



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 218 OF 2013**

**LIVINGSTONE OMUKUNDA OGOLA.....PLAINTIFF**

**VERSUS**

**JOSEPH WAMUKOTA OFUTSO.....DEFENDANT**

**JUDGEMENT**

Briefly the case is that, at all material times herein referred to the plaintiff was and is the duly registered proprietor of the whole of that parcel of land better known as L.R. NO. S/WANGA/BUCHIFI/2407 measuring 0.60 Ha (PEx 2). On or about 18<sup>th</sup> January, 2011, the plaintiff entered into land sale agreement with the defendant to buy a portion of the defendant's land measuring 0.60 Ha hived from L.R. NO. S/WANGA/BUCHIFI/2039 at a consideration of Ksh. 135,000/- which was fully paid (PEx1). The plaintiff thereafter processed the sub division and transfer of the same and obtained title deed in respect to LR. NO. S/WANGA/BUCHIFI/2407 which was his portion from the aforesaid land. The defendant has since encroached on the plaintiff's said land and constructed structures thereon without the plaintiff's consent. The plaintiff has on several occasions requested the defendant to vacate the suit land but all went in vain. Despite demand and notice of intention to sue having been made, the defendant has refused, failed and or declined to vacate the said land and persist in such refusal, failure and/or decline. The plaintiff prayer of judgment against the defendant for:-

- (a) Eviction order.
- (b) Costs of this suit.

The defence is that, if ever the plaintiff got registered himself as proprietor of L.P. SAVANGA/BUCHIFI/2407, the same was fraudulently done and the said title is, to that extent null and void and incapable of conferring any legally recognized proprietary interest in the said property to the plaintiff. The defendant never entered any sale agreement with the plaintiff over the suit land parcel on the 18<sup>th</sup> January 2011 or at all and never received the sum of Kshs. 135,000/= on account of sale of L.P. S.WANGA/BUCHIFI/2039 as alleged or at all. The defendant maintains that if ever the plaintiff processed the transfer of L.P. S.WANGA/BUCHIFI/2407 from the plaintiff's original land parcel, the same transaction was done in perpetration of a fraud as the defendant never sold any land to the plaintiff to justify such a transaction. The defendant resides in a house on a portion of his land which he has occupied for years and never at all has he encroached onto the plaintiff's land and never was he aware that the plaintiff had secretly caused the transfer of the said portion into his name or obtained title thereto.

As a result of the defendant's fraudulent dealing with land parcel

S/WANGA/BCHIFI/2039, the defendant has suffered loss and or injury

REASONS WHEREOF the defendant prays for judgment in his favour on the counter-claim and for orders that:-

- (a) The subdivision of land parcel S.WANGA/BUCHIFI/2039 be declared null and void and the resulting title S. WANGA/BUCHIFI/2407 and be recalled and cancelled.
- (b) The plaintiff's claim to the suit land be dismissed with costs to the defendant.

This court has carefully considered both the plaintiff's and the defendant's evidence and submissions therein. By a plaint dated 31<sup>st</sup> July 2013, the plaintiff Livingstone Omukunda Ogola has sought judgment against die defendant Joseph Wamukoya Ofutso for eviction and costs. His case is that the defendant was the registered proprietor of the original land parcel S./WANGA/BUCHIFI/2039 out of which he sold to him a portion measuring 0.60 Hectares under a written agreement signed before Namatsi Advocate Mumias Town on 18<sup>th</sup> January 2011. He, (plaintiff) later caused the land to be subdivided out of which he took title to his portion being S./WANGA/BUCHIFI/2407. According to the plaintiff, the Defendant had since encroached on the land and constructed structures thereon without consent. The plaintiff relied upon his statement on the date of hearing and called one witness PW 2 Asman Musindalo Makokha who supported his version while explaining that he was then the area village elder and that he was present in advocate Namatsi's office where the initial contract signed and also present at every place where the plaintiff paid the subsequent installments

The defendant maintained that he never sold the land to the plaintiff as claimed and that the plaintiff leased only one acre to plant sugarcane only to find out that he had subdivided the land and transferred 0.60 Hectares to himself. While adopting his statement and defence with a counterclaim, the defendant asked the court to dismiss the suit with costs and order cancellation of the subject title held by the plaintiff for fraud. He called no witness. 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 and this is not in dispute. 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.

Even though the defendant alleges that he leased of the suit land hived from LR. NO.S/WANGA/BUCHIFI/2039, he has not put forward any evidence to proof his allegations thereof. The sale agreement dated 18<sup>th</sup> January 2011 produced by the Plaintiff alone can lead to conclusion that the Defendant willfully sold the said portion of the land to the plaintiff. From the evidence on record, the plaintiff carried out the subdivision of the LR. NO. S/WANGA/BUCHIFI/2039 as agreed in the aforesaid agreement and new numbers emanated there from this;-

1. LR.NO. S/WANGA/BUCHIFI/2407 - LIVINGSTONE OMUKUNDA OGOLA(PLAINTIFF)
2. LR. NO. S/WANGA/BUCHIFI/2408 - JOSEPH WAMUKOYA OFUTSO  
(Holding in trust for Brian Oduor (minor))
3. LR. NO. S/WANGA/BUCHIFI/2409 - KEVIN ODUOR WAMUKOYA
4. LR. NO. S/WANGA/BUCHIFI/2410 - ASMAN MUSINDALO MAKOKHA

All the three proprietors above are the sons of the Defendant. The Plaintiff's witness PW2 is truthful and is a witness during the initiation of the contested sale agreement herein. And furthermore he is a proprietor of L.R. NO.SOUTH WANGA/BUCHIFI/2410 which is among the subdivision of the original number hence he is a party in this matter knows better everything that took place in the transaction between the Plaintiff and the Defendant.

The Defendant in his counter claim alleges that in the year 2011 he leased to the plaintiff 1 acre of land hived from LR. NO. SOUTH WANGA/BUCHIFI/2039 for sugarcane farming which was done under written agreement. Secondly the defendant alleges that he only discovered that the plaintiff had fraudulently caused sub division and transferred a portion occupied by the Defendant and the church to himself upon being served by the court documents. The alleged lease agreement was not produced in court as an evidence in supportive. This cannot be true as the defendant together with his three (3) sons obtained the Title Deeds of the sub divisions of the aforesaid land parcel through the plaintiff, no fraud has been established on the part of 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. NO. S/WANGA/BUCHIFI/2407 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 27<sup>TH</sup> DAY OF JUNE 2018.**

**N.A. MATHEKA**

**JUDGE**