



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 170 OF 2016**

**BARETA MUSANGA MWANGALE Suing on half of the estate of**

**HEZRON MWANGALE.....PLAINTIFF**

**VERSUS**

**MARTINA LUCIA MUSONYE Legal representative of the estate of**

**MARTIN MUSONYE MAJANJA.....DEFENDANT**

**JUDGEMENT**

This case is that, the plaintiff is the administratrix of the estate of Hezron Mwangale of land parcel number Isukha/Ileho/244. The defendant planted sugarcane on the plaintiff's land and he is unlawfully using the same. The plaintiff's claim against the defendant is for eviction and the removal of the sugar cane and also for a permanent injunction restraining him from interfering with the land. PW2 testified that he introduced the defendant to the said Hezron Mwangale but the defendant failed to pay the purchase price. He confirms that the defendant is using the land to date.

The defendant testified that he entered into an agreement with Hezron Mwangale on the 21<sup>st</sup> August 1991 to purchase the land parcel number Isukha/Ileho/244 which is 9 acres and he paid the purchase price in installments DEx1. The defendant took possession in 1992 and has been there since. He produced the application for consent and transfer form DEx. 3 and 4. He produced bank deposit slips DEx 2 a – e as proof of payment. DEx. 5 is an acknowledgement from the said Hezron Mwangale of part payment of Kshs 93,000/=.

This court has carefully considered the evidence and the submissions herein. At the hearing the plaintiff testified in her evidence she averred that her late husband was the registered sole proprietor of the suit land parcel known as Isukha/Ileho/244. She produced a 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.”*

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”.*

As stated above, the defendant testified that he entered into an agreement with Hezron Mwangale on the 21<sup>st</sup> August 1991 to purchase the land parcel number Isukha/Ileho/244 which is 9 acres and he paid the purchase price in installments DEx1. The defendant took possession in 1992 and has been there since. Indeed he has shown proof of payment. He then took possession and it is not disputed that he is still using the land. I find that the defendant has beneficial interest on the said land. The plaintiff admits in her oral evidence that there was another suit Kakamega HCCC No. 81 of 1994 where the defendant had sued her husband the late Hezron Mwangale concerning the suit land. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**