



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 34 OF 2014**

**APOLO MOSES OMWAKA.....PLAINTIFF**

**VERSUS**

**JAVAN OKUTOYI**

**SAMUEL MBOYA**

**JOSPHAT ESHITEBI**

**WYCLIFFE OMWAKA**

**DANIEL OMWAKA.....DEFENDANTS**

**JUDGEMENT**

The plaintiff avers that at all material times he is the lawful absolute registered proprietor of the whole of that parcel of land known as Marama/Inaya/892 measuring 2.10 hectares. The plaintiff avers that on or about 18<sup>th</sup> April 2008, the defendants who are his sons unlawfully and without any colour of right lodged a caution which was registered against the plaintiff's title land and the same has caused and restricted all dealings on the said land Marama/Inaya/892 notwithstanding that the plaintiff has to enjoy his proprietary rights being the absolute registered owner. The plaintiff avers that the defendants have never instituted any proceedings in any court of law to state what their claim is from the time they lodged the said caution. The plaintiff's claim against the defendants is for an order that the said caution registered against the plaintiff's title land parcel Marama/Inaya/892 be removed forthwith. The plaintiff prays for judgment against the defendants for:-

- a. The caution registered on land parcel Marama/Inaya/892 by the defendants be removed.
- b. Costs of this issue.
- c. Any other relief the court may deem fit be granted.

The defendant avers that their deceased grandfather was survived by two sons namely the plaintiff and one Shikuku Livingstone who stays in Uganda and as such there was no basis for the plaintiff to transfer the entire land which is ancestral to himself to the total disregard to other beneficiaries thereof. The defendant further avers that the plaintiff did take a loan from Agricultural Finance Co-operation and had land parcel No. Marama/Inaya/891 charged to secure the said loan of Ksh. 150,000/= in 2008 which loan he was unable to pay and the defendant took the initiative to pay the same on his behalf to salvage the said land from being auctioned which would have left the entire family landless and as such the caution lodged on the suit parcel of land is to act especially as the plaintiff's intention is to have this suit parcel of land which is ancestral disposed off to the detriment of the defendants. The defendant further avers that the registered owner of parcel of land No. Marama/Inaya/145 one Metosella Omwaka died way back in 1975 and the plaintiff fraudulently, unlawfully, unprocedurally and improperly caused the parcel of Marama/Inaya/145 to be subdivided creating new titles Marama/Inaya/891 & 892 thereafter had the same registered in the name of the plaintiff. The defendants prays for dismissal of this suit.

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. Marama/Inaya/892. The plaintiff avers that on or about 18<sup>th</sup> April 2008, the defendants who are his sons unlawfully and without any colour of right lodged a caution which was registered against the plaintiff’s title land and the same has caused and restricted all dealings on the said land Marama/Inaya/892 notwithstanding that the plaintiff has to enjoy his proprietary rights being the absolute registered owner. DW1 the 1<sup>st</sup> defendant testified that he does not want the plaintiff to sell the suit land hence they placed the caution. That his father has a brother who lives in Uganda and cannot be traced. DW1 stated that he lives on Land parcel No. Marama/Inaya/891 and his mother lives on Land parcel No. Marama/Inaya/892. The plaintiff testified that his children live with him and he is a polygamous man and does not intend to sell the land but give his daughters whose mother is dead. I find that the plaintiff is the sole and absolute registered owner of the suit land and has the proprietary rights over the land. Be that as it may I find that there are many other parties with beneficial interest in the said suit land and the litigants ought to sit down as a family and reach an amicable solution. For these reason this court cannot remove the caution. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. There will be no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**