



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 171 OF 2017

BONVENTURE OUNDO MBANDA

KENNEDY OUNDO.....PLAINTIFFS

VERSUS

JOHN OWUNDO MBANDA

PETER MWANZA alias PETER OUNDO KANUTI

WINDRICK OPARANYA WAMKOYA

SIMON OKWAKO.....DEFENDANT

JUDGEMENT

By a plaint dated 12th May 2017 it is stated that the plaintiffs are sons of the 1st defendants and 2nd defendant respectively who are the registered proprietors of LR South Wanga/Lureko/2513 and 2511. The plaintiffs aver that LR South Wanga/Lureko/2513 was a fraudulent sub division LR South Wanga/Lureko/654 the original parcel. The plaintiffs aver that LR South Wanga/Lureko/654 was registered in the name of the 1st and 2nd defendants and the late Nikola Muganda as joint proprietors. The plaintiffs aver that the said sub divisions resulted into LR No South Wanga/Lureko/2511, 2512, 2513 and 2514 on 10th September, 2003. The plaintiffs aver that the 1st and 2nd defendants herein who are brothers sold Land Parcel No. South Wanga/Lureko/2512 and 2513 to the 3rd and 4th defendants herein in separate transactions and occasions and are at advanced stages of obtaining titles. The plaintiffs aver that the 1st defendant has thirteen (13) children whom he had and or has given portions from LR South Wanga/Lureko/2513, caused demarcations and planted beacons. The plaintiffs aver that they have already occupied, constructed and settled on their respective Portions with their families. The plaintiffs aver that the 2nd defendant likewise had given portions of his land LR South Wanga/Lureko/2512 to his five(5) children caused demarcations and planted beacons. The plaintiffs aver that also the late Nikola Muganda the registered owners of LR South Wanga/Lureko/2514 had also given portions of his land to his sixteen (16) children who are in actual occupation and use. The plaintiffs aver that LR South Wanga/Lureko/654 (25.5 acres) was ancestral land and the same was to be equally shared between the 1st and 2nd defendants herein and late Nikola Muganda. The plaintiffs aver that their fathers have without their knowledge and or consent sold the entire LR South Wanga/Lureko/2512 and 2513 to the 3rd and 4th defendants herein and are at advanced stages of transferring title to them and thus stand to be disinherited and evicted. The plaintiffs aver that their father holds LR South Wanga/Lureko/2513 in trust for them being ancestral land and are legally entitled to it and that the 2nd defendant is also holding LR Nos. South Wanga/Lureko/2511 and 2512 in trust for his family and or his said children. The plaintiff aver are that the 1st defendant has been duped conned and confused by the 3rd and 4th defendants herein to the extent of selling this whole land above stated which he is holding in trust deserting his matrimonial home and children and staying with them in disregard of his age, health and status. The plaintiffs aver that the 1st defendant filed a suit vide Kakamega ELC No. 4 of 2014 seeking cancellation of LR No South Wanga/Lureko/2511, 2512, 2513 and 2514 and the same do revert to the original LR No. South Wanga/Lureko/654 which he was coerced and or duped to withdraw by the 2nd and 3rd defendants herein. The plaintiffs avers that the 3rd defendants have without any colour of right invaded the respective portion in LR No South Wanga/Lureko/2512 and 2513 and have cultivated are in the process of cultivating and developing the same and are threatening to demolish their houses and evict them from their inherent ancestral lands. The plaintiffs pray for judgment against the defendants herein for:-

- a) A Declaratory Order that the 1st and 2nd defendants herein are holding LR No South Wanga/Lureko/2512 and 2513 in trust for the plaintiffs and their entire families.
- b) An Order of inhibition and or prohibition to issue restricting any registrations and or dealings on LR Nos South Wanga/Lureko/2512 and 2513.
- c) An order of cancellation of all the sub divisions and subsequent registration made on LR South Wanga/Lureko/654 including cancellation of titles South Wanga/Lureko/2511, 2512, 2513 and 2514.

d) An Order of permanent injunction to issue restraining the defendants herein their agents and or servants from trespassing, occupying, developing, cultivating, planting, selling and or dealing in any manner whatsoever with the plaintiffs' respective portions in LR South Wanga/Lureko/2512 and 2513

e) Costs and interest accruing thereon.

f) Any other relief this honourable court may deem just and expedient.

The defendants jointly aver that LR No. South Wanga/Lureko/654 was subdivided to create not only one title but 4 titles namely LR No South Wanga/Lureko/2511, 2512, 2513 and 2514. The 3rd defendant states that he bought LR No. South Wanga/Lureko/2512 from Susan Bukoshe Ombunya for valuable consideration and obtained title thereto on or about 17th July, 2013 by reason whereof he is an innocent purchaser for value. The 3rd defendant states that he bought two portions measuring 0.75 acres and 1 acre of land parcel No. South Wanga/Lureko/2513 from the 1st defendant herein, who was and remains the registered proprietor, but has been unable to obtain title thereto due to a caution lodged by the plaintiffs herein. The 1st defendant avers that he has made provision for all his children and none of them will be rendered landless by reason whereof the plaintiffs claim is without basis and the same should be dismissed with costs.

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 defendant is the registered proprietor of LR South Wanga/Lureko/2511, LR South Wanga/Lureko/2512 is the 3rd defendant, LR South Wanga/Lureko/2513 is the 1st defendant and LR South Wanga/Lureko/2514 is Nikola Muganda. The 1st plaintiff testified that, the plaintiffs are sons of the 1st defendants and 2nd defendant respectively. The 1st plaintiffs states that LR South Wanga/Lureko/2513 was a fraudulent sub division LR South Wanga/Lureko/654 the original parcel. That LR South Wanga/Lureko/654 was registered in the name of the 1st and 2nd defendants and the late Nikola Muganda as joint proprietors. The plaintiffs aver that the said sub divisions resulted into LR No South Wanga/Lureko/2511, 2512, 2513 and 2514 on 10th September, 2003. The plaintiffs aver that the 1st and 2nd defendants herein who are brothers sold Land Parcel No. South Wanga/Lureko/2512 and 2513 to the 3rd and 4th defendants. That the 1st defendant is holding in trust for his children.

DW1, the 1st defendant confirms that his brother the 2nd defendant sold Land Parcel No. South Wanga/Lureko/2512 to the 3rd defendant. That he later sold part of his land Parcel No. South Wanga/Lureko/2513 to the 3rd defendant as per the sale agreements DEx2 and DEx6 in 2016. He testified that he has given all his sons land including the 1st plaintiff. DW2, the 3rd defendant testified that he is an innocent purchaser but cannot get his title for land Parcel No. South Wanga/Lureko/2513 as there is a caution on the same. I have perused the green card for Land Parcel No. South Wanga/Lureko/2512 produced as PEx1 (a) it is clear that the 2nd defendant had sold his share before subdivision and hence the same was transferred to Wilfred Okumu Walutsachi then Bukoshe Suzan Obunya who sold the same to the 3rd defendant in 2013. I find that the 1st plaintiff does not have any beneficial interest on the same as his father's land is land Parcel No. South Wanga/Lureko/2513. DW1 testified that he sold a portion of his land to the 3rd defendant in 2016 and now cannot transfer as there is a caution. I find that the 1st plaintiff and his siblings and family have a beneficial interest on the said land as this is their home and the 1st defendant holds the same in trust for his family. The plaintiffs have not shown any beneficial interest of titles South Wanga/Lureko/2511, 2512, and 2514 and the same cannot be cancelled. I find that the plaintiff has proved his case on a balance of probabilities to that extent and

I grant the following orders:

1. A Declaratory Order that the 1st defendant herein is holding LR No South Wanga/Lureko/2513 in trust for the plaintiffs and their entire families.
2. An Order of inhibition and or prohibition to issue restricting any registrations and or dealings on LR Nos South Wanga/Lureko/2513.
3. An Order of permanent injunction to issue restraining the defendants herein their agents and or servants from trespassing, occupying, developing, cultivating, planting, selling and or dealing in any manner whatsoever with the plaintiffs' respective portions in LR South Wanga/Lureko/2513
4. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE