



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC NO. 239 OF 2017

FRANCIS NAMATSI SAKA (*Suing as personal*)

representative and administrator of the estate of

ELIAKIM SAKA OPIDO (deceased)PLAINTIFF

VERSUS

DISMAS KWEYU MALALASON.....DEFENDANT

JUDGMENT

The plaintiff's case is that the deceased Eliakim Saka Odipo, the plaintiff's father was at all material times the absolute registered owner of land parcel title number NORTH WANGA/MAYONI/679. On or about 10th February, 1983 the defendant without any colour of right, consent and or authority of the deceased fraudulently caused the deceased and parcel title Number NORTH WANGA/MAYONI/679 to be sub-divided and had himself registered as the owner of the new parcels Nos. NORTH WANGA/MAYONI/927, NO. NORTH WANGA/MAYONI/1542 and NORTH WANGA/MAYONI/1543. Purporting to execute without the consent of the deceased the application of the Land Control Board and transfer form to facilitate the transfer of land to himself. Forging the relevant documents of transfer of the suit land. Forging the plaintiff's signature on the relevant documents of transfer. Forging the consent for subdivision and transfer from the Land Control Board without participation of the deceased and failing to follow the legal procedure aforesaid. The plaintiff's claim against the defendant therefore is:-

1. Land title Nos. NORTH WANGA/MAYONI/927, NORTH WANGA/MAYONI/1542 and NORTH WANGA/MAYONI/1543 be cancelled and the same to revert to the original title registered in the names of the deceased to wit NORTH WANGA/MAYONI/679.
2. Upon prayer (a) being granted a permanent injunction restraining the defendant, either by himself, or through his servants and or agents and or employees from trespassing into, laying claim, or in any manner interfering with land parcel number NORTH WANGA/MAYONI/679.

PWI gave evidence that he is the administrator of the deceased Eliakim Saka Odipo estate (Grant of letters of administration PEx 6 and death certificate PEx 7). The said the deceased Eliakim Saka Odipo was the registered owner of land parcel NO. NORTH WANGA/MAYONI/926 and 927 measuring 1.14 Ha and 1.37 Ha respectively. On 15th August 1988 Dismas Kweyu Malalason fraudulently registered himself as the owner of land parcel NO. NORTH WANGA/MAYONI/1927. He subsequently sub

divided land parcel No. NORTH WANGA/MAYONI/926 into two parcels to wit NO. NORTH WANGA/MAYONI/1542 and 1543 (PEX 1,2,3,4 &5 green cards of the said parcels of land). He further transferred land parcel NO. NORTH WANGA/MAYONI/1927 to St. Maurice Mwira Secondary School on the 8th June 2009. In the year 2003, his father filed suit against him being Civil suit No. 81 of 2003 in this court claiming to recover the said parcels of land. Unfortunately his father passed away before the case was concluded. The suit abated but the court stated that he was at liberty to file another suit. He now prays that the land titles No. NORTH WANGA/MAYONI/927, No. NORTH WANGA/MAYONI/1542 and 1543 be cancelled and do revert to the original title No. NORTH WANGA/MAYONI/679.

The defendant, DW1, Dismas Kweyu Malalason stated that he knows the plaintiff herein being his relative and the son of Joakim Saka Odipo now deceased. The plaintiff sued him in this case claiming that land parcels No. NORTH WANGA/MAYONI/927, No. NORTH WANGA/MAYONI/1542 and No. NORTH WANGA/MAYONI/1543 be cancelled and reverted in the names of the deceased to wit No. NORTH WANGA/MAYONI/679. In the year 1983, he bought 3 acres from the father of the plaintiff in respect of parcel No. NORTH WANGA/MAYONI/679. The above mentioned parcel of land was lawfully subdivided into new parcels No. LR. NO. NORTH WANGA/MAYONI/926 and No. NORTH WANGA/MAYONI/927 respectively. That he was issued with the title in respect of LR. No. NORTH WANGA/MAYONI/927 and LR. No. NORTH WANGA/MAYONI/926 remained in the deceased name. In the year 1988 he further lawfully bought from the deceased ELIAKIM SAKA ODIPO 2 acres of land from LR. No. NORTH WANGA/MAYONI/926. The deceased agreed and signed all the relevant documents and transferred to him the 2 acres at Ksh. 12,000/=. In the year 1990 the deceased approached him again and informed him that he had found another buyer who wanted to give him Ksh. 20,000/= and therefore wanted to be added Ksh. 8,000/= or else he disposes of the said property to a third party. He agreed to add the deceased Ksh. 8,000/= and entered into another agreement for sale of the two acres. The deceased had earlier agreed to transfer the whole of L.R. No. NORTH WANGA/MAYONI/926 into his names pursuant to the agreement dated the 2nd June, 1988 so that he carves out 2 acres. He subdivided LR. No. NORTH WANGA/MAYONI/926 into new parcels of land L.R. No. NORTH WANGA/MAYONI/1542 and 1543. LR. No. NORTH WANGA/MAYONI/1542 is the one which comprised of 2 acres and obtained title to the same. LR. No. NORTH WANGA/MAYONI/1543 was to be transferred back into the deceased's name. The deceased further refused to sign the transfer form to obtain title of land parcel No. NORTH WANGA/MAYONI/1543 which was the remainder after carving out 2 acres despite having obtained letter of consent for transfer and the same in his name and the same has been pending until his death. The deceased alleged that he wanted more money in order to sign the relevant transfer form. The plaintiff has gone so far as building in his parcel of land LR. No. NORTH WANGA/MAYONI/1542 immediately after the death of his father. The defendant submits that he has never forged or fraudulently obtained the deceased's documents as alleged hence the plaintiff's claim should be rejected by this court. The defendant states that on or about the 8th August, 2008 the plaintiff trespassed on the defendant's parcel of land No. NORTH WANGA/MAYONI/1542, building on the said parcel of land a semi-permanent house, cultivating maize and leasing part of parcel No. NORTH WANGA/MAYONI/1542. The defendant's claim against the plaintiff is therefore an order of eviction from parcel No. NORTH WANGA/MAYONI/1542.

This court has carefully considered the plaintiff's and the defendant's case and the submissions therein. The plaintiff alleges that the defendant forged documents in order to get the titles. The defendant gave evidence that he bought the land from the plaintiff's father. He explained in detail how in the year 1983, he bought 3 acres from the father of the plaintiff in respect of parcel No. NORTH WANGA/MAYONI/679. The above mentioned parcel of land was lawfully subdivided into new parcels LR. No. NORTH WANGA/MAYONI/926 and No. NORTH WANGA/MAYONI/927 respectively. That he was issued with title in respect of LR. No. NORTH WANGA/MAYONI/927 and LR. No. NORTH WANGA/MAYONI/926 remained in the deceased name. In the year 1988 he further lawfully bought from the deceased Eliakin Saka Odipo 2 acres of land from LR. No. NORTH WANGA/MAYONI/926. The deceased agreed and signed all the relevant documents and transferred to him the 2 acres at Ksh. 12,000/=. In the year 1990 the deceased approached him again and informed him that he had found another buyer who wanted to give him Ksh. 20,000/= and therefore wanted to be added Ksh. 8,000/= or else he disposes of the said property to a third party. He agreed to add the deceased Ksh. 8,000/= and entered into another agreement for sale of the two acres. The deceased had earlier agreed to transfer the

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“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.”

Looking at the facts of this case, the defendant has produced documents in the pleadings in his assertion of ownership over the disputed parcel of land, showing the ownership of the said parcel of land. 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.

In the instant case, evidence adduced by the defendant has not been challenged as evidence of any fraud or misrepresentation on the part of the defendant was not adduced in court. Nor any evidence that the certificates of title have been acquired illegally, unprocedurally or through a corrupt scheme. I find the plaintiff has failed to establish his case on a balance of probabilities and that indeed he was even a witness in the said sale agreements. I therefore find that the defendant is the lawfully registered owner of the suit parcel of land namely numbers NORTH WANGA/MAYONI/927, NORTH WANGA/MAYONI/1542

and NORTH WANGA/MAYONI/1543. I therefore find the counter claim has merit and grant the following orders;

1. That the plaintiff is given three (3) months to vacate the said suit parcel of land namely; NORTH WANGA/MAYONI/1542 and in default he is to be evicted forthwith.
2. Costs of this case to be borne by the plaintiff.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE