



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 637 OF 2014**

**DANIEL O. LUBANGA.....PLAINTIFF**

**VERSUS**

**RAJAB OMOLLO**

**HADIJA OKEBE OMOLLO.....DEFENDANTS**

**JUDGEMENT**

By a plaint dated 2<sup>nd</sup> February 2011, the plaintiff herein avers that, at all material times he has been and is the legal registered proprietor of that whole parcel of land known as MARAMA/SHIRO TSA/817 measuring approximately 1.7 Ha which registration was obtained on 6<sup>th</sup> January, 1998 and title deed issued on the same date to him as the registered owner. That however without any colour of right the defendants herein have trespassed onto plaintiff's land parcel, destroying his cash crops, erected semi-permanent structures, grazing cattle and carrying out agricultural activities forcefully. Due to their activities, defendants have barred and/or restricted the plaintiff from accessing his land. The plaintiff's efforts to repulse and/or stop them through provincial administration has been futile. That the plaintiff's claim against the defendants jointly and severally is for eviction and prohibitory orders forthwith. The plaintiff prays for judgment against defendants jointly and severally for:-

- (a) Prohibition and eviction.
- (b) Costs and interest effective date of suit.
- (c) Any other orders Court deems fit.

DW1, the 2<sup>nd</sup> defendant testified that, she is the heir, assignee and or proposed administrator and beneficiary of the estate of the late Mukanda Ananyilu deceased who is the brother of her late father and she is also the daughter of the late Mzee Omollo Ananyilu who is also deceased. That she is aware that the late Omukanda Ananyilu deceased alias Francis Omukanda Ananyilu deceased passed on in 1976 and that he died intestate and did not leave behind any will. That she is aware that her father the late Omollo Ananyilu deceased passed on intestate in 1982. That the parcel of land subject to this suit is family/ancestral land having been registered in the names of Omukanda Ananyilu deceased before his demise as aforesaid in trust of his brothers who include her father before it was transferred to the plaintiff herein under fraudulent means. That as aforesaid she is well aware that land parcel number Marama/Shirotsa/817 was registered in the name of the late Omukanda Ananyilu in his own trust and in trust of his brothers or her father the late Omollo Ananyilu deceased and any heirs born out of them. That she admits to the fact that land parcel number is registered in the plaintiff's name as the absolute owner but aver that the purported sale, transfer and registration of the same in the current owner is questionable on several counts. That the said land therefore did not exclusively belonged to the estate of the late Omukanda Ananyilu or his sons alone as alleged who in turn sold it to the plaintiff and without their consent acquired and fraudulently registered it in the name of the plaintiff and for all reasons and purpose the plaintiff is the one who is a trespasser on the suit land. That after the passing on of her said uncle, his then surviving sons who include the late Wycliffe Ananyilu Omukanda and themselves took over possession of the said land which they have been residing on and cultivating to date.

That her uncle and her father had ownership interest in the suit land in equal shares of a portion measuring 0.85 hectares each. That her mother the late Rukia Nandwa Omollo deceased before her demise had resided, cultivated on the suit land herein since 1940's and when she passed on and her remains were buried on a section on the suit land. That occupation and use of the suit land was peaceful and uninterrupted from any quarter. That it is between the year 1996 and 1999 when her mother, herself, her cousins intended to file and take out letters of administration to inherit land parcel number Marama/Shirotsa/817 from her deceased uncle the late Omukanda Ananyilu when she realized that the plaintiff herein had without their knowledge consented secretly and fraudulently teamed up with her cousins and got registered as the absolute registered owner of the disputed land which registration was done on the 6<sup>th</sup> January, 1998 and issued with a title deed.

That it followed that her family members and herself including her late mother complained against the actions of the plaintiff about secretly

buying land that was held in trust and transferred it without a confirmed grant of letters of administration intestate but all was in vain and that during that period the plaintiff had forcefully attempted to pull down houses in their homestead found on the said land. That in fact after the said invasion he forcefully started cultivating on some portions of the suit land but later on he was stopped by the local administration and repulsed by themselves.

That when the plaintiff realized that they are not moving from the suit land he reported her late mother Rukia Nandwa Omollo deceased at the police station on false allegations that she had on the 14<sup>th</sup> day of December, 1999 at Matioli village, Shibembe sub location township, location Butere Mumias District within the Western Province of the Republic of Kenya in order to take possession therein forcefully entered the suit land herein in a violent manner by constructing a house on the same. That as a consequence of the false report the said Rukia Nandwa Omollo deceased was charged in Butere Resident Magistrate's Court with an offence of forcible entry Contrary to Section 90 of the Penal Code in Criminal case Number 618 of 1999. That the said case proceeded on merit and the deceased was discharged after the plaintiff and the prosecution failed to prove a case against her. That in fact in the said judgment the learned magistrate observed that the said accused was in the land when the plaintiff purported to purchase it and that her homestead was on the same and that since there was a dispute to determine ownership he discharged her.

That after realizing that the plaintiff herein was still adamant and uncooperative she lodged a land dispute against him with the Butere Land Disputes tribunal for recovery of the parcel of land herein vide case number 10 of 2006. That in fact the said dispute which was heard and determined on merit was in her favour and in favour of the estate of her late father Omollo Ananyilu and her late uncle Omukanda Ananyilu the initial registered owner. That consequently and by extension of the law the said award was forwarded in this court and filed as Misc. Award Number 36 of 2008 which award is still in force and has never been set aside, dismissed by the appeal that the plaintiff purported to have preferred before the Provincial Land Disputes Appeals Committee. The 1<sup>st</sup> defendant's statement was adopted as evidence by consent of both parties and it corroborated the 2<sup>nd</sup> defendant's evidence.

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 he is the registered proprietor of that whole parcel of land known as MARAMA/SHIRO TSA/817 measuring approximately 1.7 Ha which registration was obtained on 6<sup>th</sup> January, 1998 and title deed issued on the same date to him as the registered owner. That however without any colour of right the defendants herein have trespassed onto plaintiff's land parcel, destroying his cash crops, erected semi-permanent structures, grazing cattle and carrying out agricultural activities forcefully. The plaintiff maintains that he purchased the suit land from the sons of the late Omukanda Ananyilu who transferred the same to him.

The defendants submit that, the parcel of land subject to this suit is family/ancestral land having been registered in the names of Omukanda Ananyilu deceased before his demise as aforesaid in trust of his brothers who include the 2<sup>nd</sup> defendant's father before it was transferred to the plaintiff herein under fraudulent means. That as aforesaid she is well aware that land parcel number Marama/Shirotsa/817 was registered in the name of the late Omukanda Ananyilu in his own trust and in trust of his brothers or her father the late Omollo Ananyilu deceased and any heirs born out of them.

I have carefully perused the documentary evidence before me. I had the opportunity to look at the agreement that produced by the plaintiff (PEX2) which agreements he purported to have been entered by him and the alleged vendors which agreements they dispute and note that the same consists of alterations and the vendor appears to be one Patrick Shisia Omukanda who was not the registered owner of the suit land at the material time. Secondly, that there is no evidence of the land control board consent that was given to the plaintiff and his purported

vendors to transfer the title herein to him given that this is an agricultural land where a consent must be obtained from the respective land control board to transfer the same. On perusal of the green card on record (DEX3) it showed the land was transferred to the plaintiff on the 6<sup>th</sup> January 1998. It is not disputed that the late Omukanda Ananyilu deceased alias Francis Omukanda Ananyilu deceased passed on in 1976. There is no evidence of any succession proceedings having taken place so one wonders who signed the transfer forms? It is apparent therefore that Patrick Shisia Omukanda and his brothers could have disinherited possible beneficiaries off their land by fraudulent means in that they had no locus to sale any portion of the deceased land comprised in land parcel number Marama/Shirotsa/817 since they had no letters of administration to have the locus standi when selling the same to the plaintiff. That similarly the plaintiff had no right to purport to purchase land from the aforementioned gentlemen in the absence of other beneficiaries and in the absence of letters of administration and fraudulently getting registered and transferring the same in his name. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**