



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 91 OF 2013**

**ODONGO ONDABA APELI**

**OUCHO ONDABA APELI.....PLAINTIFFS**

**VERSUS**

**STEPHEN OWINO APELI..... DEFENDANT**

**JUDGEMENT**

Briefly the case is that, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are entitled to possess and use land parcel numbers NORTH WANGA/MAYONI/721 and 722 since they are the administrators of the estate of the late Apel Ondaba Apeli. That the defendant who is a nephew to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs has trespassed into land parcel number NORTH WANGA/MAYONI/721 and 722 and started cultivating them without the authority of the plaintiff and or any legal rights. That the defendant has persisted with his illegal activities despite the fact that he has his own parcel of land which he is entitled to occupy and cultivate. That the defendant has refused, neglected and or failed to stop his illegal activity of trespass into land parcel numbers NORTH WANGA/MAYONI/721 and 722 despite demand and notice of intention to sue being served upon himself. That the plaintiff's claim against the defendant is for an order of injunction restraining the defendant either by himself, his agents and or assigns from trespassing into land parcel numbers NORTH WANGA/MAYONI/721 and 722. The plaintiff's prays for judgment against the defendant for the following orders:

- (i) Injunction.
- (ii) Costs of this suit.
- (iii) Any other order the honourable court may deem fit to grant.

The defendant states that land parcel No. NORTH WANGA/MAYONI/721 and 722 were sold by his deceased grandfather Apeli Ondaba Apeli when he was alive, in 1972 to one James M. Abudiku who has a court case with the plaintiff's herein, case No. Kakamega HCCC No. 63 of 2010. That the defendant avers that land parcel No. NORTH WANGA/MAYONI/721 does not exist as the title was closed upon subdivision of the same by the plaintiffs herein on 14<sup>th</sup> November 2003 and portions thereof sold to a third party from whom the plaintiffs received consideration and not the defendant. The defendant avers that this suit is totally misplaced, an abuse of the court process as the defendant has no dealings in the suit land nor had he any dealings prior to this suit. Accordingly the defendant avers the plaintiffs are not entitled to the orders they are seeking as the suit lacks merit, unsustainable and the plaint is vague. He is not in possession of the suit land and land parcel No. NORTH WANGA/MAYONI/722 belongs to one Remigius Ngaanyi Waiteri.

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.”*

PW1 the 1<sup>st</sup> plaintiff testified that they are entitled to possess and use land parcel numbers NORTH WANGA/MAYONI/721 and 722 since they are the administrators of the estate of the late Apel Ondaba Apeli. That the defendant who is a nephew to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs has trespassed into land parcels numbers NORTH WANGA/MAYONI/721 and 722 and started cultivating them without the authority of the plaintiff and or any legal rights. That the defendant has persisted with his illegal activities despite the fact that he has his own parcel of land which he is entitled to occupy and cultivate.

The defendant who testified in court together with his written statement stated that land parcel No. NORTH WANGA/MAYONI/721 and 722 were sold by his deceased grandfather Apeli Ondaba Apeli when he was live, in 1972 to one James M. Abudiku who has a court case with the plaintiff’s herein, case No. Kakamega HCCC No. 63 of 2010.

I have perused the exhibits on record that is, DEx4 and find that, land parcel No. NORTH WANGA/MAYONI/721 does not exist as the title was closed upon sub-division of the same by the plaintiffs herein on 14<sup>th</sup> November 2003 and portions thereof sold to a third party, this was long before this suit was filed. It has come out in evidence that the defendant is not in possession of the suit land and land parcel No. NORTH WANGA/MAYONI/722 belongs to one Remigius Ngaanyi Waiteri. The said third party is not party to this suit. I find that, this suit is totally misplaced, an abuse of the court process as the defendant has no dealings in the suit land nor had he any dealings prior to this suit. Accordingly the plaintiffs are not entitled to the orders they are seeking as the suit lacks merit and unsustainable. 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 19<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**