



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 259 OF 2013**

***VIOLETI KAVULANI AYUMBA (suing as the administratrix of the***

***Estate of late PETER AYUMBA S/O VUGUNDU).....PLAINTIFF***

**VERSUS**

**LAWRENCE LING'ONDO VUGUNDU.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 9<sup>th</sup> September 2013 the plaintiff states that at all material times the plaintiff's late husband was the beneficial owner of a portion out of land parcel known as Kakamega/Bugina/165 upon inheriting the same from his father one Joseph Vugundu but registered in the name of the defendant and holding a portion of it in trust of his late brother Peter Ayumba. The plaintiff avers that the said Joseph Vugundu, the father in-law had four sons and two parcels of land, during the first registration of land he registered land parcel Kakamega/Bugina/165 in the name of the defendant, Lawrence Ling'ondo Vugundu for himself and in trust for plaintiff's late husband to share equally and the other 2 sons were given another land at Mululu area also to share equally. The plaintiff avers that she has lived peacefully on this land parcel with her husband and her brother in-law, the defendant but the plaintiff's late husband died before sub-division and acquiring title to his portion of land which his father had clearly demarcated on the ground and was buried on his portion of land on Kakamega/Bugina/165 where he had developed and established a home for his family. The plaintiff avers that sometimes after the death of her husband and father in law who were peacefully buried therein the defendant became violent and chased the plaintiff with her entire family out of the portion of land that was occupied by her and her late husband and he threatened dire consequences to the plaintiff together with the deceased children if they dare step on land Kakamega/Bugina/165 hence breached the trust. The plaintiff's claim against the defendant is for an order that land parcel Kakamega/Bugina/165 be subdivided into two equal portions of 0.4 ha each and one portion be transferred and be registered in the plaintiff's names for her behalf and on behalf of the children of her deceased husband one Peter Ayumba who have been disinherited. The plaintiff prays for judgment against the defendants for:-

- (a) An order for sub-division of land parcel Kakamega/Bugina/165 into two equal portions of 0.4 ha each and one portion be registered in the plaintiff's names, Violet Kavulani Ayumba on behalf of the children of her deceased husband, Peter Ayumba.
- (b) An order directing the defendant to surrender to the Land Registrar Vihiga the original title deed for Kakamega/Bugina/165 to facilitate registration of the sub-division.
- (c) Costs of this suit.
- (d) Any further relief the court deems fit to grant.

PW2 and PW3 corroborated the plaintiff's evidence.

The defendant DW1, admits that the plaintiff is the wife of the late Peter Ayumba but strongly denies that her husband was the beneficial or legal owner of title No. Kakamega/Bugina/165 and states that neither before nor after his death did the plaintiff's late husband have any title, interest or right in title No. Kakamega/Bugina/165 and denies any trust over the said piece of land. The defendant states that he is the son of the late Joseph Vugundu by his first wife and there was no will or direction by Joseph Vugundu that land title No. Kakamega/Bugina/165 be shared between the defendant and the late Peter Ayumba as him being a son of the second wife was entitled to share the second house's inheritance of the land out Mululu village together with his two brothers. The plaintiff has since 1980 when the husband died never lived on parcel number Kakamega/Bugina/165 but immediately re-married and moved to her new husband's in or around Kakamega town and has lived there ever since with her children from Peter Ayumba and her new husband. In the premises the defendant denies ever chasing the plaintiff from parcel number Kakamega/Bugina/165. The defendant states that he received land parcel number Kakamega/Bugina/165 as a gift from his late father and that Peter Ayumba, being an adult at the time the land was gifted to him, there was no intention that the land be shared between him and the late Peter Ayumba. The defendant further avers that his registration as owner of land parcel number Kakamega/Bugina/165 being a first registration, his title thereto cannot be challenged, cancelled or amended as provided for in section 143 (1) of the Registered Land Act. The defendant further states that the plaintiff's husband having died in 1980 and the plaintiff being aware of the matters she brings this complaint in the year 2008, when she lodged a complaint with the District Officer, Sabatia and later the Vihiga

Land Disputes Tribunal, the present suit is now time barred under the Limitation of Actions Act, and the defendant will apply to have this suit struck out.

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 defendant is the first registered owner of land parcel Kakamega/Bugina/165. It is the plaintiff’s evidence that her husband and his brother the defendant were to share the land equally and their father had subdivided the land when he was alive. PW2 the defendant’s brother and PW3 his uncle all corroborated this evidence. That the defendant registered the land in trust of his brother and his beneficiaries. Indeed the plaintiff had taken the defendant before the Vihiga District land Tribunal in civil case number 3 of 2009 where the tribunal ruled in favour of the plaintiff. However the defendant filed Judicial Review Application Number 6 of 2009 stating that the tribunal lacked jurisdiction to order the subdivision of the suit land. The Judge ruled in that matter that the application was merited however the interested party i.e. The plaintiff herein was to continue occupying her portion and should not be evicted until the suit is determined by the court. Whereas the court finds that the certificate of title was not acquired through a corrupt scheme. I find from the evidence before me that the defendant held the title in trust of his late brother Peter Ayumba and the wife of his late brother is a beneficial owner. It is clear in the evidence adduced that the plaintiff resided on the suit land until 2008. The defendant cannot now turn round and disinherit his brother’s family. It has come out in evidence that the land at Mululu village was to be shared by his other two brothers. I find that the plaintiff has established her case on a balance of probabilities and I grant the following orders;

1. An order for sub-division of land parcel Kakamega/Bugina/165 into two equal portions of 0.4 ha each and one portion be registered in the plaintiff’s names, Violet Kavulani Ayumba on behalf of the children of her deceased husband, Peter Ayumba.
2. An order directing the defendant to surrender to the Land Registrar Vihiga the original title deed for Kakamega/Bugina/165 to facilitate registration of the sub-division.
3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22<sup>ND</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**