



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 292 OF 2015

NAPHTALI NGALWA BULIMU ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

ELIJAH KIHINJI NG'ALWA ::::::::::::::::::::::::::::::::::: DEFENDANT

JUDGEMENT

The plaintiff case is that, he is the rightful owner of land parcel number KAKAMEGA/BUGINA/232 measuring 1.4 hectares (One point four hectares) having acquired the same from his late father one JACOB NGALWA BULIMU. The defendant was also given his land parcel being KAKAMEGA/BUGINA/230 measuring 0.8 hectares (zero point eight hectares) The plaintiff has lived on the said land parcel for many years together with his parents until they passed away in the 1990s. The plaintiff has also done huge investments on the said piece of land which includes constructing a permanent residential house, installing electricity and planting tea crops. The defendant has also been living in his land parcel to date. The foregoing notwithstanding, the defendant has caused to be registered and or transferred the said land in his name and acquired the title deed for the same. The transfer of the land and issue of the title in the name of the defendant was fraudulent in that the defendant intermeddled with the estate of the plaintiff using forged or false documents to transfer the land in his name. He uttered false documents to the Land Registrar to secure a false registration. The plaintiff prays for orders that all transactions registered on Land Parcel No. KAKAMEGA/BUGINA/232 at the Land Registry be cancelled and the title reverts and or registered in the plaintiff's name and costs of the suit be met by the defendant.

PW1 Naphtali Ngalwa Bulimu, testified that, his late father one Jacob Ng'alwa Bulimu had three parcels of land registered under his name being Land Parcels No. KAKAMEGA/BUGINA/230, KAKAMEGA/BUGINA/231 and KAKAMEGA/BUGINA/232 respectively. His father later transferred to the defendant who is his brother land parcel No. KAKAMEGA/BUGINA/230 measuring 0.8 hectares. His other brother one Lotani was given land parcel No. KAKAMEGA/BUGINA/231 and he was given land parcel No. KAKAMEGA/BUGINA/232 measuring 1.4 hectares. Each one of them has occupied their respective plots long before surveying and marking of land titles was done. His other brother one Lotani later sold him his land parcel and migrated. The defendant has occupied his land parcel to date while he continued staying with his parents on his current plot until they passed on in the 1990s. He has done huge investments on his parcel including building a permanent residential house, installation of electricity and planting tea. The defendant without any colour of rights and or lawful or justifiable excuses went ahead and fraudulently obtained a land title deed of his land parcel in his name. He has further gone ahead to obtain consent forms from the Land Registry requiring him to append his signature so that he can disinherit him of his parcel and possibly evict him from his rightfully owned parcel of land. It is therefore his humble submissions to the honourable court that the title deed in the defendant's name of his land parcel being KAKAMEGA/BUGINA/232 be cancelled and or annulled and the title be reverted to the plaintiff's name. PW2 and PW3 the plaintiff's adult children confirm that they live in land

parcel being KAKAMEGA/BUGINA/232.

DW1 the defendant testified that, his father, the late Jacob Ngalwa (deceased) sired 3 sons who are as follows by order of birth: Elijah Kihinji Ng'alwa (Defendant); Lotan Kidiavai Ngalwa (Lotan) and Naphtali Ngalwa Bulumi (Plaintiff). The deceased had 2 pieces of land of which he disposed of 1 in order to educate Lotan and the plaintiff. Lotan College education and qualified as a teacher while the plaintiff went up to the university and worked with the Kenya Revenue Authority. The deceased subdivided the 2nd piece of land on the 24th day of July, 1975 into 3 portions namely, L.R. Nos. Kakamega/Bugina/230 (0.8 Ha), 231 (0.6 Ha) and 232 (1.4 Ha) registered in the names of the plaintiff, Lotan and him respectively. He got bigger portion of land since the deceased acknowledged that he had not received an education while his two siblings had been educated and were able to purchase other pieces of land. While Lotan managed to purchase land in Lugari area where he has established his home, the plaintiff has several portions of land in Kaimosi (2 acres planted with trees), Nakuru (plot with residential premises) and Chamakanga (plot with commercial premises)

There was an understanding between the plaintiff on the one hand and Lotan and him on the other hand that the plaintiff would purchase their portions of land so that he would occupy solely the 2nd piece of land which belonged to the deceased. Due to this understanding he let the plaintiff settle on his parcel of land while he occupied his. Several times he was able to identify suitable land for him to settle with his family in Kitale and Kisii areas but the plaintiff was never able due to one reason or the other to pay for his parcel of land. The plaintiff has also declined to pay for Lotan's piece of land prompting Lotan to transfer the same to his son Kidiavai Ng'alwa Timothy. As the plaintiff has been in breach of our understanding he will require him to give up 0.6 Ha so that he ends up with 1.4 Ha which by right belongs to him. That due to the breach of contract the defendant urges the court to either have the plaintiff give up the entire plot 232 to him or in the alternative to surrender 0.6 Ha from Plot 232 to him in order to end up with his rightful share of 1.4 Ha.

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

It is a finding of fact that plaintiff and defendant are brothers. It is the plaintiff's case that their father was the late Jacob Ngalwa Bulimu gifted the plaintiff plot 232 measuring approximately 1.4 Ha and plot 230 to the defendant measuring approximately 0.8 Ha. Each of the brothers resides on their respective parcel of land. However, the plaintiff has come to discover that the defendant has fraudulently caused plot 232 to be registered in the name of the defendant. The plaintiff has set out the particulars of the purported fraud. The defendant disputes this and states that, their father had three sons who are the parties herein and their brother Lotan Kidiavai Ngalwa. Each son was given a piece of land by their father; Plot 230 to the plaintiff; Plot 231 to Lotan and Plot 232 to the defendant. That the plaintiff has been residing upon Plot 232 with the express leave of the defendant pursuant to an understanding where the former was to purchase both plots 230 and 231 so that the plaintiff would remain the absolute proprietor of all the three parcels of land. However, the plaintiff reneged on the agreement and as a consequence the defendant has lodged a counter-claim to have the plaintiff either vacate plot 232 or surrender 0.6 Ha therefrom so that he would be able to have his rightful share of 1.4 Ha which is the size of plot 232.

It is the contention by the plaintiff that the defendant has fraudulently obtained title deed to plot 232. The evidence on record, namely, the certificate of register with respect to Plot 232 shows that the defendant was registered as its proprietor on the 24th day of July, 1975. What is curious is that it is not disputed that the plaintiff resides on this parcel and his parents and wife were buried there. He continued staying with his parents on this current plot until they passed on in the 1990s. He has done huge investments on his parcel including building a permanent residential house, installation of electricity and planting tea. I believe the plaintiff. I find the defendant was mischievous in registration of himself as the proprietor of Plot 232 in which he was not residing and this action was as a result of fraudulent activities to which the defendant was a party. The defendant has his own piece of land in which he has always been staying plot 230 and now demands a bigger share and/or portion of land. I find that the counter-claim has no merit and I dismiss the same. I find the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. That all transactions registered on Land Parcel No. KAKAMEGA/BUGINA/232 at the Land Registry be cancelled and the title reverts and or registered in the plaintiff's name.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE