



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 93 OF 2014

DOMINIC WASWA ONG'ONGA PLAINTIFF

VERSUS

AGNETA WANGA AURAH

CHRISTOPHER MANGANA AURAH

SAMWEL AMOMA AURAH DEFENDANTS

JUDGEMENT

The plaintiff case is that, he purchased land parcel number MARAMA/SHINAMWENYULI/2397 from one Elphas Makongo Makokha whereby he paid the entire purchase price (PEx 1 is the sale agreement). The plaintiff avers that when he bought the land, the land was under the names of the seller's grandmother and succession was undertaken and title transferred to the plaintiff. The 1st defendant is a mother to the 2nd and 3rd defendants and they are cousins to the original owner of the land and have encroached into the land and put up a structure on the land. Upon sale of the land to the plaintiff, the seller granted possession of the same to the plaintiff who developed half of the land which he is currently in occupation. The defendants jointly and severally have trespassed to half of the land and the plaintiff has suffered loss and damages. The plaintiff prays that the defendant be evicted from the land.

The defendants maintain that if ever the succession was undertaken and subsequent transfer processed, then the same transaction was done in perpetuation of a fraud as the purported seller one Elphas Mkongo Makokha had no locus stand at the time of sale. Registering himself to the whole parcel of land with intent to wrongfully dispose the defendants. Registering himself as the absolute proprietor of the suit land without consulting the defendants. Registering himself to the suit land knowing that there are other heirs in question. The defendants reside on the suit land for years and never at anytime have they encroached onto the plaintiff's land and never were they aware that the plaintiff had secretly caused the transfer of the suit land into his name and/or obtained title thereto. Without prejudice to the foregoing the defendants' case shall be that the plaintiff illegally acquired the land parcel MARAMA/SHINAMWENYULI/2397 in his name and shall by way of counter claim seek the court order for nullification of the title and restoration of the same title in the 1st defendant's name. The defendants counterclaim is that, they were at all material times to this suit, the heirs of the original proprietor of the L.R. NO. MARAMA/SHINAMWENYULI/2397. There is a case vide Kakamega H.C.C. No. 22 of 2009 touching over the same subject matter pending for determination. The defendants only discovered upon being served with the suit documents that the plaintiff had fraudulently caused transfer of the suit land into which name and obtained title deed thereof. The defendants aver that having occupied and used the suit land openly and without interruption for more than (12) years, were in effect acquired title by adverse possession. As a result of the plaintiff's fraudulent dealing with the land parcel number MARAMA/SHINAMWENYULI/2397 the defendants have suffered loss and injury. The defendants pray that this suit be dismissed with costs.

This court has carefully considered both the plaintiff's and the defendants' evidence and submissions therein. The submitted that, plaintiff bought land parcel from PW2, one Makongo Makokha. Mr. Makongo Makokha was a son to the late Sarah Cheseka Makokha who was the first registered proprietor of land parcel number MARAMA/SHINAMWENYULI/2397 after having succeeded her late father through succession case in Butere Law Courts being 176 of 2002. When the late Sarah Cheseka passed on, his son, PW2, succeeded her in Kakamega Succession Cause No. 596 of 2012.

The defendants state that they have occupied land parcel number MARAMA/SHINAMWENYULI/957 for a long time and that the land is family land. The plaintiff's not claiming land parcel number MARAMA/SHINAMWENYULI/957. The plaintiff's claim is on MARAMA/SHINAMWENYULI/2397. The defendants seem to suggest that the plaintiff procured registration of land parcel number MARAMA/SHINAMWENYULI/2397 by fraud. 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.”

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the plaintiff. 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. **Hon Justice Munyao Sila** 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.

The defendants were not able to prove any fraud in court. The defendants agree that one Sarah Cheseka Makokha was their relative. Evidence from the plaintiff together with that of PW2, show that land parcel number MARAMA/SHINAMWENYULI/957 was subdivided in Butere Succession Cause number 178 of 2002. The land was sub-divided into 3 parcels where Sarah Chiseka Makokha got 2 acres. The defendants have never challenged the orders of Butere Succession Case Number 178 of 2002. This legal process was followed. It cannot amount to fraud. When Sarah passed on, the beneficiaries again followed a legal process of filing for succession in Kakamega High Court Succession case number 596 of 2012. This is a legal process. It cannot be said to be fraudulent. The defendants have not challenged the process in the succession causes either by challenging the grants by filing an objection or otherwise. In fact the defendants agree that the land MARAMA/SHINAMWENYULI/2397 belonged to one Sarah Cheseka Makokha. From the foregoing, it is clear that all the agreed issues have been answered to such extent that the court should issue the orders prayed by the plaintiff. I find that the counterclaim must fail. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to vacate the suit land namely suit property herein L.R. MARAMA/SHINAMWENYULI/2397 within the next three (3) months from the date of this judgement and in default to be evicted forcefully.

2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE