



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 7 OF 2013

MIRIAM SHISANYA.....PLAINTIFF

VERSUS

REUBEN SHIVACHI MUNYOVI.....DEFENDANT

JUDGEMENT

In this case the plaintiff is a widow of Eliezer Chisanya Munyobi and sues on her own behalf as well as on behalf of the Estate of Eliezer Chisanya Munyobi. The defendant is the registered owner of LAND PARCEL NO. ISUKHA/SHIRERE/1138 measuring approximately 1 hectare. The plaintiff avers that the defendant transferred the land into his names from Charles Mmbwavi Itolondo who held the said land in trust for the defendant and the plaintiff's husband one Eliezer Chisanya Munyobi (now deceased) and the plaintiff claims her husband's half share or interest in Land Parcel No. Isukha/Shirere/1138. That Land Parcel No. Isukha/Shirere /1138 was to be transferred in joint names of the defendant and the plaintiff's husband Eliezer Chisanya Munyobi but the defendant transferred into his name. The plaintiff's claim against the defendant is for half share of land parcel No. Isukha/Shirere/1138 being her late husband's share which half share of the said land is held by the defendant in trust for the estate of the deceased Eliezer Chisanya Munyobi. The plaintiff prays for judgment against the defendant for:-

1. Half share of Land Parcel No. Isukha/Shirere/1138.
2. Costs of this suit.

The Defendant admits that he is the registered owner of the parcel of land known as ISUKHA/SHIRERE/1138 but denies that he holds the same in trust for himself and the Plaintiff. The Defendant avers that he acquired title to the said land parcel No. ISUKHA/SHIRERE/1138 from Charles Mmbwavi Itolondo for valuable consideration namely an exchange with land title No. ISUKHA/MUKHONJE/538 which the Defendant had acquired from his late father Isaya Munyovi Arikama who had sold to a third party one Clement Mwenesi but who on demand received a refund of the purchase price from the Defendant thereby transferring absolute ownership to the said land parcel no. ISUKHA/MUKHONJE/538. The Defendant further avers that prior to exchanging the title NO. ISUKHA/SHIRERE/1138 with title, NO. ISUKHA/MUKHONJE/538 the Defendant was in exclusive use of the latter. The Defendant further avers that although the formal exchange of the two titles was effected in or about 2006, the parties were using the respective titles from as early as the early 1970s to the total exclusion of the Plaintiff or her late husband. The Defendant avers that the Plaintiff is the registered owner of title No. ISUKHA/SHIRERE/1134 being her late husband's entitlement from their late father's estate and has therefore no claim whatsoever over title no. ISUKHA/SHIRERE/1197. In the alternative but entirely without prejudice to the foregoing the defendant avers that the Defendant having single handedly refunded the purchase price in respect of land parcel No. ISUKHA/MUKHONJE/538 to one Clement Mwenesi without any contribution from the Plaintiff's late husband, the Plaintiff is not as of right entitled to a share of the exchanged title No. ISUKHA/SHIRERE/1138 without first reimbursing to the Defendant part of the expenses incurred by the Defendant in reclaiming the said land parcel No. ISUKHA/MUKHONJE/538 at the current market value which in 2009 was assessed by elders at Kshs. 90,000/= but is now upwards to Kshs. 200,000/=. The Defendant avers that any previous offers made to the Plaintiff or her deceased husband for a portion of land parcel No. ISUKHA/SHIRERE/1138 while being specifically denied herein could only be treated as an ex gratia gesture without any legally binding obligations.

This court has carefully considered the case and the submissions herein. The plaintiff's claim against the defendant is that land parcel ISUKHA/SHIRERE/1138 which is registered in the names of the defendant was to be transferred in joint names of the plaintiff and the defendant. It is the plaintiff's evidence that land parcel ISUKHA/SHIRERE/1138 was to be shared equally between the defendant and her late husband. 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.”

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the defendant. 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 in this case is the widow of Eliezer Chisanya Munyobi and sues on her own behalf as well as on behalf of the Estate of Eliezer Chisanya Munyobi. The defendant is the registered owner of LAND PARCEL NO. ISUKHA/SHIRERE/1138 measuring approximately 1 hectare. The plaintiff avers that the defendant transferred the land into his names from Charles Mmbwavi Itolondo who held the said land in trust for the defendant and the plaintiff’s husband one Eliezer Chisanya Munyobi (now deceased) and the plaintiff claims her husband’s half share or interest in Land Parcel No. Isukha/Shirere/1138. That Land Parcel No. Isukha/Shirere /1138 was to be transferred in joint names of the defendant and the plaintiff’s husband Eliezer Chisanya Munyobi but the defendant transferred into his name. The plaintiff’s claim against the defendant is for half share of land parcel No. Isukha/Shirere/1138 being her late husband’s share which half share of the said land is held by the defendant in trust for the estate of the deceased Eliezer Chisanya Munyobi.

In this case the Defendant admits that he is the registered owner of the parcel of land known as ISUKHA/SHIRERE/1138 but denies that he holds the same in trust for himself and the Plaintiff. Be that as it may, the plaintiff produced a letter from the defendant reminding the plaintiff’s husband that they were to meet all transaction cost to enable the said parcel be transferred to both of them. The defendant decided to meet all the costs. When the family had a meeting on 21st February, 2011 the defendant agreed to be paid Ksh. 90,000/= (Ninety thousand) only as transaction cost. It is the Evidence of PW2 Japheth Itenija that as the secretary, the defendant agreed to refund the said amount but later changed his mind. The defendant confirmed that he wrote a letter and indeed there was a meeting held in relation to the transfer of the said parcel. I find that, the defendant was fraudulent in going and registering the said suit land in his name. I find that the plaintiff’s claim against the defendant for half share of land parcel No. Isukha/Shirere/1138 being her late husband’s share which half share of the said land is held by the defendant in trust for the estate of the deceased Eliezer Chisanya Munyobi has been established by oral and documentary evidence. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. That the title deed issued in the names of Rueben Shivachi Munyovi as the sole proprietor of land parcel No. Isukha/Shirere/1138 be cancelled and or revoked and half of the said land be transferred to the plaintiff herein as the sole proprietor.

2. That costs to be borne by the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE