



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 90 OF 2016

ERNEST SIFUNA SIMWERO sued as Administrator of the estate of

ESTERI OTECHE WABURIRI(DECEASED)..... PLAINTIFF

VERSUS

JARED MWIMALI MUKWANDALA.....DEFENDANT

JUDGMENT

The plaintiff avers that land parcel registration number East Wanga/Malaha/189 was initially registered in the name of the deceased Esteri Oteche Waburiri who died on the 10th day of February 1969. The defendant is the registered owner of the whole of land parcel registration number East Wanga/Malaha/189 having purportedly acquired the same by way of sale. It is the plaintiff's case that the defendant herein unlawfully, illegally, fraudulently and secretly transferred and registered land parcel registration number East Wanga/Malaha/189 on 25th October 1975, years after the death of the deceased. That it is further the plaintiff's case that the said transfer and subsequent registration of the defendant as the absolute proprietor of the suit land was unlawful and illegal in the absence of letters of administration in respect of the estate of the deceased. As a result of the said fraudulent acts of the defendant, the plaintiff stands to lose the only place he has known as home. That the plaintiff's claim against the defendant is for an order of cancellation of sub division, transfer and registration of the defendant as the owner of land parcel registration number East Wanga/Malaha/189. That the plaintiff further prays that land parcel registration number East Wanga/Malaha/189 be restored and or reverted back to its original owner Esteri Oteche Waburiri to pave way for succession proceedings. The plaintiff prays for judgment against the defendant for

- a. Cancellation of subdivision, transfer and registration of the defendant as the owner of land parcel registration number East Wanga/Malaha/189
- b. Restoration of land parcel registration number East Wanga/Malaha/189 to be reverted back to its original owner Esteri Oteche Waburiri to pave way for succession proceedings.
- c. Costs of this suit.

The defendant stated that, he is indeed the registered proprietor of land parcel number East Wanga/Malaha/189 and the same was transferred to him by his mother Mautuma Anjiko. The defendant avers that the late Esteri Oteche Waburiri had sold the entire land parcel East Wanga/Malaha/189 to the late Phileph Misiko. It is not true that the late Esteri had left her land to her family. The defendant avers that in 1975, he objected to the sale of land parcel number East Wanga/Malaha/189 to Mr. Misiko and he filed Kakamega Civil case No. 274 of 1975. The defendant further avers that he refunded Kenya shillings 1670/= to the late Misiko who had to vacate the land and left it for him to occupy. The defendant avers that when the said Misiko left the land for him, he did approach the land's office at Kakamega to process for him the title. The Land Registry referred the defendant to the Land Board. The defendant avers that he informed the Land Board clerk that he wanted the land parcel transferred to him and that the registered proprietor was his deceased grandmother. The defendant avers that the said clerk advised him to go with his mother who could help him get the transfer. That on 23rd September 1975 the defendant and his mother went to the land control board whereby the clerk assisted them to sign the forms and they were given consent. The defendant avers that if the action he did at the land board was illegal he was not aware of its illegality and that he did so in good faith and without ill intention. The defendant therefore denies that the transfer and subsequent registration of land parcel number East Wanga/Malaha/189 to his name was fraudulent. The plaintiff has never stayed on land parcel number East Wanga/Malaha/189, has never used it and he has no interest on the land parcel. The defendant avers that this matter is barred by statute as the claim is barred by limitation of actions act and that it should be dismissed.

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. East Wanga/Malaha/189. The defendant has raised the issue of the suit being time barred. The 2nd defendant submits that the plaintiff's action to recover land and recover mesne profits is statute barred by reason of Sections 7 and 8 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya.

Section 7 of the Act provides:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.

Section 8 of the Act provides:-

An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.

In the case of *Ishmael Ithongo v Geoffrey Ithongo Thindiu* (1981) eKLR the appellate court stated as follows:

“Section 26 of the Act states that where, in case of an action for which a period of limitation is prescribed, the action is based on the fraud of the defendant or his agent, or the right of action is concealed by the fraud of any such person, the period of limitation does not begin to run until the plaintiff has discovered the fraud. In deciding whether first issue is time barred the court reiterated section 26 of the Act, and it provides:

“Where, in the case of an action for which a period of limitation is prescribed, either —

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.”

13. In the case of *Justus Tureti Obara v Peter Koipeitai Nengisoi* [2014] eKLR Justice Okongo observed that:

‘I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial. *the court went ahead and stated thus:*

“In relying on section 26 of the Limitation of Actions Act and the authority above, I will not term the Plaintiff’s claim of fraud as baseless and further it is trite law that where there are allegations of fraud, the suit should be set down for hearing. In the circumstances, I find that the Plaintiff’s claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitations of Actions Act”.

I find that the suit herein is anchored on fraud and in terms of Section 26 of the Limitation of Actions Act the suit herein is not time barred. The plaintiff testified that land parcel registration number East Wanga/Malaha/189 was initially registered in the name of the deceased Esteri Oteche Waburiri who died on the 10th day of February 1969. It is the plaintiff’s case that the defendant herein unlawfully, illegally, fraudulently and secretly transferred and registered land parcel registration number East Wanga/Malaha/189 on 25th October 1975, years after the death of the deceased. The defendant avers that the late Esteri Oteche Waburiri had sold the entire land parcel East Wanga/Malaha/189 to the late Phileph Misiko. It is not true that the late Esteri had left her land to her family. The defendant avers that in 1975, he objected to the sale of land parcel number East Wanga/Malaha/189 to Mr. Misiko and he filed Kakamega Civil case No. 274 of 1975. The defendant further avers that he refunded Kenya shillings 1670/= to the late Misiko who had to vacate the land and left it for him to occupy. The defendant avers that when the said Misiko left the land for him, he did approach the land’s office at Kakamega to process for him the title. The defendant avers that a clerk advised him to go with his mother who could help him get the transfer. That on 23rd September 1975 the defendant and his mother went to the land control board whereby the clerk assisted them to sign the forms and they were given consent. The defendant avers that if the action he did at the land board was illegal he was not aware of its illegality and that he did so in good faith and without ill intention. I find that ignorance of the law is no defence. The defendant transferred the suit land to his name long after the registered proprietor had died and without undertaking succession proceedings. I find the said transfer was fraudulent. The plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. Cancellation of subdivision, transfer and registration of the defendant as the owner of land parcel registration number East Wanga/Malaha/189
2. Restoration of land parcel registration number East Wanga/Malaha/189 to be reverted back to its original owner Esteri Oteche Waburiri to pave way for succession proceedings.
3. 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