



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 256 OF 2015

RAJAB MUSOTSI MABUKA.....PLAINTIFF

VERSUS

ALBERT MAKOKHA MANYASA

STEPHEN ABWORA OKUMU.....DEFENDANTS

JUDGEMENT

By a plaint dated 9th September 2015 the case is that, at all material times the plaintiff was the registered proprietor of L.R. No. NORTH WANGA/NAMAMALI/1190 measuring approximately 0.94 Ha. That however, the plaintiff has recently come to discover that the defendants fraudulently caused the suit land to be sub-divided into plots 1198 (in the plaintiff's name) and 1199 (first in the name of the 1st defendant and presently in the 2nd defendant's name). The particulars of the fraud are that, the 1st defendant purporting that the plaintiff disposed of plot 1199 measuring approximately 0.60 Ha to him at a consideration of Ksh. 73,000/=. The 1st defendant causing the sub-division of plot 1190 without due process of the law. The 1st defendant causing himself to be registered as the owner of plot 1199 without the due process of the law. The defendants transacting with regard to plot 1199 with the full and express knowledge that the same rightfully belonged to the plaintiff. The 2nd defendant causing his registration as the owner of plot 1199 with the full knowledge that the creation of the same was illegally done and none of the defendants taking up vacant possession of plot 1199 despite being the registered owners at various times. The plaintiff prays for judgment against the defendants jointly and/or severally for:-

1. Cancellation of plots 1198 and 1199 in order to restore plot 1190 in the name of the plaintiff.
2. Costs of this suit.

The 1st defendant testified that vide an agreement made on 19th June, 1995 (DEx1) the plaintiff sold to the 1st defendant a portion of land measuring 1.5 acres (0.6 Hectares) out of land parcel No. NORTH/WANGA/NAMAMALI/1190 at a consideration of Ksh. 73,000/= which was paid in full whereupon the plaintiff applied and obtained consent from Mumias Land Control Board for sub-division of the said parcel of land into two portions and he executed mutation forms which were registered before the plaintiff again applied for and obtained consent for the transfer of the portion of land measuring 0.6 Hectares (1.5 acres) designated as L.R NORTH WANGA/NAMAMALI/1199 into the name of the 1st defendant and on 12th September, 1996 the plaintiff executed forms for transfer of the said title into the name of the 1st defendant which transfer was effected on 18th September, 1996. That the plaintiff voluntarily executed all the relevant documents and carried out all the necessary processes and procedurally and lawfully transferred land parcel No. NORTH/WANGA/NAMAMALI/1199 into the name of the defendant and handed over to and the 1st defendant took vacant possession of the said parcel of land and he occupied and commenced using the said parcel of land exclusively, peacefully, openly, undisturbed and uninterrupted by inter alia planting trees and crops such as maize and beans and then sugarcane contracted to M/S. Mumias Sugar Co. Ltd from 1999. That vide an agreement made on 30th October, 1999 the plaintiff and his immediate neighbour one John Otuya agreed to open up a road of access to the 1st defendant's land by each surrendering a portion of land measuring 6 feet to enable tractors to be ferrying sugarcane with ease from the 1st defendant's land parcel No. NORTH/WANGA/NAMAMALI/1199. That by 1999 the 2nd defendant was a sugarcane farmer in respect of sugarcane contracted to Mumias Sugar Co. Ltd vide Account NO. 51360 which sugarcane was on a parcel of land neighbouring land No. N. WANGA/NAMAMALI/1199. The 1st defendant avers that the plaintiff's two wives namely Adicha Nerima Musotsi and Mwanaisha Akumu Musotsi and his sons David Hamis Musotsi, Peter Odhiambo, Hassan Moi Musotsi and John Kansila Musotsi approached him and told the 1st defendant that they were aware he had purchased land parcel No. NORTH/WANGA/NAMAMALI/1199 from the plaintiff but the latter had not given them any share out of the purchase price and pleaded for some ex-gratia payment and the 1st defendant out of good faith and in order to promote good neighbourliness paid them Ksh. 10,000/= on ex gratia basis vide an agreement made on 11th July, 2004.

DW2 the 2nd defendant testified that, vide an agreement made on 13th December, 2008 the 1st defendant with the knowledge of the plaintiff sold to the 2nd defendant the whole of land parcel No. NORTH/WANGA/NAMAMALI/1199 at a consideration of Ksh. 120,000/= which was paid in full where upon the 1st defendant handed over to the 2nd defendant vacant possession of the said parcel of land and transferred

his sugarcane contract into the name of the 2nd defendant who with the knowledge of the plaintiff has and continues to have exclusive, continuous, open and notorious occupation, possession and use of the said parcel of land to-date and the 2nd defendant maintains that he is an innocent purchaser for value without notice and the plaintiff is a total stranger to him and no claim lies against him. The 2nd defendant avers that in August, 2015 the plaintiff who is his neighbour approached him and asked him to pay him some money on the ground that land parcel No. NORTH/WANGA/NAMAMALI/1199 was originally the plaintiff's and the purchase price he had received from the defendant was not adequate, a request the 2nd defendant flatly refused whereupon the plaintiff threatened to evict him.

DW3 John Otuya who is a neighbour corroborated the defendant's case. He agreed to open up a road of access to the 1st defendant's land by each surrendering a portion of land measuring 6 feet to enable tractors to be ferrying sugarcane with ease from the 1st defendant's land parcel No. NORTH/WANGA/NAMAMALI/1199. DW4 is the village elder who drafted the sale agreement DEX1 and witnessed it. DW5 another village elder witnessed the second agreement when the ex gratia payment was paid to the plaintiff's family. DW6 and DW7 the plaintiff's 2nd wife and son respectively confirmed the land was sold to the 1st defendant and they later received the ex gratia payment.

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 his written statement stated that he was the registered owner of parcel of land known as No NORTH WANGA/NAMAMALI/1199 measuring approximately 0.94 Ha. He produced all the relevant agreements, transfer documents, mutation form, consents and sugarcane farming contracts with Mumias Sugar Factory (PEX 1 to 14) to show he bought the land and took possession. He later sold the land to 2nd defendant. DW3 to DW7 all corroborated his evidence. The plaintiff's case is a mere denial that he ever sold the land to the 1st defendant. He states that all the documents are a forgery and he never signed the same. He never called any witness to corroborate his story. DW4 the village elder who authored the land sale agreement and witnessed it DEX1 indeed confirms that the plaintiff sold the said suit land to the 1st defendant. I find that no evidence has been adduced to show that the defendant was involved in any illegality, any unprocedural process or corrupt scheme to obtain the title. I find that the sub-division of land parcel No. NORTH WANGA/NAMAMALI/1190 creating title Nos. NORTH WANGA/NAMAMALI/1198 and 1199 and the transfer of the title No. NORTH WANGA/NAMAMALI/1199 to the defendant and subsequently to the 2nd defendant was lawful, procedural, open, voluntary and proper and the exclusive possession, occupation and use thereof by the defendant and then the 2nd defendant is legal, proper and lawful and cannot in law be disturbed and as such the plaintiff is not entitled to orders of cancellation of land title Nos. NORTH WANGA/NAMAMALI/ 1198 and 1199 or restoration of title No. NORTH WANGA/NAMAMALI/1190 or any remedy at all. The plaintiff has failed to prove his case on a balance of probabilities and I dismiss his case with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE