fit to grant.

The 2<sup>nd</sup> defendant avers that he purchased 1 ½ acres from the 1<sup>st</sup> defendant's land parcel No. N/Wanga/Matungu/2800 at a consideration of Ksh. 350,000/=. The 2<sup>nd</sup> defendant further avers that title deed for the same piece of land is about to issue; he further states that official search conducted indicates sub-division of land parcel No. N/Wanga/Matungu/235 into N/Wanga/Matungu/2799 and 2800 respectively in the name of the plaintiff and the 1<sup>st</sup> defendant respectively. The 2<sup>nd</sup> defendant avers that since he bought the said piece of land he has been residing on the same. He further avers that the plaintiff's sons trespassed, interfered and removed the 2<sup>nd</sup> defendant's fence. That due to the same act by the plaintiff's sons actions, they have been charged in Mumias Senior Principal Magistrate's Court Criminal Case No. 185 of 2015.

This court has carefully considered the evidence and submissions therein. The defendants failed to attend court to prosecute the counterclaim and the same was dismissed with no orders as to costs. 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 was the registered proprietor of L.R. No. North Wanga/Matungu/235 (Plot 235) measuring approximately 4.79 Ha. The plaintiff's evidence is that the Matungu Land Disputes Tribunal vide claim No. 15 of 2008 did issue a decision on the 10<sup>th</sup> day of July, 2008 to the effect that plot 235 be split between the defendant (5 acres) and the plaintiff (7 acres). That the above decision of the tribunal was adopted as a judgment of the Resident Magistrate's Court vide Kakamega Chief Magistrate's Misc. Award No. 342 of 2008. That citing this decision of the tribunal the defendant has caused plot 235 to be sub-divided into L.R. Nos. North Wanga/Matungu/2799 and 2800 in the name of the plaintiff and 1<sup>st</sup> defendant respectively on the 14<sup>th</sup> day of January, 2016. The suit land was subdivided pursuant to a court order that is, judgment of the Resident Magistrate's court vide Kakamega Chief Magistrate's Misc. Award No. 342 of 2008. The plaintiff never appealed against the same on the issue of jurisdiction and instead filed a fresh suit in 2017. I find this is an abuse of the court process. The claim if at all ought to be pursued in that matter. I find that this suit is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**