



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 15 OF 2013

SEVENZIA A. AMUTI.....PLAINTIFF

VERSUS

KAITANO ASHIONO EMBALI.....DEFENDANT

JUDGEMENT

The plaintiff brings this suit in the capacity as the personal representative of the estate of Ibrahim Mukanzi who was the registered owner of parcel of land No. Idakho/Shivalaga/457 (PEx1 is the letter of grant). The plaintiff avers that the deceased was her father and in the year 2000 he suffered dislocation of his hip which had initially sustained injuries arising from a road traffic accident. The plaintiff avers that due to the deceased illness and condition he could not walk long distances and most of the time he was in his compound. The plaintiff avers that in the year 2005 the deceased condition worsened and was bedridden and she is the one who used to take care of her deceased father by washing him and cleaning him whenever he messed up as there was no one else to take care of him. The plaintiff avers that immediately upon the death of his father the defendant fenced off part of the parcel of land number Idakho/Shivagala/457 and started constructing a house thereon. The plaintiff avers that she decided to conduct a search of their parcel of land No. Idakho/Shivagala/457 and to her surprise the said parcel of land had been closed on subdivision and created other title number IDAKHO/SHIVAGALA/2542 – 2545 and on further conduction of search to the purported number created thereon the plaintiff discovered that registration had been effected as follows:-

- i. 3/11/2010 L.R. NO. KAKAMEGA/SHIVAGALA/457 was closed on subdivision to created title number IDAKHO/SHIVAGALA/2542-2545.
- ii. 16/1/2010 L.R. NO. IDAKHO/SHIVAGALA/2542 was transferred to KaitanoAshionoEmbaliLukhutsa and a title deed issued on 6/12/2010.
- iii. 3/11/2010 L.R. NO. IDAKHO/SHIVAGALA/2543, 2544 and 2545 were retained in the names of Ibrahim Mukanzi.

The plaintiff avers that all transaction leading to closure and subdivision of parcel of land No. Idakho/Shivagala/457 were fraudulent and/or moved with irregularities cause by the defendant herein. The plaintiff avers that accordingly they have suffered irreparable loss due to the fraudulent action of the defendant and seek redress from the honourable court as they have been rendered landless. The plaintiff further avers that the defendant as a result of the forged title deed took advantage of the same to cause the remains of his family members who died to be interred on the deceased parcel of land which the plaintiff prays for their exhumation from their land herein. The plaintiff further prays for cancellation of title No. Idakho/Shivakala/2542 registered in the defendant names cancelled and all subsequent title created out of the deceased parcel of land No. Idakho/Shivagala/457 cancelled and the same reverted back to the deceased name to enable smooth succession of the deceased estate. The plaintiff further prays for an order of eviction to issue against the defendant from parcel of land No. Idakho/Shivakala/457 and/or any title created there from to wit; L.R. IDAKHO/SHIVAKALA/2542. The plaintiff prays for judgment against the defendant for:-

- a. The plaintiff further prays for cancellation of title No. Idakho/Shivakala/2542 registered in the defendant name cancelled and all subsequent title created out of the deceased parcel of land No. Idakho/Shivakala/457 cancelled and the same reverted back to the deceased name to enable smooth succession of the deceased estate.
- b. The plaintiff further prays for an order of eviction to issue against the defendant for parcel of land No. Idakho/Shivakala/457 and/or any title created therefrom to wit: L.R. IDAKHO/SHIVAKALA/2542.
- c. Costs of this suit.
- d. That any other relief this honourable court deems fit and just in the circumstances to grant.

PW2 and PW2 corroborated the plaintiff's evidence they stated that the said Ibrahim Mukanzihad an accident and was an invalid for the last five years of his life. The late Ibrahim Mukanziwas illiterate as he never went to school and could not read or write.

The defendant submitted that Ibrahim Mukanzi was the registered owner of Land parcel No. Idakho/Shivagala/457, the defendant denies that the plaintiff is the personal representative of the estate of Ibrahim Mukanzi, denies that she is the deceased's daughter and or related to him in any way and the plaintiff. The defendant avers that on 1st July, 2009, he entered into a land sale agreement with the deceased Ibrahim Mukanzi which agreement was duly witnessed by several people, full consideration was paid, the defendant took immediate vacant possession land on which he has since stayed with his family to-date with full knowledge of the plaintiff. The defendant avers that he purchased 0.25 Ha of land out of Land Parcel No. Idakho/Shivagala/457 from the deceased, followed normal procedure whereafter the land was subdivided into three portions designed as follows:-

- i. Idakho/Shivagala/2542 registered in the defendant's names.
- ii. Idakho/Shivagala/2543, 2544 and 2545 registered in the deceased's sons' names namely Silvanus, Protus and Kizito.

The defendant avers that the wrong passport size photographs was due to a mix up in the survey office which mistake was investigated and corrected and does not in anyway amount to fraud and/or irregularity and the defendant called the surveyor a witness in this case. DW4 the surveyor states that the photo on the transfer form was the wrong one but it was a mistake and he was to change it. DW2 and DW3 all confirmed that they were witnesses to the sale agreement.

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.”

It is not in dispute that Idakho/Shivagala/2542 being the subdivision of Idakho/Shivagala/457 is registered in the name of the defendant herein. The plaintiff avers that all transaction leading to closure and subdivision of parcel of land No. Idakho/Shivagala/457 were fraudulent and/or moved with irregularities cause by the defendant herein. It is the plaintiff's evidence that her father Ibrahim Mukanzi was too sick at the time of the sale agreement to participate in the same. I have perused the documents adduced as evidence in this matter. It is curious to find that the purchaser signed one agreement and used a thumb print on the other. PW2 a clan elder testified that the late was illiterate and could not have signed the agreement. I believe him. Looking at the sale agreement it is not disputed that the photo of the purchaser is not the one of the seller Ibrahim Mukanzi and the surveyor states that this is the photo that he was given by the seller's son. Indeed he confesses that the transfer documents were brought to him already signed. It is clear to me that the said Ibrahim Mukanzi was not party to this agreement. There is also a contradiction on the purchase price. The sale agreement stated it was 300,000/= Kshs while the transfer documents state it was 50,000/= kshs. Lastly from the minutes of the land control board dated 13th May 2010 it appears that consent to transfer the suit land was never given or discussed as indicated in the letter of consent PEx5. I find that all transactions leading to closure and subdivision of parcel of land No. Idakho/Shivagala/457 were fraudulent and/or moved with irregularities caused by the defendant herein. I find the defence frivolous and I reject it. I find that the plaintiff has proved beneficial interest of the suit land together with other family members. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. Cancellation of title No. Idakho/Shivakala/2542 registered in the defendant name cancelled and all subsequent title created out of the deceased parcel of land No. Idakho/Shivakala/457 cancelled and the same reverted back to the deceased name to enable smooth succession of the deceased estate.
2. The defendant is to vacate from parcel of land No. Idakho/Shivakala/457 and/or any title created therefrom to wit; L.R. IDAKHO/SHIVAKALA/2542 within the next 6 (six) months and in default eviction order to issue forthwith.

3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE