



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 26 OF 2013

DORICA MASITSA BUNUKU..... PLAINTIFF

VERSUS

SAUL MUNANDI MAIKUVA DEFENDANT

JUDGEMENT

By a plaint dated 2nd January 2013, the plaintiff avers that she is the only surviving daughter to the late Sumba Muranda who was the registered owner of 5.8 ha L.R. NO. S. KABRAS/SHAMBERERE/994 on 9/7/1973. The defendant is a son to the late Yohana Maikuva Muranda who was the registered owner of L.R. NO. S. KABRAS/SHAMBERERE/993 measuring 30.5 Ha. That Sumba Muranda's brother the late Yohana Mayukuba was later registered on 18/6/74 as owner of L.R. NO. S. KABRAS/SHAMBERERE/994 vide land Succession Cause No. 17/73 and later corrected names on 16/8/74 to read Maikuba s/o Muranda otherwise known as Yohana Mayuba then issued with land certificate on 23/9/74. On becoming of age, the plaintiff asked the defendant's father if the plaintiff could cultivate her late father's piece of land. The defendant's father called the defendant and told him of the plaintiff's intention since the land was not his. The defendant refused saying that girls were not entitled to land inheritance. The plaintiff filed Kakamega High Court Civil Case No. 161/2000 against the defendant's father who died in 2001 before the case was concluded and the matter later abetted as there was no administrator to the estate of the defendant's father then. On 10/4/2012, the Abashikusi (Nawande clan) members sat and resolved that L.R. No. S. KABRAS/SHAMBERERE/994 belonged to the plaintiff as the only surviving beneficiary to the estate of her late father. On 15/4/2008, the plaintiff in company of William Indangasi Muranda conducted a search at the Kakamega District Lands Registry and discovered that L.R. NO. S. KABRAS/SHAMBERERE/994 was registered in the names Maikuba s/o Muranda. On 27/4/2012 the plaintiff in company of William Indangasi Muranda again conducted an official search at the Kakamega Lands office and discovered that L.R. NO. S. KABRAS/SHAMBERERE/993 had been subdivided by the defendant into two portions being L.R. NO. S. KABRAS/SHAMBERERE/3172 and 3173. On the same day 27/4/2012, the plaintiff in company of William Indangasi Muranda conducted a search on L.R. NO. S. KABRAS/SHAMBERERE/994 and discovered that the defendant had changed it to a new number S. KABRAS/SHAMBERERE/3185 measuring 5.8 Ha which was the acreage of L.R. NO. S. KABRAS/SHAMBERERE/994. On the same day 27/4/2012, the plaintiff in company of William Indangasi Muranda conducted a search on L.R. No. S. KABRAS/SHAMBERERE/3185 and discovered that the defendant had subdivided it into two portions L.R. NO. S. KABRAS/SHAMBERERE/3248 and 3249. The plaintiff states that the defendant has settled his family on the plaintiff's father's estate and intends to share out the said estate to his family members. On 27/7/2012, the plaintiff obtained a limited grant ad litem from Kakamega High Court vide P & A Cause No. 836/2012 giving the plaintiff authority to sue for her father's estate. The plaintiff's claim against the defendant is for orders cancelling all transfers and registrations arising from L.R. NO. S. KABRAS/SHAMBERERE/994 and reinstating it to its original ownership as at 1974, the plaintiff be registered as the absolute owner of L.R. NO. S. KABRAS/SHAMBERERE/994; and the defendant, family members, servants and agents be evicted and permanently barred from L.R. NO. S. KABRAS/SHAMBERERE/994. The plaintiff prays for judgment against the defendant for:-

- (a) Orders cancelling all transfers and registrations arising from L.R. NO. S. KABRAS/SHAMBERERE/994, reinstating it to its original ownership as at 1974, the plaintiff be registered as the absolute owner of L.R. NO. S. KABRAS/SHAMBERERE/994 and the defendant, his family members, servants and agents be evicted and permanently barred from L.R. No. S. KABRAS/SHAMBERERE/994.
- (b) Costs and interest of this suit.
- (c) Any other relief that this honourable court may deem fit to grant.

PW2, PW3 and PW4 all corroborated the plaintiff's evidence.

The defendant avers that the suit herein is res judicata as the issues raised therein if so were properly dealt within the case Kakamega District Magistrates Court Land Succession Cause No. 17 of 1973 and Kakamega HC Succession Cause No. 4 of 2008 and the instance case therein is therefore bad in law and abuse of the due process of court. The defendant avers that if the Abashikusi Nawade clan deliberated on matters concerning ownership of parcel of land no. S/KABRAS/SHAMBERERE/994 which is denied. The same is their opinion not enforceable in law and it amounts to intermeddling with a private property lawfully acquired by the defendant herein and their decision has no legal consequence thereto.

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 the late Sumba Muranda who was the registered owner of 5.8 ha L.R. NO. S. KABRAS/SHAMBERERE/994 on 9/7/1973. The defendant is a son to the late Yohana Maikuva Muranda who was the registered owner of L.R. NO. S. KABRAS/SHAMBERERE/993 measuring 30.5 Ha. That Sumba Muranda’s brother the late Yohana Mayukuba was later registered on 18/6/74 as owner of L.R. NO. S. KABRAS/SHAMBERERE/994 vide Land Succession Cause No. 17 of 1973. It is in evidence that the defendant obtained the title through Kakamega HC Succession Cause No. 4 of 2008. The plaintiff has produced the said proceedings of Land Succession Cause No. 17 of 1973 clearly stating that the said suit land was awarded to the defendant’s father.

In the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR, the court of Appeal held as follows;

“The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM’s court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate’s court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent’s counsel was duly served with the application and or a hearing notice and had failed to turn up.

It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

I find that the said ruling in Land Succession Cause No. 17 of 1973 was not set aside and still stands. As stated above, it is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable. Be that as it may, I find no evidence that the title held by the defendant was obtained through fraud or any corrupt scheme. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it with no orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE