



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAKAMEGA**  
**ELC CASE NO. 302 OF 2013**  
**IN THE MATTER OF CLAIM OF LAND UNDER ADVERSE POSSESSION**  
**AND**  
**IN THE MATTER OF LAND PARCELS NO. SOUTH KABRAS/CHISERO/1456**  
**BETWEEN**  
**SELESTIN LIBESE OMBOSO.....APPLICANT**  
**VERSUS**  
**CHARLES MBOKA INDOMBELA.....1<sup>ST</sup> RESPONDENT**  
**FECHENIA SUNDULI WECHULI.....2<sup>ND</sup> RESPONDENT**

**RULING**

This application is dated 6<sup>th</sup> July 2017 and is brought under order 37 rule 7 of the Civil Procedure Rules 2010 and section 38 of the Law of Limitations Act cap 22 of the Laws of Kenya seeking the following orders;

1. THAT the sale of the one and half (1 ½) acres of land from Title Number SOUTH KABRAS/CHESERO/1456 by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent/2<sup>nd</sup> purchaser pursuant to the agreement for sale dated 29<sup>th</sup> day of July, 2006 be declared null and void for all purposes.
2. THAT all transactions relating to the said title at the Land Control Board Office, Survey office and the Lands Office at kakamega be declared null and void for all purposes and the said title to revert to its original status.
3. THAT an eviction order be issued against the 2<sup>nd</sup> respondent and the buildings/structures and other improvements erected and being on the suit premises be demolished accordingly.
4. THAT the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to hand vacant possession of the suit premises to the applicant within a stipulated period.
5. THAT in the alternative, the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to pay to the applicant the

amount/sum equivalent to the current market value of the one and half (1 ½) acres of land which the applicant had purchased from the registered proprietor of the said piece of land pursuant to the agreement for sale dated 31<sup>st</sup> day of July, 1993.

6. THAT the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to pay to the applicant damages for the loss the applicant has sustained for twelve (12) years without using the said piece of land.

7. THAT the 1<sup>st</sup> and 2<sup>nd</sup> respondent be ordered to pay the costs of this suit plus interest thereon at court rates.

The applicant submitted that, on the 31<sup>st</sup> day of July, 1993, she purchased one and half (1 ½) acres of land out of Land parcel number south Kabras/Chesero/1456 from the registered proprietor Mboga Indombela at an agreed purchase price of Kenya shillings Thirty Eight Thousand (Ksh. 38,000/=) as reflected in the agreement for sale a copy of which is attached and marked SLO1. That after payment of the said purchase price she moved into the said piece of land and started using it by planting therein maize, beans and sugarcane peacefully but unfortunately the registered proprietor passed away on 18<sup>th</sup> day of May, 1994 before he had transferred the said piece of land to her. By the time I purchased the said piece of land the first respondent was already an adult and he knew that she had purchased one and half (1 ½) acres of land from his father before he passed away. After burial of Mboga Indombela, she requested the first respondent Charles Mboka Indombela to file a succession case in the High court at Kakamega so that he could transfer to her the portion of land which she had purchased from his late father but he refused to do so. That after using the said piece of land for more than fourteen (14) years, the first respondent decided to use physical threats against her and her workers and he eventually chased her away from the said piece of land during the month of June, 2006 and she instructed Michael Kiveu, Advocate to act for her in the matter on 23<sup>rd</sup> day of August, 2006 in order to protect her interest in respect of the said title. That after he had chased her away, he sold the said piece of land to someone else on 29<sup>th</sup> day of July, 2006 as reflected in the copy of the agreement for sale a copy of which is attached and marked SLO. 2 before filing a succession case thereby denying her, her rights as required by the provisions of the Law of Succession Act Cap. 160 laws of Kenya in her capacity as a first purchaser. That after the first respondent had sold the said piece of land to a second purchaser, he decided to file a succession case in the High Court at Kakamega without her knowledge being succession cause No. 463 of 2006 and was issued with the Grant of letters of Administration interstate in his name alone and thereafter he decided to reflect the name of the second respondent, Fechenia Sunduli Wechuli in all the transactions relating to the succession matter at the lands office, survey office and the Land Control Board as a beneficiary/dependant which information he knew very well that it was quite false because the 2<sup>nd</sup> Respondent was not related to the deceased Mboga Indombela.

The 1<sup>st</sup> respondent submitted that at the material time I was a minor aged 11 years old. That from the date of my father's death he has not heard of any claim from anybody as far as the purchase of land is concerned. Even during the funeral procession no one stood and claimed about the same. That during the succession cause there was a notice of the Kenya Gazette which no objection was made.

The 2<sup>nd</sup> respondent submitted that, she is the registered owner of the piece of land known South Kabras/Chesero/2712 measuring approximately 0.54 hectares which was partitioned from land parcel South Kabras/Chesero/1456. Attach is a certified copy of certificate of official search marked "FSW-1". She has been occupying the entire portion of a land parcel South Kabras/Chesero/2712 and using it since she bought it on 29<sup>th</sup> July, 2006. When she bought the said piece of land, there was no one in occupation or using it as alleged by the applicant herein as she had vacant possession after buying it. She bought the said piece of land South Kabras/Chesero/2712 from Charles Mboka Indombela, who was the only beneficiary to the estate of Mboga Indombela who died on 18<sup>th</sup> May, 1994. Attach is a copy of the land sale agreement dated 29<sup>th</sup> July, 2006 marked "FSW-2" and an acknowledgement of receipt of the balance of the 7<sup>th</sup> August, 2006 marked "FSW-3. That to date she has constructed on said land parcel three permanent residential houses, a one semi-permanent cow shed, a pit latrine and has had peaceful occupation and use of her 0.54 hectare piece of land since she bought it on 29<sup>th</sup> July, 2006 and the

applicant is not at all entitled to the same portion through adverse possession as claimed. After she bought the said piece of land measuring 0.54 hectares from Charles Mboka Indombela, he instituted succession proceedings in respect of the estate of Mboga Indombela as the only surviving child and beneficiary of the said deceased vide Kakamega High Court Succession Cause No. 463 of 2006 after he obtained the requisite documents to enable him transfer title of the portion. Attach is a copy of the certificate of death of Mboga Indombela deceased marked "FSW-4", a letter dated 14<sup>th</sup> August, 2006 from the Assistant Chief Kakunga sub location marked "FSW - 5", an official certificate of search for land parcel South Kabras/Chesero/1456 measuring approximately 1/1456 measuring approximately 1.53 Ha belonging to the deceased herein Mboga Indombela marked "FSW-6" and a gazette notice dated 29<sup>th</sup> September, 2006 in respect of the petition for grant of letters administration for Kakamega Succession Cause No. 463 of 2006 marked "FSW-7". A grant of letters was then duly issued to Charles Mboka Indombela on 11<sup>th</sup> January, 2007 a copy of the same attached and marked "FSW-8".

Thereafter, the said Charles Mboka Indombela petitioned for the confirmation of the grant of the letters of administration issued to him and the same was duly confirmed on 25<sup>th</sup> July, 2008 with orders that she be given her one portion of land that she had bought attach is the application for confirmation marked "FSW-9" and a certificate of confirmation of grant marked "FSW-10" That they applied to Chairman Land Control Board, Malava for the portion of land parcel south Kabras/Chesero/1456 as had been demarcated on the ground in respect of the portion that I had bought and the portion that was remaining to the said Charles Mboka Indombela and a letter of consent for the partition was duly issued by the land Control Board attach is a copy of the application for consent of Land Control Board marked "FSW-11" and letter of consent marked "FSW-12" That land parcel South Kabras/Chesero/1456 was later partitioned into two portions, with the portion belonging to Charles Mboka Indombela measuring approximately 0.97 hectares land being marked as South/Chesero/2711 on the land register and the portion belonging to her being marked as South Kabras/Chesero.2712 on the land register and measuring 0.54 hectares. Attached is a copy of the application for partition marked "FSW-13", the mutation form in respect thereof marked "FSW-14" and a search marked "FSW-1" and a copy of the title deed marked "FSW-15" showing she is the registered free hold owner. The alleged land sale agreement between the applicant and a one Mboga Indombela (deceased) dated 31<sup>st</sup> July, 1993 allegedly witnessed by the Chief South Kabras Location and a letter dated 3<sup>rd</sup> March, 1995 from the chief East Kabras location are forgeries and not genuine as they don't make any reference to the land registration title number from which the said applicant allegedly bought 1 ½ acres of land from. And further the said land sale agreement dated 31<sup>st</sup> July, 1993 was allegedly witnessed by the Chief South Kabras location yet the said letter dated 3<sup>rd</sup> March, 1995 is from allegedly the Chief East Kabras location which is a totally different location and it is not factually possible that the alleged parcel of land that the applicant bought from the said Mboga Indombela (deceased) was situated in two different physical locations.

This court has considered both the applicant's and the respondents' submissions herein. It has been established that the 2<sup>nd</sup> respondent is the registered owner of the piece of land known South Kabras/Chesero/2712 measuring approximately 0.54 hectares which was partitioned from land parcel South Kabras/Chesero/1456. Attach a certified copy of certificate of official search marked "FSW-1" and a copy of the title deed marked "FSW-15". It is submitted that she has been occupying the entire portion of a land parcel South Kabras/Chesero/2712 and using it since she bought it on 29<sup>th</sup> July, 2006. On the other hand the applicant submitted that, on the 31<sup>st</sup> day of July, 1993, she purchased one and half (1 ½) acres of land out of Land parcel number south Kabras/Chesero/1456 from the registered proprietor Mboga Indombela at an agreed purchase price of Kenya shillings Thirty Eight Thousand (Ksh. 38,000/=) as reflected in the agreement for sale a copy of which is attached and marked SLO1. That after payment of the said purchase price she moved into the said piece of land and started using it by planting therein maize, beans and sugarcane peacefully but unfortunately the registered proprietor passed away on 18<sup>th</sup> day of May, 1994 before he had transferred the said piece of land to her. I find that the land sale agreement marked SLO1 between the applicant and a one Mboga Indombela (deceased) dated 31<sup>st</sup> July, 1993 allegedly witnessed by the Chief South Kabras Location and a letter dated 3<sup>rd</sup> March, 1995 from the Chief East Kabras location marked SLO1 do not make any reference to the land registration title number from which the said applicant bought 1 ½ acres of land from. This court cannot determine at this stage

what land is referred to 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.**

The 2<sup>nd</sup> respondent has attached a copy of the application for partition for the suit land marked “FSW-13”, the mutation form in respect thereof marked “FSW-14” and a search marked “FSW-1” and a copy of the title deed marked “FSW-15” showing she is the registered free hold owner this has not been challenged.

Furthermore, the orders sought for in this application are substantive orders and are to be sought by way of a plaint as prescribed in order 3 rule 1 (1) of the Civil Procedure Rules 2010 which provides that every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed and not by way of an interlocutory application as being sought in the said application and the said notice of motion dated 6<sup>th</sup> July, 2017 therefore cannot stand. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22<sup>ND</sup> DAY OF NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**