



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 50 OF 2016

YAKOBET NECHESA WABUKO.....PLAINTIFF

VERSUS

HUMPHREY OLWISI MURANDA

EVERLYNE OMUSINDE OMUNGO.....DEFENDANTS

JUDGEMENT

This case is briefly that, the plaintiff is the legal administratrix of the estate of her late husband Moses Wabuko Musiko, having been granted with a grant and certificate of confirmed grant vide Butere RMC No. 115 of 2000. The plaintiff avers that her late husband Moses Wabuko Misiko had purchased land parcel Marama/Shianda/126 registered owner one Muranda Anyonje in 1975 and the said Muranda Anyonje moved away from the said land and went to settle at Bungoma and the plaintiff took possession of the said land with her late husband. The plaintiff avers that, the 1st defendant is a son to the late Muranda Anyonje, while the 2nd defendant is a wife to the 1st defendant. The plaintiff avers that there have been several cases between the plaintiff and the first defendant both at the Chief Magistrate's Court Kakamega, High Court Kakamega and Court of Appeal at Kisumu which have all been decided in favour of the plaintiff. The plaintiff avers that while an appeal filed by the 1st defendant was pending at Kakamega High Court vide appeal No. 55 of 2002 and Court of Appeal at Kisumu vide formally Appeal No. 9 of 2006 (later appeal No. 44 of 2006), the 1st defendant unlawfully and without any justifiable cause transferred land parcel Marama/Shianda/126 to the 2nd defendant, his wife. The plaintiff avers that the said transfer of the suit land Marama/Shianda/126 by the 1st defendant to the 2nd defendant was done by 1st defendant with the intention to defeat the cause of justice as he had the full knowledge that his appeals were pending both in the High Court Kakamega and or Court of Appeal at Kisumu. The plaintiff avers that she has a decree issued in her favour vide Kakamega CMC Misc. Award No. 38 of 2002 since the appeals to the superior courts by the 1st defendant were dismissed or struck out and the plaintiff cannot be able to enforce the said decree since the said parcel of Land Marama/Shianda/126 is now in the names of the 2nd defendant, hence this claim. The plaintiff's claim against the defendants jointly and severally is for an order declaring that the transfer and registration of Land Parcel Marama/Shianda/126 effected on 24th January, 2006 as entry No. 5 in the Register extract by the 1st defendant in favour of the 2nd defendant was done unlawfully to defeat the cause of justice and hence should be cancelled and the land reverts into the names of the 1st defendant. The plaintiff avers that upon the said land reverting into the name of the 1st defendant, the same be also ordered cancelled and be registered in the name of the plaintiff as per the decree of the court vide Kakamega CMC. MISC. Award No. 38 of 2002. The plaintiff shall also seek for an order of eviction of the defendants from the suit land and order restraining them from interfering in any manner with this suit land. The plaintiff prays for judgment against the defendants for:-

- a. An order declaring that the transfer of land parcel Marama/Shianda/126 as per entry No. 5 in the register extract (Green Card) was unlawful and should be cancelled and the land reverts into the name of the 1st defendant.
- b. An order directing the 2nd defendant to surrender the title deed for land parcel Marama/Shianda/126 to the Land Registrar Kakamega for cancellation.
- c. An order that upon the said cancellation and reverting into the names of the 1st defendant, the same shall also be cancelled and the land transferred into the name of the plaintiff as decreed in Kakamega CMCC Misc. Award No. 38 of 2002.
- d. An order of eviction of the defendant's from the said land Marama/Shianda/126 forthwith.
- e. Costs of suit.
- f. Any other relief the court may deem fit to grant to meet the ends of justice.

The Defendants aver that no sale agreement and / or agreement to sell existed between Moses Wabuko Misiko (deceased) and Muranda Anyonje (deceased) and in fact none has been exhibited by the Plaintiff. The Defendant denies the allegations that he unlawfully and or

fraudulently caused land parcel number Marama / Shianda/126 to be registered in the name of the 2nd Defendant.

The 2nd Defendant testified that she is the registered owner of the suit land and that the Plaintiff's claim is unfounded, bad in law and lacks merit. The 2nd Defendant's interest as the registered proprietor of the suit land is therefore protected by the provisions of Section 27 and 28 of the Repealed Registered Land Act and Section 26 of the Land Registration Act, 2012. The 2nd Defendant further contends that the Plaintiff's claim is hopelessly time barred, bad for misjoinder of parties and further that there is no privity of contract and or estate between the Plaintiff and the 2nd Defendant to warrant the grant of any of the reliefs sought by the Plaintiff. The Defendant further contends that the Plaintiff cannot found her cause of action on KAKAMEGA CMC MISC, A WARD NO. 38 of 2002 since the said award was made by a tribunal without jurisdiction and is such null and void ab-initio. The defendants therefore pray that the honourable court declares that the 2nd defendant is the rightful registered owner of the whole of that parcel of land known as Marama/Shianda/126.

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.”

The plaintiff testified that she is the legal administratrix of the estate of her late husband Moses Wabuko Musiko, having been granted with a grant and certificate of confirmed grant vide Butere RMC No. 115 of 2000. The plaintiff avers that her late husband Moses Wabuko Misiko had purchased land parcel Marama/Shianda/126 registered owner one Muranda Anyonje in 1975 and the said Muranda Anyonje moved away from the said land and went to settle at Bungoma and the plaintiff took possession of the said land with her late husband. The plaintiff avers that, the 1st defendant is a son to the late Muranda Anyonje, while the 2nd defendant is a wife to the 1st defendant. The plaintiff avers that there have been several cases between the plaintiff and the first defendant both at the Chief Magistrate's Court Kakamega, High Court Kakamega and Court of Appeal at Kisumu which have all been decided in favour of the plaintiff. The plaintiff avers that while an appeal filed by the 1st defendant was pending at Kakamega High Court vide appeal No. 55 of 2002 and Court of Appeal at Kisumu vide formally Appeal No. 9 of 2006 (later appeal No. 44 of 2006), the 1st defendant unlawfully and without any justifiable cause transferred land parcel Marama/Shianda/126 to the 2nd defendant, his wife. The plaintiff avers that the said transfer of the suit land Marama/Shianda/126 by the 1st defendant to the 2nd defendant was done by 1st defendant with the intention to defeat the cause of justice as he had the full knowledge that his appeals were pending both in the High Court Kakamega and or Court of Appeal at Kisumu. The plaintiff avers that she has a decree issued in her favour vide Kakamega CMC Misc. Award No. 38 of 2002 since the appeals to the superior courts by the 1st defendant were dismissed or struck out and the plaintiff cannot be able to enforce the said decree since the said parcel of Land Marama/Shianda/126 is now in the names of the 2nd defendant, hence this claim. The defendant does not dispute that all his appeals were dismissed in favour of the plaintiff. He maintains that the tribunal had no jurisdiction to entertain such a case and there was no sale agreement between Moses Wabuko Misiko (deceased) and Muranda Anyonje (deceased). I find that this case has been adjudicated and decided upon by a superior court and the defendants cannot reopen the issues again. Indeed the transfer of the ownership of the suit land to the 2nd defendant was fraudulent as the 1st defendant was aware of the pending cases. I found the counterclaim has no merit and I dismiss it. The plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order declaring that the transfer of land parcel Marama/Shianda/126 as per entry No. 5 in the register extract (Green Card) was unlawful and should be cancelled and the land reverts into the name of the 1st defendant.

2. An order directing the 2nd defendant to surrender the title deed for land parcel Marama/Shianda/126 to the Land Registrar Kakamega for cancellation.

3. An order that upon the said cancellation and reverting into the names of the 1st defendant, the same shall also be cancelled and the land transferred into the name of the plaintiff as decreed in Kakamega CMCC Misc. Award No. 38 of 2002.

4. The defendants, is to vacate the suit land, land parcel No.Marama/Shianda/126 within the next 3 (three) months from the date of this judgement and in default an eviction order to issue forthwith.

5. Costs of suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA