



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 34 OF 2016**

**JOHN LUCHEVELELI WASWA.....PLAINTIFF**

**VERSUS**

**LEVY INJENDI WASWA.....DEFENDANT**

**JUDGEMENT**

The plaintiff's claim against the defendant is for the parcels numbers S/KABRAS/CHEMUCHE/3284, S/KABRAS/CHEMUCHE/3285 and S/KABRAS/CHEMUCHE/3286 be reverted back to the original number S. KABRAS/CHEMUCHE/1158 and in the names of the deceased Waswa Nalianya for the family to file a succession for proper sharing among the family of the deceased only. It is his claim that, the defendant forged and subdivided L/P NO. S/KABRAS/CHEMUCHE/1158 into three portions and sold or transferred one portion to a non member of the deceased's family without even following proper procedure by filing succession and therefore the person occupying the portion on the said land vacate to allow proper procedure to be followed by the deceased's family. The letters of administration used by the defendant were a forgery and he was not involved. The plaintiff prays for judgment against the defendant is;

(a) The L/P NO.S KABRAS/CHEMUCHE/3284, 3285 and 3286 be reverted back to original number S. KABRAS/CHEMUCHE/1158 and the person who is occupying part of the land meant for the plaintiff to vacate the same and proper procedure be followed by all the family of the deceased.

(b) Cost of this suit.

DW1 the defendant testified that, the plaintiff herein is their elder brother who is now the remaining family chairman after the death of their mother who chaired their family meetings and co- chaired by the plaintiff herein. The plaintiff herein participated in all the family meetings and all events that took place of far as the land petitioning, sub- division and successor's plan was concerned. The plaintiff attended the family meeting which was chaired by their late mother and co-chaired by him the plaintiff herein, whereby it was in this family meeting that the defendant was picked as the family administrator. These meeting chaired by their late mother and co- chaired by, the plaintiff herein came as a result of the plaintiff failing to achieve the family goals. The family agreed and partitioned the L.P NO. S. KABRAS/CHEMUCHE/1158 into five (5) of 4 acres to each individual and 4 and 1/2 acre to the plaintiff herein whom they added 1/2 an acre and they did that as a show of respect to him as their elder brother, who did the allocation and petitioning of land to them.

The defendant took over the Administration mandate as assigned by his family members whereby he started executing his mandate by finding someone who expressed to him very clearly that he knew what should be done in the succession process. He relied most on the copies of documents availed to him by the surveyor doing the work such as 02/11/201 Mutation Form Letters of Grant and Certificate of Confirmation of Grant of Succession Cause No. 60 of 2006. DW2, DW3, DW4 and DW5 who are all his brothers corroborated the defendant's evidence.

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.”*

The plaintiff’s case is that the plaintiff and the defendants are blood brothers and their father Waswa Nalianya died intestate in 2002 leaving behind land parcel S. KABRAS/ CHEMUCHE/1158. Sometime in the year 2006 the land was subdivided vide Succession Cause No 60 of 2006 which was a forgery and not relating to the estate of the said Waswa Nalianya. The defendant in submissions admitted these facts and accepts that the said process was a forgery but places the blame on the surveyor whom he gave the work. I find that the Certificate of Confirmation of Grant of Succession Cause No. 60 of 2006 was a forgery and hence the subdivision and all titles issued therefrom are invalid. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. That the Land Parcels No. S KABRAS/CHEMUCHE/3284, 3285 and 3286 be cancelled and be reverted back to original number S. KABRAS/CHEMUCHE/1158 and in the names of the deceased Waswa Nalianya and the same to be subjected to Succession proceedings.
2. Cost of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**