



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 21 OF 2013**

**ZADOCK OBENDA ISAYA.....PLAINTIFF**

**VERSUS**

**NIXON MBOKU AFANDA.....DEFENDANT**

**JUDGEMENT**

In this case the plaintiff avers that in the year 2004 he purchased a portion of land from one Josephat Ogonda Inguva measuring approximately 0.11 ha from parcel of land No. S/MARAGOLI/BUGONDA/602 at a consideration of Ksh. 140,000/= which sum of money was paid in full. The plaintiff avers that the said portion of land he had purchased a title to the said was processed designated as S/MARAGOLI/BUGONDA/2937 measuring approximately 0.11 Ha with a clear demarcation on the ground. The plaintiff avers that the said vendor the late Josephat Ogonda Inguva offered to sell him his remaining portion of land designated as S/MARAGOLI/BUGONDA/2936 (PEX1 is the title deed) on condition that since he was ill and with no other relative, the plaintiff herein was to take charge of his funeral upon his demise. The plaintiff avers that he and the vendor attended all necessary land control board and consents obtained effectively transferring the said parcel of land to the plaintiff herein registration was effected on 30<sup>th</sup> April, 2008. The plaintiff avers that upon the death of the vendor Josephat Ogonda Inguva the defendant herein being the area assistant chief has without any justifiable cause and/or excuse trespassed onto the plaintiff parcel of land above land No. S/MARAGOLI/BUGONDA/2936 by planting thereon maize and beans and bananas thereby denying the plaintiff peaceful use of his legally acquired property. The plaintiff avers that as an administrator, the action of the defendant amounts to an abuse of office thereby punishable by law. The plaintiff therefore prays for an order of permanent injunction restraining the defendant either by himself or through his agents and/or servants from ever laying claim onto, trespassing, moving onto, farming and/or in any other way from interfering with the plaintiff peaceful use of his parcel of land No. S/MARAGOLI/BUGONDA/2936. The plaintiff prays for judgment against the defendant for:-

1. An order of permanent injunction restraining the defendant either by himself or through his agents and/or servants or any one acting under his direction from ever laying claim onto, trespassing, moving onto, farming and/or in any other way from interfering with the plaintiff peaceful use of his parcel of land No. S/MARAGOLI/BUGONDA/2936.
2. Costs of the suit be borne by the defendant.
3. Any other relief this honourable court may deem fit and just to grant.

The defendant submitted that the register in respect of land parcel S. MARAGOLI/BUGONDA/1236 shows that suit parcel was reverted into the deceased's names one Josphat Ogonda. The said suit parcel is now part of the estate which is being succeeded in Vihiga vide succession cause No. 25 of 2014, as evidence by the grant which was produced in court as evidence. As such there is no land known as S. MARAGOLI/BUGONDA/1236 in the name of the plaintiff which can give rise to the orders sought. That land is in the name of the deceased one Josphat Ogonda and if the plaintiff so feels he has a claim then he sought to raise his grievances in the succession cause at Vihiga. Though he bought the parcel from the family of the deceased, he is not the absolute owner yet. The defendant adduced evidence and stated that he undertook due diligence in ensuring that before he purchased the suit land it was in the name of the deceased. The land registrar also summoned the plaintiff to explain how he obtained title in respect of the suit property which was later cancelled. In a nutshell, the plaintiff has not satisfactorily fulfilled the ingredients required in granting of the orders sought. DW2 and DW3 testified that they sold the land to the defendant who is their nephew because he took care of the medical and funeral expenses of the deceased.

This court has carefully considered the evidence and the submissions herein. It is a finding of fact that the suit land parcel No. S/MARAGOLI/BUGONDA/2936 is registered in the name of the plaintiff herein. The plaintiff testified that he bought a portion from Josphat Ogonda (deceased) the suit parcel originally the land was S., MARAGOLI/BUGONDA/602. He caused the subdivision of the said land parcel in 2008 where the original title resulted into S. MARAGOLI/BUGONDA/1237 in his name and 1236 remained in Josphat Ogonda's name. It is a finding of fact that Josphat Ogonda died on the 28<sup>th</sup> day of June, 2009. The plaintiff caused the transfer of S. MARAGOLI/BUGONDA/2936 on 29<sup>th</sup> October, 2009. He produced transfer documents to prove the said transaction.

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.”*

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 adduced evidence and stated that he undertook due diligence in ensuring that before he purchased the suit land it was in the name of the deceased. He has not produced any documentary evidence to back his claim. I find that there was no land for sell by the time he claims to have bought the same. The land was not available by the time the succession cause was filed in court. His witnesses testified that they sold him the land as he had helped them with the medical and funeral expenses. I find that no evidence has been adduced to show that the plaintiff obtained the title illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order of permanent injunction restraining the defendant either by himself or through his agents and/or servants or any one acting under his direction from ever laying claim onto, trespassing, moving onto, farming and/or in any other way from interfering with the plaintiff peaceful use of his parcel of land No. S/MARAGOLI/BUGONDA/2936.
2. Costs of the suit be borne by the defendant.

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**