



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 304 OF 2015**

**GUNYAMA ANDREW GUNYAMA ..... PLAINTIFF**

**VERSUS**

**ATANAS ATONYA MAJENGO ..... DEFENDANT**

**JUDGEMENT**

The plaintiff case is that, the defendant and himself are joint registered proprietors in equal shares of L.R. No: Butso/Indangalasia/681 measuring 6.5 acres as from 20<sup>th</sup> May 1994. The plaintiff avers further that irreconcilable differences have arisen between the defendant and himself over the use of the land making it impossible for him and the defendant to remain Joint proprietors of L.R. No: Butso/Indangalasia/681. On a number of occasions, the plaintiff has approached the defendant to have L.R. No. Butso/Indangalasia/681 sub-divided into two parcels so that each of them obtains separate titles thereto to no avail thus necessitating this suit. The plaintiff's claim against the defendant is an order compelling him to attend the relevant Land Control Board for its consent to sub-divide L.R. No. Butso/Indangalasia/681 into two equal portions with separate titles thereto so to have one of them registered in his name and the other in the plaintiff's name. The plaintiff prays for judgment against the defendant for;

- a. An order compelling him to attend the relevant Land Control Board for its consent to sub-divide L.R. No: Butso/Indangalasia/681 into two equal portions with separate titles thereto so as to have one of them registered in his name and the other in the plaintiff's name or in the alternative, the Deputy Registrar of this Court be authorized to do it on the defendant's behalf
- b. Costs of this suit.
- c. Any other or further relief this court may deem fit to grant.

The Defendant submits that if indeed the Plaintiff and Defendant are jointly registered as the proprietors of L.R. No Butso/Indangalasia/681 then such registration is fraudulent and the Defendant gives notice to counter-claim for the suit land to be rightly registered in his name as the sole and absolute proprietor thereof. The Defendant states that he has been in occupation and exclusive use of the suit land since the year 1996 when he moved into it after purchasing the same through the Plaintiff and as such the question of irreconcilable differences between the parties herein does not arise. That it is only in the year 2014 when the issue of joint proprietorship first came into the fore and the Defendant vehemently states that the suit land cannot be sub-divided as the Plaintiff has no share therein. That between the years 1991 to 1995 the Defendant progressively gave the sum of Kshs 330,000 to the Plaintiff to purchase for him a parcel of land wherein he would be able to settle down with his family as he was then working for gain in Nairobi. That eventually the Plaintiff managed to purchase on behalf of the Defendant L.R. No Butso/Indangalasia/681 measuring approximately 6.5 acres from the late Charles Chisienya Luchibia. That the Defendant moved into the suit land from the year 1996 and to date he has been in full and exclusive occupation and use of the suit land and it is only in the year 2014 that the Plaintiff first raised the issue of joint proprietorship with the Defendant. That the registration of the Plaintiff and Defendant as joint proprietors of the suit land is fraudulent and without due process. That the Defendant prays for this Honourable Court to direct that the name of the Plaintiff be deleted from the certificate of register of the suit land so that the Defendant becomes the sole and absolute proprietor of L.R. No Butso/Indangalasia/681. That the Defendant also prays for the attendant costs of the counter-claim.

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. 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.

It is a finding of fact that the plaintiff and the defendant are joint registered owners of the suit land namely L.R No Butso/Indangalasia/681 (Plot 681).The Plaintiff states that he purchased L.R No Butso/Indangalasia/681 (Plot 681)from the late Charles Chisiyanya Luchibia (Deceased) the husband to Ezines Kayege Charles (DW 2) for the sum of Kshs 327,000 as is denoted by the Agreement (PEX 2)dated the 18<sup>th</sup>day of May 1994.That the Defendantwho at the material time was working in the city of Nairobi contributed only Kshs 30,000towards the purchase of Plot 681 as indicated in the Acknowledgment Note (PEX3) dated the 11<sup>th</sup> day of January 1992 while the Plaintiff provided the entire balance.

The Plaintiff registered both the Defendant and himself as the joint proprietors of Plot 681 and a title deed (PEX 1) to this effect was issued although subsequently, differences arose between the parties herein as to the use of Plot 681.That by a letter (PEX 4) dated the 6<sup>th</sup>day of May 2015 the Plaintiff required the Defendant to appear before the Land Control Board (Board) for the purposes of sub-dividing equally between themselves Plot 681 but the Defendant declined to do so as depicted by the letter (PEX5) dated the 14<sup>th</sup> day of May 2015.The plaintiff and the defendant are relatives as per their evidence. Thus, the Plaintiff seeks orders directing the Defendant to appear before the Board for the sub-division of Plot 681 as described above or in the alternative the Deputy Registrar be permitted to do the same on behalf of the Defendant. The Statement of Defence and Counter-claim dated the 24<sup>th</sup> day of December 2015 asserts that in fact the entire money used to purchase Plot 681 emanated from the Defendant as he used to remit it to the Plaintiff while he was working in Nairobi.That the Defendant took actual and physical possession of Plot 681 in the year 1996 when he moved in with his family, first settling in the house left behind by the Deceased and his wife Ezines (DW2) before finally constructing his own.That the Plaintiff only began claiming half of Plot 681 in the year 2014. However, the Defendant has denied being privy to any transactions leading to his name being registered alongside that of the Plaintiff as co-proprietors. DW2 testified that although the Plaintiff is the one who did the actual payments for Plot 681, nevertheless he was buying for the Defendant who was then working in Nairobi.The Defendant produced a Certificate of Search of Plot 681 as DEXh 1 and has by his Counter-claim prayed for the deletion of the name of the Plaintiff as a co-proprietor of Plot 681 and that he should be registered as its sole and absolute owner.The defendant alleges that he is the one who purchased the entire land through the plaintiff. He failed to adduce any evidence showing that he paid the entire purchase price of Ksh. 327,000/=. He also said that the plaintiff was acting as his agent when he was buying the land. He never adduced any evidence to show that the plaintiff was his agent. I find that the defendant has failed to prove on a balance of probabilities that he paid anything more than the 30,000/= which was acknowledged by the plaintiff. It is also curious that he did not raise any issue in the title being registered jointly until this matter was filed in court. I see no evidence of fraud on the part of the plaintiff. The defendant’s counter claim is dismissed.

I find that the plaintiff has proved joint ownership of land parcel No.Butso/Indangalasia/681, the plaintiff is entitled to the rights of a registered joint proprietor of a parcel of land, which is exclusive, peaceful, unfettered and unimpeded possession, occupation and use of half of the land as stipulated in the Registration of Land Act. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. An order compelling the defendant to attend the relevant Land Control Board for its consent to sub-divide L.R. No: Butso/Indangalasia/681 into two equal portions with separate titles thereto so as to have one of them registered in his name and the other in the plaintiffs’ name or in the alternative, the Deputy Registrar of this Court be authorized to do it on the defendant’s behalf
2. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**