



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 505 OF 2014

STELLA NAMUKHULI KOMBO.....PLAINTIFF

VERSUS

JACKSON MAMBO.....DEFENDANT

JUDGEMENT

The plaintiff avers that she is the absolute legal registered proprietor of L.R No. Isukha/Lubao/2725. The plaintiff avers that she acquired the subject property procedurally and for valuable consideration. The plaintiff further avers that she has clearly demarcated the subject property and has been occupying and using the same without any interruption, interference and/or intermeddling. The plaintiff avers that the defendant has without any colour of right and/or authority from the plaintiff entered, remained, occupied and refused to move out of the subject property and consistently defied all attempts, legal or otherwise to have him peacefully move out of the subject property. The plaintiff avers that she has not in any way acquiesced to the defendant's entry and occupation of a portion of the subject property. The plaintiff avers that the defendant's actions are an impediment to the plaintiff's right to own, occupy and peacefully use the subject property. And the plaintiff's claim against the defendant is for an order of eviction to issue removing the defendant from the subject property and a permanent injunction restraining the defendant by himself and/or his servants, agents, employees, relatives and/or any person claiming through him from occupying, dealing, working, tilling, encroaching, interfering or in any manner whatsoever from intermeddling in L.R. No. Isukha/Lubao/2725. The plaintiff prays for judgment against the defendant for:-

- (a) An order of eviction from L.R. No. Isukha/Lubao/2725.
- (b) A permanent injunction restraining the defendant by himself and/or through his servants, employees, agents and/or any person claiming through him from entering, occupying, interfering and/or in any way intermeddling in L.R. No. Isukha/Lubao/2725.
- (c) Costs of this suit.

PW2, Moses Mmbwanga Mambo testified how the suit land belonged to their father. After their father's death he took out letters of administration and as a family they agreed to sell the land to the plaintiff. They bought land in Moi's Brigde with the purchase price and the entire family moved there. This included the defendants family and PW2 build them a house and bought them land. After about one year the defendant said he wanted to return. The defendant is his deceased's brother's son and the latter was represented by his mother DW2.

The defendant DW1, submits that the plaintiff has had herself registered as the owner/proprietor of parcel of land known as Isukha/Lubao/2725. The defendant further avers that his late father occupied and utilized the said portion of land during his lifetime since 1970s or thereabouts until his demise in 1991 or thereabouts and was buried on the suit land and had already settled thereon his family members exclusive of the plaintiff herein. The defendant avers that the plaintiff has never been in actual occupation and or utilization of the suit land herein other than in occupation and or possession of separate parcels of land sharing common boundaries which she alleges to have purchased from the defendants uncles namely Moses Mmbwangamambo, Ernest Nyabela, Stanley Shirandula and Peter Visao who were also beneficiaries of the estate of the said Jackson Mambo and moved out of their respective parcels of land in 2012 or thereabouts to other parcels of land purchased elsewhere to pave way for the plaintiff herein to establish an institution by the name Jabstar Academy which she commenced construction in October, 2012 or thereabouts and completed the constructions within a span of three months and the plaintiff has enrolled the first batch of students from the beginning of January, 2013. The defendant further avers that pursuant to Succession Cause in Kakamega HC Succession Cause No. 207 of 1989 in which a Grant of Letters of Administration Intestate were issued on 2nd March, 2006 to Moses Mmbwanga Mambo as the administrator of the estate of the late Jackson Mambo and confirmed on 30th January, 2007 his late father Stephen Shanyisa alias Jumba was a beneficiary and was given a portion of land measuring 0.35 hectares a share out of the said deceased said estate comprising of land parcel originally known as Isukha/Lubao/476 (DEx2). The defendant further avers that being one of the sons of the late Stephen Shanyisa alias Jumba together with other family members they have been occupying and or utilizing the said parcel of land since the same was allocated to the deceased. The defendant further avers that the plaintiff does not have a good title to the suit land herein since he obtained title No. Isukha/Lubao/2725 secretly, illegally and fraudulently without due regard to the defendant's interest therein. The defendant avers that owing to his quiet continuous, uninterrupted possession, occupation and use of the suit land he was born, the plaintiff's title therein was extinguished by operation of law and hence Moses Mmbwanga Mambo could not pass any title thereof to the plaintiff. The defendant prays that the plaintiff's suit against him be dismissed with costs and judgment be entered in his favour against the

plaintiff for:-

- (a) A declaration that the acquisition of title Isukha/Lubao/2725 by the plaintiff as the proprietor thereof is illegal and unlawful and should be cancelled and the same be reverted into the original title Isukha/Lubao/476 in the name of the late Jackson Mambo.
- (b) Costs of the counter claim.
- (c) Any other relief that the honourable court deems just and fit to grant.

DW2, the defendant's mother testified that she was asked to sign the agreement and did not know what she was signing. They are now landless and are renting. DW3 states that his brother got letters of administration of their father's estate and he got his inheritance. He however states that DW2 did not sell her husband's portion.

This court has carefully considered the evidence 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.”*

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. THE Judge 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 in dispute that the plaintiff is the absolute registered proprietor of L.R No. Isukha/Lubao/2725. The issue for determination is whether she holds a legal title in light of the defendant's counterclaim. The plaintiff testified that she purchased the suit land from Moses Mmbwanga Mambo, Aggrey Shikuri, Daniel Luta and Peter Visao who were also beneficiaries of the estate of the said Jackson Mambo and they moved out of their respective parcels of land in 2012 or thereabouts to other parcels of land purchased elsewhere to pave way for the plaintiff herein to establish an institution by the name Jabstar Academy which she commenced construction in October, 2012. Paragraph 6 of the sale agreement (PEX6) is clear that the interests of Stephen Shanyisa, Peter Malesi and Stanley Shirandula were to be catered for by Betty Mmbone, Juma Kevin Mambo and Philistr Olondo John respectively. Betty Mmbone is the widow of Stanley Shirandula and the mother of the defendant. Indeed the chief's letter PEX9 confirms that they sold their land willfully and moved to Moi's Bridge and that he had personally visited them in their new farms. They only returned 22 months later to reclaim the suit land. The plaintiff has produced all the transfer documents duly executed as per the sale agreement and she is in possession of the suit land. I find the defendant is not being truthful in this matter. This is a case where the defendant cannot have his cake and eat it, that is to say the defendant cannot have both the money and land. I find that they moved to Moi's Bridge as confirmed by the area Chief and have now decided to move back. I find the defendant has failed to prove his counter claim on a balance of probabilities and I dismiss it. I find that the plaintiff is the absolute legal registered proprietor of L.R No. Isukha/Lubao/2725. I find no evidence of fraud and or misrepresentation in the acquisition of the said suit land. I find the plaintiff has established her case on a balance of probabilities and I grant the following orders;

1. The defendant by himself and/or through his servants, employees, agents and/or any person claiming through him are to vacate from L.R. No. Isukha/Lubao/2725 within the next thirty (30) days from the date of this judgement in default eviction order to issue.
2. A permanent injunction to issue restraining the defendant by himself and/or through his servants, employees, agents and/or any person claiming through him from entering, occupying, interfering and/or in any way intermeddling in L.R. No. Isukha/Lubao/2725.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE