



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 41 OF 2017**

**STEPHEN ODHIAMBO MWARO .....PLAINTIFF**

**VERSUS**

**THOMAS OTOYO MWARO.....DEFENDANT**

**JUDGEMENT**

This case is that at all material times the plaintiff was the registered proprietor of L.R. No. North Wanga/Koyonzo/971 (Plot 971) measuring approximately 8.5 acres. That the Matungu Land Disputes Tribunal vide Claim No. 14 of 2010 did issue a decision on the 5<sup>th</sup> day of January, 2011 to the effect that plot 971 be split between the defendant (2 acres) and the plaintiff (6.5 acres). That the above decision of the tribunal was adopted as a judgment of the Resident Magistrate's court vide Mumias Senior Resident Magistrate's Misc. Award No. 2 of 2011 on the 26<sup>th</sup> day of June, 2011. That citing this decision of the tribunal the defendant has caused plot 971 to be sub-divided into L.R. Nos. North Wanga/Koyonzo/2909 and 2910 in the name of the plaintiff and defendant respectively on the 4<sup>th</sup> day of December, 2013. That the sub-division of plot 971 into plots 2909 and 2910 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 971. That despite notice and intention to sue in default the defendant has declined to surrender his unlawful registration as such proprietor. That the plaintiff avers that there have been various causes in relation to the subject matter herein, viz Claim No. 14 of 2010 before the Matungu Land Disputes Tribunal and Mumias Misc. Award No. 2 of 2011. The plaintiff prays for judgment against the defendant for:-

1. Cancellation of L.R. Nos. North Wanga/Koyonzo/2909 and 2910 in order to restore the former L.R. Nos. North Wanga/Koyonzo/971.
2. Costs of this suit.

The defendant declares that this suit is filed in bad faith as both defendant and the plaintiff are rightful sons of the late Thomas Mwaro Mung'oma the original owner of the title deed No. N. Wanga/Koyonzo/971 which is the subject matter of the case and if the plaintiff had the whole of the said title transferred into his sole name, such transfer was irregular, unlawful and improper and the plaintiff held such title in trust for himself and the defendant, who was entitled to two acres thereof. The defendant by birthright is entitled to a minimum and fair share of 2 acres from the suit land and plaintiff alongside with his follower brother (John) share the remaining 6 ½ acres of the title No. N. Wanga/Koyonzo/2909. The plaintiff is aware that before their father who died in 2010 he had demarcated and or curved 2 acres for the defendant from the suit land N. Wanga/Koyonzo/971 and even now the demarcation marks are there. The plaintiff during the attendance of tribunal proceedings testified that the defendant was entitled to share of the family land. The defendant through his efforts and on learning that the plaintiff could not cause sub-division of the suit land applied normal procedures and the 2 acres were transferred and registered in his name. That the tribunal and courts awards were issued in good faith and that, the plaintiff was given rights of appeal within a specified time. The plaintiff remained dormant since then until an afterthought hence to file this suit. The defendant admits that he filed claim No. 14 of 2010 at the Matungu Land Disputes Tribunal which tribunal awarded the defendant the two acres out of land parcel No. N. Wanga/Koyonzo/971 which award was adopted as an order and decree of the court vide Mumias SPM Misc. Civil Award No. 2 of 2011 and which the Executive officer of the court executed documents for sub-division of land parcel No. N. Wanga/Koyonzo/971 resulting in land title Nos. N. Wanga/Koyonzo/2909 and 2910 with title No. N. Wanga/Koyonzo/2010 comprising the portion occupied by the defendant being transferred into the defendant's name. The defendant avers that the Matungu Land Disputes Tribunal and Mumias Court are or were valid creatures of statute which determined the dispute herein and rendered a decision binding on all the parties involved including the plaintiff who if dissatisfied ought to have appealed against the said verdicts but having failed to so appeal is still bound by the said verdict and his attempt to run away or wriggle out of the said verdicts but having failed to so appeal, this suit is irregular, improper and not permissible in law and this suit is incompetent, spurious, frivolous, full of mischief and a total abuse of the due process of court and or a mockery of justice. The defendant avers that the plaintiff herein filed judicial review proceedings vide Kakamega HC Misc. Civil application No. 137 of 2013 seeking to quash the proceedings and decision of the Matungu Land Disputes Tribunal in claim No. 14 of 2010 aforesaid on the ground that the tribunal's proceedings and decision were ultravires as it lacked jurisdiction to entertain the dispute or issue the orders it did but the said Judicial Review Proceedings failed and vide this suit the plaintiff seeks to have a second bite at the cherry over the same issues and cause of action, which are a replica of the issues raised in the Judicial Review Application. The plaintiff should appreciate that the

defendant has done for him (sub-division) which the plaintiff would do and in this respect, there is absolutely no need to restore the former title No. Koyonzo/971. If this is done the process of sub-division will be repeated and that will be a waste of time and expenses there to. Entirely without prejudice to the foregoing the defendant avers that this suit is res judicata, sub judice, duplex, a non-starter, statute barred and incompetent and he will raise a preliminary objection, notice whereof is hereby given, seeking to have this suit struck out with costs for being untenable, vexatious, indefensible and a waste of precious judicial time.

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/Koyonzo/971 (Plot 971) measuring approximately 8.5 acres. That the Matungu Land Disputes Tribunal vide Claim No. 14 of 2010 did issue a decision on the 5<sup>th</sup> day of January, 2011 to the effect that plot 971 be split between the defendant (2 acres) and the plaintiff (6.5 acres). That the above decision of the tribunal was adopted as a judgment of the Resident Magistrate's court vide Mumias Senior Resident Magistrate's Misc. Award No. 2 of 2011 on the 26<sup>th</sup> day of June, 2011. That citing this decision of the tribunal the defendant has caused plot 971 to be sub-divided into L.R. Nos. North Wanga/Koyonzo/2909 and 2910 in the names of the plaintiff and defendant respectively on the 4<sup>th</sup> day of December, 2013. That the sub-division of plot 971 into plots 2909 and 2910 was null and void since the tribunal had no jurisdiction whatsoever to determine title to land. 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.

On the issue of res judicata and or subjudice the defendant submitted that that the plaintiff herein filed judicial review proceedings vide Kakamega HC Misc. Civil application No. 137 of 2013 seeking to quash the proceedings and decision of the Matungu Land Disputes Tribunal in claim No. 14 of 2010 aforesaid on the ground that the tribunal's proceedings and decision were ultravires as it lacked jurisdiction to entertain the dispute or issue the orders it did but the said Judicial Review Proceedings failed. The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I have perused the pleadings in Judicial Review proceedings vide Kakamega HC Misc. Civil application No. 137 of 2013 and the same seek to quash the proceedings and decision of the Matungu Land Disputes Tribunal in claim No. 14 of 2010 aforesaid on the ground that the tribunal's proceedings and decision was ultravires as it lacked jurisdiction to entertain the dispute or issue the orders. The parties are the same and so is the subject matter. I find that this suit is res judicata and is not merited 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 25<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**