



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 167 OF 2017

ADUKAN LODUNG JENIPHER 1ST PLAINTIFF

JOSEPH NDILE KIRAGAVA 2ND PLAINTIFF

VERSUS

PROTUS IMBALA RAPANDO.....DEFENDANT

JUDGEMENT

By a plaint dated 26th May 2017, the late Godfrey Lushacka Kiragava bought about 0.76 Ha of land parcel number Butsotso/Esumeyia/118 from the late Richard Nduku Luchendo. That the late Richard Nduku Luchendo died before transferring the portion of land to the late Godfrey Lushacka Kiragava. That the late Godfrey Lushacka Kiragava settled his family on the portion of 0.76 ha of land parcel number Butsotso/Esumeyia/118. That the defendant petitioned for letters of administration of the estate of the late Richard Nduku Luchendo and he was issued with letters of administration vide Kakamega High Court Succession Cause number 235 of 2000. That the defendant was given consent by the family members of the late Richard Nduku Luchendo to obtain letters of administration even though he was a purchaser of apportion of the estate. That the defendant upon obtaining the letters of administration applied for confirmation of the grant of letters of administration and distributed the estate among all the beneficiaries. That land parcel number Butsotso/Esumeyia/118 was sub-divided into seven portions by the consent of all parties vide succession cause number kakamega HC Succession No. 235 of 2000. That the defendant sub-divided land parcel number Butsotso/Esumeyia/118 into land parcel numbers Butsotso/Esumeyia/4386, 4388, 4389, 4390, 4391 and 4392 which he gave the beneficiaries as follows:-

- (a) Butsotso/Esumeyia/4386 – Protus Imbala Rapando.
- (b) Butsotso/Esumeyia/4387 – Protus Imbala Rapando.
- (c) Butsotso/Esumeyia/4388 – Benard Shikuku Nduku.
- (d) Butsotso/Esumeyia/4389 – Sabeth Nduku
- (e) Butsotso/Esumeyia/4390 – Gabriel Nduku
- (f) Butsotso/Esumeyia/4391 – Consolata Oronya Akhulunya
- (g) Butsotso/Esumeyia/4392 – Chibole Mushen

That the defendant gave himself two parcels of land that is land parcel numbers Butsotso/Esumeyia/4386 and 4387 and left the late Godfrey Lushacka Kiragava without any portion. The plaintiff avers that the action of the defendant was fraudulently and meant to deny the estate of the late Godfrey Lushacka Kiragava title to land parcel number Butsotso/Esumeyia/4387. That the late Godfrey Lushacka Kiragava was entitled to get land parcel number Butsotso/Esumeyia/4387 measuring about 0.76 Ha as per the certificate of confirmation of grant issued by the court. That the plaintiffs' claim against the defendant is for an order of cancellation of the title deed issued to the defendant in respect of land parcel number Butsotso/Esumeyia/4387 and issuance of a new title deed for the same in favour of the plaintiffs. The plaintiffs' avers that the defendant has refused, neglected and or refused to transfer land parcel number Butsotso/Esumeyia/4387 to themselves despite demand and notice of intention to sue being served upon himself. PW2 maintains that he is residing on the said piece of land from the time his brother Godfrey Lushacka Kirigava purchased it. The plaintiffs pray for judgment against the defendant for the following orders:-

- (a) Cancellation of the title deed issued to the defendant in respect of land parcel number Butsotso/Esumeyia/4387 and issuance of a new title deed for the same in favour of the plaintiffs.
- (b) Costs of this suit.

(c) Any other order the honourable court may deem fit to grant.

The defendant admits that he sub-divided parcel No. Butso/Esimeyia/118 into seven new portions. The defendant denies the allegation that he gave himself two portions of land that is Butso/Esimeyia/4386 and 4387 and left the late Godfrey Lushacka Kirigaya without any portion. The defendant avers that the late Godfrey Lushack Kiragaya got his share of land parcel No. Butso/Esimeyia/4387 on 12/9/2013 and his title deed on 20/9/2013. The defendant avers that the plaintiff is not entitled to orders of cancellation of land title No. Butso/Esimeyia/4387 and issuance a new title deed. The defendant maintains that the said Geoffrey Lushack sold the land to him and moved to Kitale. The said PW2 and family members were on the land when he bought it and have refused to move out. He produced a land sale agreement to confirm the said purchase.

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 Muniyo 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 a finding of fact that the defendant is the registered owner of land parcel no. Butso/Esimeyia/4387. The following facts are not in dispute; that the late Godfrey Lushacka Kiragava bought about 0.76 Ha of land parcel number Butso/Esimeyia/118 from the late Richard Nduku Luchendo. That the late Richard Nduku Luchendo died before transferring the portion of land to the late Godfrey Lushacka Kiragava. That the late Godfrey Lushacka Kiragava settled his family on the portion of 0.76 ha of land parcel number Butso/Esimeyia/118. That the defendant petitioned for letters of administration of the estate of the late Richard Nduku Luchendo and he was issued with letters of administration vide Kakamega High Court Succession Cause number 235 of 2000. That the defendant was given consent by the family members of the late Richard Nduku Luchendo to obtain letters of administration even though he was a purchaser of apportion of the estate. That the defendant upon obtaining the letters of administration applied for confirmation of the grant of letters of administration and distributed the estate among all the beneficiaries. That land parcel number Butso/Esimeyia/118 was sub-divided into seven portions by the consent of all parties vide succession cause number kakamega HC Succession No. 235 of 2000. That the defendant sub-divided land parcel number Butso/Esimeyia/118 into land parcel numbers Butso/Esimeyia/4386, 4388, 4389, 4390, 4391 and 4392 which he gave the beneficiaries. The late Godfrey Lushacka Kiragava was to get his share of land parcel No. Butso/Esimeyia/4387.

What is in dispute is that, the said Geoffrey Lushacka Kiragava sold the land to the defendant before he died. The defendant produced a sale agreement but did not call any witnesses to corroborate his evidence. Indeed he admitted that the late Geoffrey Lushacka Kiragava’s family resides on this land and did so when he allegedly purchased the same. They have beneficial interest on this land. I find that the plaintiffs’ have proved their case on a balance of probabilities and I grant the following orders;

1. Cancellation of the title deed issued to the defendant in respect of land parcel number Butso/Esimeyia/4387 and issuance of a new title deed for the same in favour of the plaintiffs.
2. Costs of this suit to the plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE