



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 223 OF 2017**

**ZAKARIA MUGATSIA ANYULA.....PLAINTIFF**

**VERSUS**

**AGNETA MMBONE OKWEMBA .....DEFENDANT**

**JUDGEMENT**

By a plaint dated 10<sup>th</sup> July, 2017 the plaintiff is the registered proprietor of that land better described as L.R. S. MARAGOLI/BUYONGA/795 measuring 0.45 hectares or thereabout. The defendant who is a sister in law to the plaintiff without any known legal and justifiable reason whatsoever went to the land registry at Vihiga and placed a caution on the plaintiffs above stated land parcel. As a result of the said caution placed by the defendant herein the plaintiff who is of advanced age and also sickly has been unable to freely deal with his land as he so wishes and or desires. The plaintiff wishes to transfer the subject land to his children but is unable to do so because of the said caution. Despite several requests to the defendant to remove the said caution the defendant has adamantly refused. The plaintiff has also summoned the defendant through the Land Registrar Vihiga County to remove the said caution without success, hence this suit. The plaintiff's claim against the defendant is for an order of voluntary removal of the caution placed on the plaintiff's land and in default the Land Registrar Vihiga County be allowed and or authorized by the court to have the said caution removed. The plaintiff prays for judgment to be entered against defendant for:-

1. Removal of the caution immediately.
2. Costs.

PW1 the plaintiff confirmed that the defendant was his sister in law. He stated that their father gave him the land and his brother was given his own. He produced the title deed and the transfer documents as exhibits. His father died in 2006 long after he had given him the land in 2002.

The defendant DW1, testified that land parcel number S. Maragoli/Buyonga/795 belongs to Josephat Okwemba Anyula the defendant's husband and the plaintiff herein jointly. The defendant avers that land parcel S. Maragoli/Buyonga/795 belong to her late husband Herman Anyura Chasya who passed on the 29<sup>th</sup> day of May, 1992 and the plaintiff herein jointly. That on 9<sup>th</sup> day of October, the plaintiff fraudulently transferred the said land parcel to himself from one Herman Anyura Chasya who was the father of the plaintiff and the defendant's husband. DW2 and DW3 testified that the plaintiff was their cousin and that this was their ancestral land. DW2 disowned his statement and denied that he ever stated that the plaintiff used fraudulent means to transfer the title.

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 was the registered proprietor of land parcel number Maragoli/Buyonga/795. The plaintiff’s evidence is that, his late father Herman Anyula Chasya during his life time had five parcels of land S.Maragoli/Buyonga/787, S. Maragoli/Buyonga/795, S.Maragoli/Buyonga/978. S. Maragoli/Buyonga/1022 and S. Maragoli/Buyonga/1007. The family had two sons namely the plaintiff and his elder brother Josphat Okwemba Anyula who was the defendant’s husband. The latter died in 1992. In 2002 their father decided to gift the two families of his sons. Josphat Okwemba Anyula was given Maragoli/Buyonga/987 and S. Maragoli/Buyonga/1022. The plaintiff was given S. Maragoli/Buyonga/787 and S. Maragoli/Buyonga/795 the suit property herein. In 2007 S. Maragoli/Buyonga/1007 was also divided between the two families and one portion is registered in the defendant’s son’s name. It is a finding of fact that the said brother Josphat Okwemba Anyula had moved out from the ancestral land in 1991 to settle with his family. It is the plaintiff’s case that, defendant who is a sister in law to the plaintiff without any known legal and justifiable reason whatsoever went to the land registry at Vihiga and placed caution on the plaintiffs above stated land parcel. As a result of the said caution placed by the defendant herein the plaintiff who is of advanced age and also sickly has been unable to freely deal with his land as he so wishes and or desires. The plaintiff wishes to transfer the subject land to his children but is unable to do so because of the said caution. I find that there is no evidence adduced that the plaintiff obtained the said title through fraud or misrepresentation. I find that the plaintiff is the absolute and indefeasible owner of the suit property to the exclusion of the defendant. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. The defendant is to remove the caution placed on S. Maragoli/Buyonga/795 within the next 30 days from the date of this judgement in default the Land Registrar is authorized to do so.
2. Each party to bear its own costs of this suit.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**