



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 179 OF 2013

ALICE TSIMBILI ALFAYO.....PLAINTIFF

VERSUS

HERMAN MATSE LUCHEVELELI

LAND REGISTRAR

THE ATTORNEY GENERAL.....DEFENDANTS

JUDGEMENT

Briefly the case is that, at all material times to this suit the land parcel known as KAKAMEGA/KAMBIRI/438 was registered in the names of the late Alfayo Lucheveleli Bushuru who died in 1974 or thereabouts. The plaintiff avers that on or about 12th June, 2003 the 1st defendant fraudulently and secretly caused transfer and registration of land parcel known as KAKAMEGA/KAMBIRI/438 into his own name in collaboration with the 2nd defendant. The transfer and registration of the said land known as KAKAMEGA/KAMBIRI/438 were done long after the death of the original proprietor Alfayo Lucheveleli alias Alfayo Lucheveleli Bushuru who died in 1974 or thereabouts. The 1st Defendant had notice of the actual or constructive of the rights of the Plaintiff and or their members of the family. The 1st Defendant in collaboration with the 2nd Defendant fraudulently caused the transfer without proper documents more particularly when the registered proprietor was already dead and all the fraud/moves was within the 1st Defendant's knowledge. The registration of the 1st Defendant as the sole owner of the land parcel known as KAKAMEGA/KAMBIRI/438 measuring 7.6 acres or thereabouts was fraudulent and ought to be cancelled.

The Plaintiff further avers that she is one of the widows of the late Alfayo Lucheveleli alias Alfayo Lucheveleli Bushuru and the 1st Defendant as on of the deceased and are all beneficiaries together with other members of the family to the estate of the deceased. The Plaintiffs claim is for an order of cancellation of title No. KAKAMEGA/KAMBIRI/438 to revert into the names of the deceased Alfayo Lucheveleli Bushuru. The Plaintiff further prays that the Court do declare the transfer and registration of the land parcel known as KAKAMEGA/KAMBIRI/438 in favour of the 1st Defendant was irregular, illegal, unprocedural and fraudulent and the title issued in the names of the 1st Defendant be revoked and or cancelled forthwith. The Plaintiff further prays for an order to compel the 2nd Defendant to avail the parcel file in respect of title No. KAKAMEGA/KAMBIRI/438 to the Plaintiff. The Plaintiff prays for an order of permanent injunction to restrain the 1st Defendant either by himself, through his agents, relatives, workers, servants and whomsoever claiming under him from evicting, alienating, selling, transferring, trespassing into, carrying any works on or in any manner interfering with the Plaintiffs occupation, possession and use of the suit land known as KAKAMEGA/KAMBIRI/438. The Plaintiff prays for general damages. The Plaintiff prays for judgment against the Defendants jointly and or severally for orders:

- a) Cancellation of the title NO. KAKAMEGA/KAMBIRI/438 and restoration of the original title in the name of Alfayo Lucheveleli Bushuru.
- b) Declaration that the transfer and registration of the land parcel known as KAKAMEGA/KAMBIRI/438 in favour of the 1st Defendant was irregular, illegal, unprocedural and fraudulent and the title in the names of the 1st Defendant be revoked and or cancelled forthwith.
- c) General damages
- d) Costs of the suit
- e) Interest on (d) and (e) above at court rates.

The 1st defendant denies that the plaintiff is the administratrix or can be an administratrix of the estate of the late Alfayo Lucheveleli Bushuru

as she moved out of the home and is happily married to one Chelagat after several other marriages. The 1st defendant avers that the late Alfayo Lucheveleli had mortgaged the suit land to A.F.C. (Agricultural Finance Corporation) and passed on before repaying the loan. The 1st defendant avers that he paid the debt and was registered the owner thereof after finalizing with A.F.C. The 1st defendant avers that the plaintiff is not entitled to the orders sought. The 1st defendant avers that he has since 1975 been in occupation and use of the suit land while the plaintiff left the home in the same year and has never returned to date and hence her claim is time barred. The 1st defendant avers that the present suit is full of falsehood concocted by the plaintiff for selfish gains and all the alleged beneficiaries are adults capable of lodging their own claims if any.

PW2, PW3 and PW4 all relatives of the litigants corroborated the plaintiff's evidence. They stated that the deceased had three wives and they should all benefit from the said land and not only the defendant.

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 the defendant is the registered owner of land parcel No. KAKAMEGA/KAMBIRI/438. At all material times to this suit the land parcel known as KAKAMEGA/KAMBIRI/438 was registered in the name of the late Alfayo Lucheveleli Bushuru who died in 1974 or thereabouts. The plaintiff avers that on or about 12th June, 2003 the 1st defendant fraudulently and secretly caused transfer and registration of land parcel known as KAKAMEGA/KAMBIRI/438 into his own name in collaboration with the 2nd defendant. The transfer and registration of the said land known as KAKAMEGA/KAMBIRI/438 were done long after the death of the original proprietor Alfayo Lucheveleli alias Alfayo Lucheveleli Bushuru who died in 1974 or thereabouts. The 1st defendant avers that the late Alfayo Lucheveleli had mortgaged the suit land to A.F.C. (Agricultural Finance Corporation) and passed on before repaying the loan. The 1st defendant avers that he paid the debt and was registered the owner thereof after finalizing with A.F.C. he paid the loan on his behalf and transferred the land to himself. The 1st defendant never appeared in court to give oral evidence. DW1, DW2 and DW3 all corroborated the 1st defendant's statement of defence. I have perused the documents produced as evidence and from the green card PEx2 I find that, Transfer is alleged to have taken place on 12th June 2003 when the registered owner died in 1974 or thereabouts. Failing to adhere to legal provisions for transfer and registration of titles. The 1st Defendant did not have the locus standi to cause transfer and registration of the suit land into his name. The 1st Defendant as the son of the late Alfayo Lucheveleli Bushuru knew that the only way the title of land parcel known as KAKAMEGA/KAMBIRI/438 could be transferred would be under the provisions of the Law of Succession Cap 160 Laws of Kenya yet no succession proceedings were instituted in respect of the estate of the deceased. The defendant is guilty of forging and or presenting a forged Grant of Letters of Administration Intestate or Certificate of Confirmation of Grant and or any other documents purportedly to be authenticated in respect of the estate of the deceased. I find the defence frivolous and I reject it. I find that the plaintiff has proved beneficial interest of the suit land together with other family members. General damages have not been proved and the same will not be awarded. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. Cancellation of the title NO. KAKAMEGA/KAMBIRI/438 and restoration of the original title in the name of Alfayo Lucheveleli Bushuru and thereafter to be subjected to succession proceedings.
2. Declaration that the transfer and registration of the land parcel known as KAKAMEGA/KAMBIRI/438 in favour of the 1st Defendant was irregular, illegal, unprocedural and fraudulent and the title in the names of the 1st Defendant be revoked and or cancelled forthwith.

3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE