



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 321 OF 2014

BELISI K. ASENSA (*suing as the administrator of the late*

NATHAN ASENSA NDUGU.....**PLAINTIFF**

VERSUS

JAPHET ISINGA.....**DEFENDANT**

JUDGEMENT

The plaintiff's case is that she is the legal administrator of the Estate of Nathan AsenaNdugu(deceased) and she brings this action for the benefit of the Estate of the deceased having been granted letters of administration ad litem in Kakamega High Court Succession Cause No. 713 of 2011. At all material times the plaintiff's late husband was the owner of the land parcel known as KAKAMEGA/ MBALE/545 measuring 0.2 Ha upon transmission and upon inheriting the same from his father Barnaba Ndugu the original proprietor. On or about the 15th October 1988 the deceased, Nathan Asena Ndugu sold to the defendant, Japhet Isinga a portion of land out of land parcel KAKAMEGA/ MBALE/545 measuring 47ft by 78ft at a consideration of Ksh. 70,000/=. The plaintiff avers that on or about 21st November 1994 the defendant fraudulently transferred the whole parcel of land into his names other than causing sub division as was required. The plaintiff avers that she has lived and continues to live on the said land while the defendant utilizes the portion measuring 47ft by 78ft to date. On or about 25th April 2012 the defendant issued to the plaintiff demand notice to vacate the suit land despite knowing that the registration giving rise to his registration of the whole land into his names was fraudulent. The plaintiff's claim against the defendant is for an order for cancellation of the defendant's registration as the owner of land parcel KAKAMEGA/ MBALE/545 as per the records at the lands registry and the same reverts into the names of Nathan AsenaNdugu for purposes of proper sub division as per the agreement between the deceased and the defendant and upon the defendant proving clearance of the purchase price. The plaintiff further prays that the defendant surrenders to the Land Registrar the title deed for KAKAMEGA/ MBALE/545 which is in her possession for cancellation as prayed. The plaintiff also prays that an order of permanent injunction be issued restraining the defendants from evicting the plaintiff from the portion she occupies on land parcel KAKAMEGA/ MBALE/545. The plaintiff prays for judgement against the defendant for:-

An order for cancellation of the defendant's names as the sole registered owner of land parcel KAKAMEGA/ MBALE/545 as per the records at the lands registry and the said land reverts in the names of Nathan AsenaNdugu(deceased) for purpose of proper sub division as per the agreement between the deceased and the defendant and upon the defendant proving clearing the purchase price. An order directing the defendant to surrender to the Land Registrar the title deed for KAKAMEGA/ MBALE/545 which is in his possession for cancellation. An order for permanent injunction restraining the defendant from evicting the plaintiff from the portion she legally occupies on the suit land. Cost of this suit.

DW1 the defendant admits that he bought parcel of land known as KAKAMEGA/MBALE/545 from the late Nathan AsenaNdugumeasuring 0.28 Ha. The defendant avers that he actually purchased the whole of parcel of land known as KAKAMEGA/MBALE/545 from the deceased Nathan AsenaNdugu. The actual acreage as indicated on the title is the actual measurement that the defendant purchase from the deceased after adding the remaining portion. The deceased died on 11th February, 2007 exactly 13 years after the land was legally transferred into the defendant's names. During the defendant's lifetime no complaint was ever raised as to the legality of the title. The deceased voluntarily appeared before the Honourable Magistrate in Vihiga where he executed the transfer of the suit parcel. Again the deceased voluntarily appeared before the Land Control Board and consented to the transfer of the bought parcel. The deceased voluntarily appeared before the Assistant Chief identification before commencing the transfer process.

The defendant avers that he is the sole absolute registered owner of all that parcel of land known as KAKAMEGA/MBALE/545 which he legally purchased from the deceased (DEx1 copies of the sale agreement). Nathan AsenaNduguan had it legally transferred into his names. The defendant avers that though he has been using part of the suit parcel he actually purchased the whole of the suit parcel from the deceased. The defendant avers that his counter claim against the plaintiff is for an order of eviction and a permanent injunction against the plaintiff, her relatives, servants or any other person purporting to act either through them or under their authority from interfering with the plaintiff's quiet occupation of land parcel KAKAMEGA/MBALE/545 as he is now the legally registered owner. The defendant prays for judgment against the plaintiff and the subsequent dismissal of the plaintiff's suit with costs.

This court has carefully considered both the plaintiff's and the defendant's case and the 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

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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.

Looking at the facts of this case, the plaintiff submitted that, she filed this suit by way of plaint filed in court on 11th May 2012 in her capacity as the legal representative of the estate of her late husband Nathan AsenaNdugu. The plaintiff was granted a limited grant ad-litem vide Kakamega High Court Succession

Cause No. 713 of 2011. The claim herein as filed by the plaintiff touches on land parcel Kakamega/Mbale/545 originally in the names of Nathan AsenaNdugu(deceased) measuring 0.28Ha which the plaintiff claims the defendant herein fraudulently wholly transferred into his names. The plaintiff states that the defendant had only purchased a portion measuring 47ft by 78ft at a consideration of Ksh. 70,000/= on 15th October 1988 and not the whole land parcel Kakamega/Mbale/545 measuring 0.2 Ha. The plaintiff produced a sale agreement dated 15th October 1988 which shows that the defendant purchased a portion measuring 47 ft by 78ft out of plot No. 545 (PEx2). The Green Card produced by the plaintiff also confirms that as per entry No. 5 that the plaintiff was initially registered owner of L.R. Kakamega/Mbale/545 which land came to the possession by way of transmission after filing succession (PEx3).The plaintiff submits and contends that the defendant fraudulently transferred the whole of land parcel Kakamega/Mbale/545 when he fully knew that he had purchased a portion of it particularly measuring 47ft by 78 ft.The plaintiff also contends that the defendant took advantage of the deceased's illiteracy by preparing transfer documents which the deceased signed knowing that he was sub-dividing the suit land and indeed the defendant failed to sub-divide the land but instead fraudulently transferred the whole land. By a letter dated 13th July 2001 by the deceased, Nathan AsenaNdugu through his advocates, B.A. Nyanga& Co. Advocates, the deceased addressed the defendant raising claims of the defendant breaching the agreement by failing to pay the balance of the purchase price Ksh. 10,000/= and further that the defendant notwithstanding owing the said balance, had gone ahead to transfer the whole land rather than the portion he had purchased.Nathan AsenaNdugu died on 11th February 2007, by the time he was a live there seems to have existed a dispute between him and the defendant as regards the manner in which the defendant has transferred the whole suit land into his names. From the evidence adduced by both and on record it is confirmed that each occupies his own portion as clearly demarcated and fenced on the ground. The plaintiff in her evidence also confirmed that she buried her late husband on the said portion she occupies and also buried her own son on the said land and has continued staying on the said land without any interruption from the defendant until when she received a notice from the defendant's advocate to vacate the land and that is what prompted her to file this suit.

The defendant's contention is that he further purchased another portion out of the suit land to add to the earlier purchased portion and produced DEx1 as the sale agreements. Be that as it may, This court has perused the minutes of the Land Control Board dated 27th May 1994 DEx14 in the defendant's list of documents No. 14 clearly minute No. 18/94 (3) indicates as follows:-

NATHAN ASENA.

“He applied for a plot transfer of plot No. Mbale/1415. Consent for plot sub-division had already been issued by the Vihiga Land Control Board. The case was examined critically and found clear. It was approved.”

The land control board clearly stated that consent for plot sub-division had already been issued by the Vihiga Land Control Board and the portion now that was transferred is plot number Mbale/1415 . The court took a look at this document critically in view that plot No. Mbale 1415 has been crossed out and inserted with 545 and this appears to the court to be a forgery. In the absence of evidence to the contrary, I believe that by the time the deceased signed transfer forms and appeared before the Vihiga Resident Magistrate he was transferring a portion of land that had been allocated land parcel Kakamega/Mbale/1415 and not land parcel Kakamega/Mbale/545 and that he was not transferring plot 545. There is no counter signature by the person who crossed out plot No. Kakamega/Mbale/1415. In the circumstances, I find that the plaintiff has proved her case on a balance of probabilities and I enter judgment in her favour. I find that L.R. Kakamega/Mbale/545 ought to have been sub-divided and not wholly transferred to the defendant and hence the said registration of the whole parcel of land into the defendant's names should be cancelled and proper sub-division carried out to give each party its registration numbers. The counter claim is dismissed with costs and I proceed to make the following orders;

1. An order for cancellation of the defendant's name as the sole registered owner of land parcel KAKAMEGA/MBALE/545 as per the records at the lands registry and the said land reverts in the

names of Nathan AsenaNdugu (deceased) for purpose of proper sub division as per the agreement between the deceased and the defendant and upon the defendant proving clearing the purchase price.

2. An order directing the defendant to surrender to the Land Registrar the title deed for KAKAMEGA/MBALE/545 which is in his possession for cancellation.

3. An order for permanent injunction restraining the defendant from evicting the plaintiff from the portion she legally occupies on the suit land.

4. Cost of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF OCTOBER 2017.

N.A. MATHEKA

JUDGE