



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 43 OF 2014

JACKSON ANUNDA MAPESA

ISAAC AMAKOBE OTUNDO

RAPHAEL LICHUMA OTUNDOPLAINTIFFS

VERSUS

GERISHOM MAKOLO OTUNDO.....DEFENDANT

JUDGEMENT

In this case, the plaintiff avers that L.R. No Butstosto/Esumeiya/445 (76.5 acres) was the property of his late father Amos Otundo Makolo. The plaintiff's avers that the defendant is an elder brother to them. The plaintiff avers their father appointed the Defendant being his elder son to hold the said land L.R. No. Butstosto/Esumeiya/445 (76.5 acres) in trust for his siblings. The plaintiff's aver that their father allocated L.R. No. Butstosto/Esumeiya/105 (22.5 acres) to four of his sons including the plaintiff which parcels are still in the name of the deceased. He allocated L.R. No Butstosto/Esumeiya/94 (6 acres) to his second born son Philip Alwanga who is now deceased. The plaintiff's aver that the two widows of their late brother reside on the suit land since 1989 and the 2nd plaintiff since 1987. This happened during the lifetime of their father. The land was registered in trust during the land adjudication process as the plaintiffs were still very young. Be that as it may, the defendant has now refused to give the family members their share. The plaintiffs pray for judgement to be entered against the defendant for;

1. A declaration that the plaintiffs are the joint beneficiaries/heirs of land L.R. No Butstosto/Esumeiya/445 (76.5 acres).
2. An order directing that above parcel be subdivided and shared equally in the names of all the concerned beneficiaries or surviving family members.
3. Costs of this case.

The plaintiffs called witnesses including their sister in laws testified that the land was transferred to the Defendant being the elder brother to hold the said land L.R. No. Butstosto/Esumeiya/445 (76.5 acres) in trust for the family. PW2 the area Chief testified that the matter was brought to his office and the defendant conceded to subdivide the land but later changed his mind. PW3 a sister in law to the parties testified that the deceased Amos Otundo Makoloduring his life time, took his son and herself to the suit land L.R. No Butstosto/Esumeiya/445 (76.5 acres) and showed each one of them where to settle and boundaries were then set on the land. Further she testified that she is living there since 1988 with her co wife and the deceased sons also live there.

DW1 stated that, the plaintiffs were given L.R. No Butstosto/Esumeiya/105 (22.5 acres) where they settled after their father died. Their late brother Philip was given L.R. No Butstosto/Esumeiya/94 (6 acres) and there is no need to include him in this matter. He was allocated parcel land L.R. No Butstosto/Esumeiya/445 (76.5 acres) and is not holding it in trust for the family. The defendant testified that he is the first registered proprietor of the suit land in 1968 and has allowed the family members to reside there. DW2 corroborated the defendant's evidence. There is no trust registered on his title deed or land parcel and the issue of trust is an afterthought and ought to be dismissed. The defendant's counter claim is for a permanent injunction to restrain the plaintiffs with the suit land parcel L.R. No Butstosto/Esumeiya/445 (76.5 acres).

This court has carefully considered the evidence and the submissions herein. 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.”*

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 defendant who testified in court together with his written statement stated that he was the registered owner of parcel of land known as parcel land L.R. No Butstosto/Esumeiya/445 (76.5 acres). There is no trust registered on his title deed or land parcel and the issue of trust is an afterthought and ought to be dismissed. The defendant’s counter claim is for a permanent injunction to restrain the plaintiffs with the suit land parcel L.R. No Butstosto/Esumeiya/445 (76.5 acres).

The plaintiffs’adduced evidence calling witnesses including their sisters in law who testified that the land was transferred the Defendant being the elder brother to hold the said land L.R. No Butstosto/Esumeiya/445 (76.5 acres) in trust for the family. PW2 the area Chief testified that the matter was brought to his office and the defendant conceded to subdivide the land but later changed his mind. PW3 a sister in law to the parties testified that the deceased Amos OtundoMakoloduring his life time, took his son and herself to the suit land L.R. No Butstosto/Esumeiya/445 (76.5 acres) and showed each one of them where to settle and boundaries were then set on the land. Further she testified that she is living there since 1988 with her co wife and the deceased sons also live there.I find that the plaintiffs have a beneficial interest in the said land and it is not in dispute that the land belonged to their late father. Some of the family members have built their homes and have been residing there since 1988. Even though this land was acquired procedurally it was to be held in trust on behalf of the other members of the family of the late Amos OtundoMakolo. It is not for the defendant to now decide which family member will occupy which portion. Indeed it is a finding of fact that, many of the family members reside on this land. The defendant’s counter claim is for a permanent injunction to restrain the plaintiffs with the suit land parcel L.R. No Butstosto/Esumeiya/445 (76.5 acres), the same has not been proved and I dismiss it. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A Declaration that the Defendant is holdingL.R. No Butstosto/Esumeiya/445 (76.5 acres) in trust for the plaintiff, his siblings and all other beneficiaries.
2. An order that L.R. No Butstosto/Esumeiya/445 (76.5 acres) be subjected to succession proceedings.
3. Each party to bear their own costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26THDAY OF JULY2018.

N.A. MATHEKA

JUDGE