



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 635 OF 2014

ARTHUR JAMES OTENYO

NASHON OLUKO AMBOKO.....PLAINTIFFS

VERSUS

JACTONE OKILA OKAMA

JACTONE OKILA OKAMA

(sued as the administrator of

the estate of the late ZEDEKIAH

OKILA OKAMA.....DEFENDANTS

JUDGEMENT

The plaintiffs' aver that the 1st plaintiff is a beneficiary of 0.68 Ha out of Land parcel No. W. Bunyore/Embali/2948 by virtue of possessing purchaser's interest. The 2nd plaintiff is the registered owner of land parcel No. West Bunyore/Embali/2948 measuring 1.11 Ha which title has been sub divided pursuant to sale agreement and created 2 new numbers being West Bunyore/Embali/2948 and West Bunyore/Embali/2949 which two numbers were never registered due to restriction by the 1st defendant. The 1st plaintiff avers that he paid Ksh. 220,000/= out of the agreed Ksh. 300,000/=, the agreement being that the balance would be cleared upon transfer of the parcel. That pursuant to the terms of the agreement the 1st plaintiff and the registered owner, Amboko Oluko Nashon 2nd plaintiff obtained the consent of the Land Control Board for subdivision but was unable to have the transfer effected because the 1st defendant lodged a restriction against land parcel No. West Bunyore/Embali/2948. The plaintiffs further aver that the defendant's actions were with malice and with no color of right as he has no legal or equitable interests in law in the parcel. The 2nd plaintiff avers that the defendants entered the suit land forcefully and started cultivating the whole of it claiming beneficiary interest and have since occupied it forcefully by way of cultivation. The 2nd plaintiff prays for an order that the defendants be declared trespassers ab-initio on land parcel No. West Bunyore/Embali/2948 and an order of eviction do issue against the defendants, their agents, servants and or any person acting their instructions. The plaintiff further prays for an order for removal of restriction placed by the 1st defendant in the suit property. The plaintiffs pray for judgment against the defendants for:-

- (a) That the defendants be declared a trespassers and that the restriction lodged by the 1st defendant be removed forthwith from West Bunyore/Embali/2948.
- (b) Eviction of the defendants, their agents, servants or any persons acting under their instructions from land parcel No. West Bunyore/Embali/2948.
- (c) A permanent injunction restraining the defendant by himself, his agents, servants or anybody acting under his authority from entering unto, trespassing, erecting or in any other way dealing with the plaintiff's land parcel No. West Bunyore/Embali/2948.
- (d) Costs of this suit.
- (e) Any other relief this honourable court may deem fit and just to grant.

The defendants aver that the 1st defendant is the son to the 2nd defendant who upon his death, the 1st defendant took out his letters of administration. That the 2nd defendant and the 1st defendant are brothers and sons to the late Okama Andula who was the original owner of land parcel West Bunyore/Embali/1696 the suit property herein prior to its registration. That during the adjudication of period, the 2nd

defendant was away working in Uganda and the family then decided that their ancestral land be registered in the name of the 2nd plaintiff to hold the same in trust of the 2nd defendant. At the time the land was known as West Bunyore/Embali/1696. Meanwhile the family of Okama Andula continued residing on the land parcel and when the 2nd defendant returned home to settle the family agreed that the parcel of land be split into two where the 2nd plaintiff's family took half of it while the 2nd defendant and his family took the other half where they have resided to date. All the family members of the two brothers continued to reside on this parcel of land for well over five decades in peace. That the 2nd plaintiff later moved to subdivide West Bunyore/Embali/1696 into parcels being West Bunyore/Embali/2948 and West Bunyore/Embali/2949. The 2nd plaintiff retained West Bunyore/Embali/2949 and the other parcel West Bunyore/Embali/2948 was to go to the 2nd defendant. However, this did not take place as the 2nd plaintiff tried to sell the same to the 1st plaintiff. The 1st defendant upon discovering this, he moved quickly to lodge a caution to preserve the land. The defendants/counter-claimants aver that by virtue of the agreement that the original suit parcel of land West Bunyore/Embali/1696 was registered in the name of the 2nd plaintiff and his family having continued to reside on the parcel of land over the decades without any interruptions from the 2nd plaintiff/respondent, the 1st and 2nd defendants/counter-claimants had acquired constructive trust over the suit property before its sub division to West Bunyore/Embali/2948. The 2nd plaintiff/respondent after the subdivision where he retained West Bunyore/Embali/2949 where he resided it was in order for him to have transferred West Bunyore/Embali/2948 to the 2nd defendant/Counter-Claimant who was residing on that land together with his family that included the 1st defendant/Counter-claimant herein. In the alternative and without prejudice to the generality of the foregoing, the 1st defendant/counter-claimant avers that having resided on the suit property herein West Bunyore/Embali/2948 without interruption for well in excess of twelve (12) years without force, without secrecy and without permission, he has acquired registrable interests and accordingly has acquired the land through adverse possession. The defendants/counter-claimants claim against the respondents therefore is for an order that they be declared the rightful owners of land parcel West Bunyore/Embali/2948 and the respondents be restrained from evicting them or interfering with the counter claimants use and occupation of the suit land. The defendants/counter-claimants pray that the plaintiff's suit be dismissed with costs and that:-

- (a) A declaration that the 1st and 2nd defendants have acquired registrable interests in land parcel West Bunyore/Embali/2948.
- (b) The Land Registrar to register the defendants/counter-claimants as the bona fide owners of land parcel West Bunyore/Embali/2948 in place of the 2nd plaintiff/respondent.
- (c) An order of permanent injunction restraining the plaintiffs/respondents, their agents, servants, family and or any person from evicting the defendants/counter-claimants or interfering with their use and occupation of land parcel West Bunyore/Embali/2948.
- (d) Costs of the suit.
- (e) That any such other or further relief as this honourable court may deem appropriate to be made.

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 2nd plaintiff is the registered proprietor of Land parcel No. West Bunyore/Embali/2948. The plaintiffs' aver that the 1st plaintiff is a beneficiary of 0.68 Ha out of Land parcel No. W. Bunyore/Embali/2948 by virtue of possessing purchaser's interest. The 2nd

plaintiff is the registered owner of land parcel No. West Bunyore/Embali/2948 measuring 1.11 Ha which title has been sub divided pursuant to sale agreement and created 2 new numbers being West Bunyore/Embali/2948 and West Bunyore/Embali/2949 which two numbers were never registered due to restriction by the 1st defendant. The 2nd plaintiff produced the sale agreement confirming the same as PEx3. The 2nd plaintiff confirmed in his testimony that they when to the Land Control Board and the mutation and sale was approved. The 1st plaintiff is deceased and was never substituted hence his case has abated. The 2nd plaintiff confirms that he sold the said suit land West Bunyore/Embali/2948 to the 1st plaintiff hence he cannot now claim interest in the same. He testified that he wanted the restriction removed so he can transfer the same to the buyer. However, the buyer is deceased and has not been substituted. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. The defendants failed to attend court to give oral evidence in support of their counterclaim. The same has not been proved on a balance of probabilities and I dismiss the same. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE