



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 278 OF 2013

HELAN VUSULO IMBAHARE.....PLAINTIFF

VERSUS

FWELIDA IMINZA MUSUNSAJI.....DEFENDANT

JUDGEMENT

Briefly, the case is that on or about 28th May, 2011 the plaintiff herein bought a portion of land measuring 0.8 of an acre from one John Musunsaji – deceased a husband to the defendant herein at an agreed consideration of Ksh. 160,000/=, which consideration price the plaintiff paid the full agreed consideration and took possession of the same by growing crops and constructed a semi permanent structure thereon. The defendant's husband the said John Musunsaji had also bought the suit property herein from one James Ambani in whose name the said suit property was still registered in. It is the plaintiff's case that indeed the said James Ambani took all the necessary steps to transfer the demised 0.8 portion to the plaintiff and signed all the necessary transfer forms and had even booked a date at the Ileho Land Control Board when the said James Ambani would cause the transfer of the said demised portion to the plaintiff. It is the plaintiff's case that however the said original seller and husband to the defendant herein John Musunsaji died some time on July, 2011 some days before the said James Ambani and the plaintiff could appear at the Ileho Land Control Board and get the requisite consent to transfer the demised 0.8 acre to the plaintiff's name. It is the plaintiff's case soon after the death of her husband the defendant herein and the said James Ambani colluded behind the plaintiff's back and secretly went and caused the sold portion to be registered in the name of the defendant herein Fwelida Iminza Musunsaji to the exclusion of the plaintiff herein. It is further the plaintiff's case that at the time the defendant and the said James Ambani colluded with the defendant and caused the suit land herein to be directly registered in the name of the defendant, the plaintiff herein had already incurred other expenses including paying survey fees and Land Control Board attendance fees amounting to Ksh. 13,000/=. As a result of the collusion of the defendant and the defendant and the said James Ambani the plaintiff has been denied the enjoyment and right to her 0.8 acres of land, as the same is now registered in the name of the 1st defendant to the exclusion of the plaintiff who ought to have been rightful person to be registered as owner of the same. As a result of the said illegal direct transfer of the whole of the suit property by the original registered owner James Ambani to the defendant herein the plaintiff has been denied the right to her 0.8 acre portion of the suit property hence this suit. The plaintiff's claim against the defendant is for a claim of a portion measuring 0.8 acres from the suit property herein L.R. Isukha/Ileho/440, sold to the plaintiff by the defendant's husband John Musunsaji and now registered in the names of the defendant. Despite the plaintiff's efforts to persuade the defendant to peacefully surrender and transfer the 0.8 acre portion to the plaintiff the defendant has refused is adamant and evasive hence this suit. The plaintiff prays for judgment against the defendant for:-

(a) An order directing the defendant to voluntarily curve out and transfer 0.8 acre portion of the land parcel L.R. ISUKHA/ILEHO/440, and transfer the same to the plaintiff. In default the Deputy Registrar of the High court be authorized to sign all the necessary documents on behalf of the defendant so as to cause the excision of the 0.8 acre portion from suit property L.R. ISUKHA/ILEHO/440 and have the same transferred and registered in the names of the plaintiff herein.

(b) Costs.

The defendant in her testimony denies the veracity of the said claims and particularly disputes the suggestion that John Musunsaji disposed of any portion of L.R. No. Isukha/Ileho/440 to the plaintiff or that the plaintiff as a consequence of such supposed disposition of land took possession of any portion thereof and the plaintiff shall be put to strict proof. The defendant contends that she is a stranger to the said averments but wishes to add that if indeed there was an arrangement between the deceased and one James Ambani concerning the suit land, then the proper parties to be sued herein would have been the estate of the deceased and the said James Ambani. The defendant states that the suit land was transferred to her in accordance with the law and the fact of the plaintiff incurring losses as a result of her alleged dealings with the deceased and James Ambani cannot be attributed to her. The defendant holds that she has resided in the suit land for over 4 decades thus negating the assertions of the plaintiff that she is entitled to its user or proprietorship.

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 defendant who testified in court together with her written statement stated that she was the registered owner of parcel of land known as L.R. No. Isukha/Ileho/440 (PEx4 is a copy of the official search). The plaintiff on the other hand testified that, she bought a portion of land measuring 0.8 of an acre from one John Musunsaji – deceased a husband to the defendant herein at an agreed consideration of Ksh. 160,000/=, which consideration price the plaintiff paid the full agreed consideration and took possession of the same by growing crops and constructed a semi permanent structure thereon. The defendant's husband the said John Musunsaji had also bought the suit property herein from one James Ambani in whose name the said suit property was still registered in. It is the plaintiff's case that indeed the said James Ambani took all the necessary steps to transfer the demised 0.8 portion to the plaintiff and signed all the necessary transfer forms and had even booked a date at the Ileho Land Control Board when the said James Ambani would cause the transfer of the said demised portion to the plaintiff. It is the plaintiff's case that however the said original seller and husband to the defendant herein John Musunsaji died some time on July, 2011 some days before the said James Ambani and the plaintiff could appear at the Ileho Land Control Board and get the requisite consent to transfer the demised 0.8 acre to the plaintiff's name. It is the plaintiff's case soon after the death of her husband the defendant herein and the said James Ambani colluded behind the plaintiff's back and secretly went and caused the sold portion to be registered in the name of the defendant.

I have carefully perused the documents produced in evidence. PEx1 the sale agreement between one John Musunsaji seller and David Ngaira as the buyer. The acreage for sale has been amended and/or changes and is not clear. At the end of the agreement the plaintiff is now indicated as the buyer. This agreement has been tampered with and is contradictory and cannot stand. The other documents PEx 2 the transfer documents are blank except for a thumb print. The same are not conclusive. PEx 3 the search certificate dated 19th October 2011 indicated that the owner was one Ambani Mukokho. Hence the said John Musunsaji had no capacity to sell the said parcel of land. It is not in dispute that it is the defendant who is in possession of the land and not the plaintiff. I find that no evidence has been adduced to show that the defendant was involved in any illegality, any un procedural process or corrupt scheme to obtain the title. The plaintiff has failed to prove her case on a balance of probabilities and I dismiss her case with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE