



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 159 OF 2017

WILFRED LUNANI CHITIAVIPLAINTIFF

VERSUS

KOIKOI K. ZAKARIADEFENDANT

JUDGEMENT

The plaintiff avers that as at 26th April 2011 the parcel of land known as South Kabras/Chesero/188 was registered in his name as the absolute proprietor. The plaintiff further avers that on or about the year 2010 the plaintiff without intention caused the death of one of his sons, and as a result of which the plaintiff was arrested, charged and held at the G.K. prisons Kakamega. The plaintiff avers that while the plaintiff was at the G.K. Prison Kakamega the defendant and one Zakayo Indagala visited him and they told him that the plaintiff having caused the death of his own son, it was a custom/tradition that upon being released from prison, the plaintiff would not go back to his home and continue staying on the same land with his family. The plaintiff avers that Zakayo Indagala and the defendant told him that the defendant was ready, able and willing to take a portion measuring 1 acre(0.4 Ha) out of the plaintiff's parcel of land known as South Kabras/Chesero/188 and buy the plaintiff an equivalent alternative portion of land measuring (0.4 Ha) one acre on which the plaintiff would settle upon his release from prison. The plaintiff avers that he agreed to the suggestion and proposal as made by the defendant, and that the plaintiff and the defendant proceeded to the office of the Welfare Officer at the G.K. Prisons where the plaintiff signed documents to facilitate the sub division and transfer of a portion measuring 0.4 Ha(1 acre) out of the plaintiff's parcel of land known as South Kabras/Chesero/188 and eventual transfer of the same to the defendant, on the understanding that the defendant would buy the plaintiff an alternative portion of land measuring equally 1 acre(0.4 Ha) on which the plaintiff would settle upon release from prison. The plaintiff avers that the defendant ultimately got a portion measuring 0.5 Ha(1 ¼ acres) out of the parcel of land known as South Kabras/Chesero/188 transferred to him. The plaintiff avers that the act of the defendant having a portion measuring 0.5H (1 ¼ acres) instead of 0.1 acre out of the plaintiff's parcel of land known as South Kabras/Chesero/188 transferred in the name of the defendant was unjustified in so far as it was a departure from the agreement the plaintiff had with the defendant. The plaintiff further avers that upon the plaintiff's release from prison the plaintiff proceeded home and found that though the defendant had taken the plaintiff's land, the defendant had not bought the plaintiff an alternative piece of land as had been agreed. The plaintiff's claim, therefore, is that the registration of a portion of land measuring 0.5 Ha(1 ¼ acres) in the name of the defendant out of the plaintiff's parcel of land known as South Kabras/Chesero/188 is unlawful and unjustified. The plaintiff claims that this transfer and registration be cancelled and the parcel of land measuring 0.5 (1 ¼) known as South Kabras/Chesero/2894 be cancelled and the same does revert to the plaintiff. The plaintiff prays that:-

- (a) The parcel of land known as South Kabras/Chesero/2894 measuring 0.5 Ha(1 ¼) now registered in the name of the defendant be cancelled and the same be transferred in the name of the plaintiff at the defendant's expense.
- (b) Any other further reliefs that the Honourable court deem just to grant
- (c) Costs of this suit.

The defendant avers that the plaintiff is not entitled to the claim sought and the same ought to be dismissed with costs. The defendant avers that on the 25th April 2010 the plaintiff through one Zakayo Indakala approached the defendant for purchase of a portion of land measuring 0.4 Ha from L.R. No. South Kabras/Chesero/188 at a consideration of Kshs.225,000/= only. The defendant avers that he paid the plaintiff in full. The defendant further avers that the plaintiff approached him with an offer for sale of another portion measuring ¼ acre from the said land at a consideration of Kshs.50,000/= which offer the defendant agreed to and ought the same on 23rd May 2010 and paid for the same in full. That the plaintiff then consolidated the two portions which added to 0.5 Ha and transferred the same to the defendant whereby the defendant got registered. The defendant avers that he was not under any obligation to purchase for the plaintiff an alternative land and that allegation is strange to the defendant. DW2 testified that the plaintiff was his brother and that he sold land to the defendant. DW3 the plaintiff's son, corroborated the defendant's evidence. He testified that they sold the initial 1 acre to the defendant and the family bought land in Likuyani. They needed additional money to cleanse the sister's home because the father had sought refuge there after the murder and he sold an additional ¼ acre. The plaintiff signed all the documents. The plaintiff refused to move to Likuyani saying it was far and they sold the land and gave him the money.

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 defendant is the registered proprietor of Land parcel No. South Kabras/Chesero/188. The plaintiff produced a copy of the green card and the search certificate. The plaintiff avers that he signed documents to facilitate the sub division and transfer of a portion measuring 0.4 Ha(1 acre) out of the plaintiff's parcel of land known as South Kabras/Chesero/188 and eventual transfer of the same to the defendant, on the understanding that the defendant would buy the plaintiff an alternative portion of land measuring equally 1 acre(0.4 Ha) on which the plaintiff would settle upon release from prison. The plaintiff avers that the defendant ultimately got a portion measuring 0.5 Ha (1 ¼ acres) out of the parcel of land known as South Kabras/Chesero/188 transferred to him. The plaintiff avers that the act of the defendant having a portion measuring 0.5Ha (1 ¼ acres) instead of 0.1 acre out of the plaintiff's parcel of land known as South Kabras/Chesero/188 transferred in the name of the defendant was unjustified in so far as it was a departure from the agreement the plaintiff had with the defendant. DW1 the defendant testified that on the 25th April 2010 the plaintiff through one Zakayo Indakala approached the defendant for purchase of a portion of land measuring 0.4 Ha from L.R. No. South Kabras/Chesero/188 at a consideration of Kshs.225,000/= only. The defendant avers that he paid the plaintiff in full. The defendant further avers that the plaintiff approached him with an offer for sale of another portion measuring ¼ an acre from the said land at a consideration of Kshs.50,000/= which offer the defendant agreed to and ought the same on 23rd May 2010 and paid for the same in full. That the plaintiff then consolidated the two portions which added to 0.5 Ha and transferred the same to the defendant whereby the defendant got registered. DW2 and DW3 corroborated his evidence. DW3 the plaintiff's son testified that the plaintiff sold the initial 1 acre to the defendant and the family bought land in Likuyani. They needed additional money to cleanse the sister's home because the father had sought refuge there after the murder and he sold an additional ¼ acre. The plaintiff signed all the documents. The defendant produced both sale agreements signed by the plaintiff using his thumb print (DEx1 & 2). The plaintiff refused to move to Likuyani saying it was far and they sold the land and gave him the money. I believe the defence. The defendant's title is indefeasible and can only be challenged if it is fraudulent scheme which the plaintiff has not done. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE