



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 35 OF 2016**

**RAJAB MUSEBE OMBUNGA.....PLAINTIFF**

**VERSUS**

**MIRAJI YABUNGA MUSEBE**

**SARAFINA RABANDO MURACHISI.....DEFENDANTS**

**JUDGEMENT**

The plaintiff avers that, 1<sup>st</sup> defendant is his aunty and was to hold land parcel number S/Wanga/Lureko/478 in trust for the plaintiff's share since he was still a minor. The 2<sup>nd</sup> defendant is a stranger who acquired land fraudulently. The plaintiff's claim against the defendants is for land parcels number S/Wanga/Lureko/478 be reverted back to the original number S/Wanga/Lureko/478 and in the name of the deceased Hamisi Wesonga for the family to file succession for proper sharing amongst the family of the deceased. In this case the 2<sup>nd</sup> defendant who is a stranger to him acquired land using fraudulent means and registered in her name without following the proper procedure and obtained title deed. That the plaintiff herein who is the rightful beneficiary filed succession HCC Succession No. 76 of 2016 which is still underway. The plaintiff prays for judgment against the defendants for:

(a) The L.P. No. S/Wanga/Lureko/478 which is registered in the name of Sarafina Rabando Marachisi be cancelled and be reverted back to its original number L.P. S/Wanga/Lureko/478 and in the name of the deceased Hamisi Wesonga.

(b) Costs of this suit.

The 1<sup>st</sup> defendant testified that, she is the plaintiff's aunty and was to hold the suit land in trust for him until he obtained the age of majority. That the 2<sup>nd</sup> defendant used fraudulent means to register herself as the owner. The 2<sup>nd</sup> defendant avers that the suit land S/Wanga/Lureko/478 initially belonged to Hamisi Wesonga who is the biological father to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant avers that the plaintiff is not a heir to the estate of Hamisi Wesonga. The 2<sup>nd</sup> defendant avers that she has occupied the suit land since the 1960 to date where she lived with her mother, wife to Hamisi. The 2<sup>nd</sup> defendant prays the plaintiff suit be dismissed with costs to the 2<sup>nd</sup> defendant. DW3 testified that the 2<sup>nd</sup> defendant is Hamisi Wesonga's daughter.

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 2<sup>nd</sup> defendant is the registered proprietor of Land parcel No. S/Wanga/Lureko/478. The plaintiff testified that, 1<sup>st</sup> defendant is his aunty and was to hold land parcel number S/Wanga/Lureko/478 in trust for the plaintiff's since he was still a minor. The 2<sup>nd</sup> defendant is a stranger who acquired land fraudulently. The 1<sup>st</sup> defendant corroborated his evidence. I have perused the land register produced in Court as PEX2. Indeed the first registered owner on 9<sup>th</sup> January 1967 was one Hamisi Wesonga. On 7<sup>th</sup> November 2007 the same was registered in the name of the 1<sup>st</sup> defendant to hold in trust for the plaintiff Rajab Omusebe Ombunga. On the 20<sup>th</sup> December 2012 the same was transferred to the 2<sup>nd</sup> defendant Sorofina Rabando Murachisi. I find that this final transfer was fraudulent as no explanation has been given for the same. The title was obtained illegally and unprocedurally. I find that the 1<sup>st</sup> defendant was to hold the suit land in trust for the plaintiff and if there are any other beneficiaries the same should be subjected to succession proceedings. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The L.P. No. S/Wanga/Lureko/478 which is registered in the name of Sarafina Rabando Marachisi be cancelled and be reverted back to its original number L.P. S/Wanga/Lureko/478 and in the name of the deceased Hamisi Wesonga.

2. The 2<sup>nd</sup> defendant to bear the costs of this suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**