



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

E LC NO. 651 OF 2014

PETER MUNALA KATAKA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JANE INYANJE M. KATAKA ::::::::::::::::::::::::::::::::::::::: DEFENDANT

JUDGMENT

The plaintiff in the plaint avers that at all material times to this suit he was the administrator of the estate of the deceased Mark Kataka. The plaintiff avers that the deceased prior to his death had purchased L.R. NO. SOUTH/KABRAS/SAMITSI/1271 and registered the same in the defendant's name to hold the same in trust for the beneficiaries of the deceased estate. The plaintiff avers that the defendant without any justifiable cause decided to dispose off the L.R. NO. SOUTH/KABRAS/SAMITSI/1271 to the prejudice of other beneficiaries of the deceased's estate. The plaintiff avers that the defendant sold the suit parcel of land to one Erick Isaac Chisutia who has since decided to take possession of the suit parcel of land. The plaintiff avers that he has since filed a Succession Cause No. 175 of 2014 at Bungoma which is still pending hearing and determination. The plaintiff avers that as a measure to safeguard the interests of other beneficiaries in the estate of deceased did lodge a caution and restriction respectively on the suit parcel of land on the 29th day of August, 2014. The plaintiff avers that the defendant's actions are unlawful and only intended to disinherit beneficiaries in the deceased estate as the suit parcel of land comprises of the deceased estate as the defendant was merely a trustee. The plaintiff avers that the land sale transaction between the defendant and Erick Isaac Chisutia should be declared null and void. The plaintiff avers that other beneficiaries in the estate of the deceased have been occasioned massive loss and damage. This suit is neither res-subjudice nor res-judicata. the plaintiff prays for judgment against the defendant for; Cancellation of the land sale transaction between the defendant and Erick Isaac Chisutia and any other 3rd parties. Costs of the suit.

Despite the hearing date having been taken by consent the plaintiff failed to attend court and his case was dismissed and the court proceeded with the defence hearing.

DW1 the defendant gave evidence and denies that the deceased purchased land Parcel No. SOUTH/KARAS/SAMITSI/1271 and registered the same in the defendant's names to hold in trust for the beneficiaries of the deceased's estate and puts the plaintiff to strict proof to the contrary. The defendant stated that the deceased prior to his death possessed land parcel No. SOUTH KABRAS/SAMITSI/446 which he subdivided into parts for his 3 wives, the defendant being the 3rd wife of the deceased and the defendant processed title to her portion of land which latter became known as SOUTH KABRAS/SAMITSI/1271 (DEx 1) leaving SOUTH KABRAS/SAMITSI/1270 with proper boundaries marked for the 1st and 2nd wives of the deceased and that the plaintiff has no claim over the defendant's land parcel and further the issue of trust is misplaced. She produced a copy of the will (DEx6).

The said portion was then registered in the names of the defendant solely and exclusive by the deceased owner and rather the plaintiff nor his family members have a legally recognizable claim over the suit land and for that reason the defendant did not require the permission of the beneficiaries of the deceased's estate to dispose off her legally owned land parcel No. SOUTH/KABRAS/SAMITSI/1271 nor did she require to notify the said beneficiaries and the defendant. The defendant states that Bungoma High Court Succession Cause No. 175 of 2014 has nothing to do with her legal ownership of Land Parcel No. SOUTH/KABRAS/SAMITSI/1271.

The defendant submitted that the plaintiff, his agents and representatives illegally and without any colour of right lodged a caution on her land parcel No. SOUTH/KABRAS/SAMITSI/1271 on the 10th July 2014 and a restriction on the 29th August 2014 and the defendant prays for removal of the said caution and restriction. The defendant prays that the plaintiff suit be dismissed and the counter claim be allowed with costs for removal of caution and restriction lodged by the plaintiff his agents and or representative on the defendant's land parcel No. SOUTH/KABRAS/SAMITSI/1271. Costs of this suit.

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.”

Looking at the facts of this case, the defendant has produced documents in the pleadings in her assertion of ownership over the disputed parcel of land, namely the Title Deed, the Official Search, Mutation from and Map (DEx 1,2,4&5) 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

certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. I therefore find that the defendant is the lawfully registered owner of the suit parcel of land namely number SOUTH KABRAS/SAMITSI/1271. The plaint having earlier been dismissed I order that the counter claim is allowed with costs for removal of caution and restriction lodged by the plaintiff his agents and or representative on the defendant's land parcel No. SOUTH/KABRAS/SAMITSI/1271. Costs of this suit to the defendant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF JULY 2017.

N. A. MATHEKA

JUDGE