



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC NO. 12 OF 2015

AUGUSTINO MARANGO OGOLA)

MARTIN MATIRO WAMUKOU (*suing as legal and personal*

representative and beneficiary of the estate of the late

MARANGO OGOLA MARANGO (DECEASED).....PLAINTIFFS

VERSUS

CLEOPHAS MARANGO OGOLA.....DEFENDANT

JUDGEMENT

The plaintiffs' case is that, they are the legal beneficiaries and personal representatives of the estate of the late Marango Ogola Marango (deceased) who demised on the 23rd October, 1966. 1st plaintiff is the brother of the defendant herein and the uncle to the 2nd plaintiff; the deceased herein being the father of the 1st plaintiff and the grandfather of the 2nd plaintiff. That the defendant is the registered owner of all that parcel of land designated as South Wanga/Bukaya/676 which measures approximately 21 acres or thereabout. The land once belonged to and was registered in the names of the late Marango Ogola Marango before and after his demise on the 23rd day of October, 1966 or thereabout and that the said land was after his demise supposed to benefit his three sons.

PW1 testified that after the demise of the original owner i.e. the late Marango Ogola Marango deceased letters of administration were to be taken out jointly and severally in the High Court to obtain a grant of representation and a certificate of the confirmed grant to enable the said land to be demarcated, partitioned and or subdivided, registered and transferred in the names of the 3 sons of the said deceased. The plaintiffs' further aver that during the lifetime and immediately after the demise of the late Marango Ogola Marango deceased they were residing and cultivating on each of their respective portions of seven (7) acres each hence the respective boundaries which had been planted by the deceased in accordance to his sharing to his sons was interfered with by the defendant. The plaintiffs' aver that on or about the 17th July, 2006 when they were contemplating to file the said succession to inherit the said land and after conducting an official search of the said land they discovered that the defendant without any colour of right, without the plaintiffs' and the deceased's members of family consent and without a certificate of a confirmed grant from the High Court the defendant had illegally and unlawfully proceeded at the lands registry and fraudulently caused to be changed the registration of the parcel of land herein from the deceased's names into his names.

The plaintiffs on various occasions beseeched and requested the defendant to voluntarily rescind the said illegal registration so that the said registration reverts back in the names of the deceased for proper filing of letters of administration in court for proper administration, sharing and distribution to the rightful beneficiaries who include the plaintiffs but all has been in vain. The plaintiffs further aver that they previously prevailed upon the defendant alternatively to appear before the necessary land control board and have the said land surveyed and subdivide into 3 equal portions of seven (7) acres each so that the same are registered in the name of the plaintiffs and the defendant respectively as ordered by the land disputes tribunal but the plaintiffs' efforts landed on the defendant's deaf ear. The defendant failed and ignored their request and they lodged a dispute over the parcel of land in question in the defunct land disputes tribunal in South Wanga Division as against the defendant vide Tribunal Case Number 34 of 2006. The said tribunal arbitrated on the said case on merit and in his evidence the defendant admitted holding the said land in his own trust and in trust of his brothers. That it is the plaintiffs' case that the elders in the said tribunal ruled in favour of the plaintiff's whereof the plaintiffs were awarded a portion of seven (7) acres each to be carved off from land reference number South Wanga/Bukaya/676. That the plaintiffs contend that the said findings and award was filed in the Kakamega Chief Magistrate's Court vide Misc. award Number 213 of 2006 and adopted as the judgment of the court in favour of the plaintiffs vide the order dated the 4th June, 2007. The plaintiffs further state that the defendant for no apparent reason became aggrieved by the said findings, award and judgment and preferred an appeal against the plaintiffs in the Western provincial Land Disputes Appeals committee vide Appeal Case Number 78 of 2007 for reasons not known to the plaintiffs but to the defendant's knowledge he never prosecuted the said appeal. The plaintiff's state that the land disputes number 18 of 1990 was repealed and therefore the land disputes appeals committee legally ceased to function and since the Land and Environment Court Act and the Constitution enactment came in place and in view of the fact that the defendant's appeal had not been determined they can only ventilate, solve and determine their land problem in this court. The plaintiffs stated that since the secret and fraudulent registration and transfer of the suit land in the names of the defendant he has barred and stopped the plaintiffs from working on their respective portions thereby forcing them to remain in portions measuring less than 3 acres or thereabout whereof the defendant is occupying and using the rest of the land.

The plaintiffs' claim jointly and severally against the defendant is for an order for cancellation and nullification of registration of land parcel number South Wanga/Bukaya/676 in the names of the defendant so that it reverts in the names of the late Marango Ogola Marango deceased for proper letters of administration and transfer in the names of the beneficiaries and especially the plaintiffs or alternatively an order that the defendant be ordered to sign relevant documents to transfer 7 acres of land each to the plaintiffs and default the deputy registrar of this court or its Executive Officer to be authorized to do so on his behalf in favour of the plaintiffs.

DW1, the defendant contends that he was fairly registered on the land with the consent of his deceased father and grandfather. That at the time, the defendant shared a name with his deceased father namely MARANGO OGOLA and the defendant's name was MARANGO OGOLA MARANGO. The defendant further states that since he was 20 years or thereabout at that time his late father opted to register the parcel in his name, the 1st plaintiff was a minor by then aged 10 years old. The defendant states that the case was not decided on merit and he later lodged and appeal via Appeal No. 78 of 2007 where he stayed the decision of the tribunal and the resultant court orders. The defendant submits that he is ready to give the plaintiff's four acres each and remain with the rest.

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 –

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 it is not disputed that the plaintiffs are legal beneficiaries and personal representatives of the estate of the late Marango Ogola Marango (deceased) who demised on the 23rd October, 1966. 1st plaintiff is the brother of the defendant herein and the uncle to the 2nd plaintiff; the deceased herein being the father of the 1st plaintiff and the grandfather of the 2nd plaintiff. That the defendant is the registered owner of all that parcel of land designated as South Wanga/Bukaya/676 which measures approximately 21 acres or thereabout. The land once belonged to and was registered in the names of the late Marango Ogola Marango before and after his demise on the 23rd day of October, 1966 or thereabout and that the said land was after his demise supposed to benefit his three sons. However, the defendant contends that he is the registered owner of the land because when he was a child he picked some money somewhere which he gave his father to help in purchasing the land hence he should be entitled to more. I find this explanation ridiculous and I dismiss the same. I find that the defendant fraudulently registered the property in his name knowing very well it was ancestral land and his siblings were also beneficiaries in equal measure. In the circumstances, I find that the plaintiffs’ have proved their case on a balance of probabilities and I enter judgment in their favour. I find that L.R. South Wanga/Bukaya/676 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 beneficiary as per the succession laws and I proceed to make the following orders;

1. An order for cancellation and nullification of registration of land parcel number South Wanga/Bukaya/676 in the names of the defendant so that it reverts in the names of the late Marango Ogola Marango deceased and after proper letters of administration are issued the same to be transferred in the names of the beneficiaries

2. Costs of this suit to be borne by the defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE

