



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 61 OF 2016

JOHN OMUKUBI WANYUNGU.....PLAINTIFF

VERSUS

KWEYU KHAISIO.....DEFENDANT

JUDGEMENT

By a plaint dated 11th April 2016 the plaintiff avers that at all material times he was and still is the sole registered proprietor of the parcel of land designated as Marama/Shinamwenyuli/1854 containing by measurement 1.26 hectares whose boundaries are clearly delineated on the ground. The plaintiff avers that the parcel of land now known as L.R. No. Marama/Shinamwenyuli/1854 was purchased by his deceased father Zablon Wanyungu Khatembu from land parcel No. Marama/Shinamwenyuli/373 which was the subject of Mumias District Magistrate's Court Succession Cause No. 4 of 1970 and Kakamega High Court Succession Cause No. 169 of 1995 wherein it was held that land parcel No. Marama/Shinamwenyuli/373 be sub-divided into two which was done with the plaintiff getting L.R. No. Marama/Shinamwenyuli/1854 whereas the defendant and his brother Opana Khaisio being entitled to land parcel no. Marama/Shinamwenyuli/1855 whose transfer costs the defendant and his brother were to incur. The plaintiff avers that the defendant took occupation and use of land parcel No. Marama/Shinamwenyuli/1855 whereas the plaintiff occupied the suit land parcel No. Marama/Shinamwenyuli/1854. The plaintiff avers that the defendant illegally, wrongfully, forcefully and without any justification or colour of right, consent or authority trespassed onto land parcel No. Marama/Shinamwenyuli/1854 and started working on the said parcel of land and then sued the plaintiff vide Bungoma HCCC No. 233 of 2013 (O.S) claiming the said parcel of land which suit was however struck out with costs for being res judicata and incompetent. That despite the verdict in Bungoma HCC No. 233 of 2013 (O.S) and the plaintiff's requests to the defendant to cease his acts of trespass and vacate the plaintiff's land parcel No. Marama/Shinamwenyuli/1854 the defendant has remained adamant and has failed and refused to vacate the said parcel of land and the defendant's acts of trespass have and continue to occasion the plaintiff loss and damage. The plaintiff prays for judgment against the defendant for orders that:-

- (a) This honourable court does declare and order that the plaintiff being the rightful owner of land parcel No. Marama/Shinamwenyuli/1854 is entitled to exclusive, peaceful and unimpeded possession and use thereof and to issue an order for the eviction from the said parcel of land of the defendant, his relatives, agents, servants, employees or anybody claiming through him.
- (b) This honourable court be pleased to issue a permanent injunction perpetually restraining the defendant either by himself and or through his relatives, employees, agents and or any other person claiming under him from alienating, laying claim to, trespassing onto, utilising, developing, carrying out any works on, constructing on or in any other manner dealing with land parcel No. Marama/Shinamwenyuli/1854 and or interfering with the plaintiff's peaceful and exclusive ownership, possession and use thereof.
- (c) Costs of this suit and interest.
- (d) Any other or further relief deemed fit and just.

PW2 corroborated the plaintiff's evidence.

DW1 the defendant denies that he took occupation and/or use of Marama/Shinamwenyuli/1855 whereas the plaintiff occupied Marama/Shinamwenyuli/1854. The defendant denies ever illegally, forcefully and/or without any justification or color of right, consent or authority trespassed onto land parcel Marama/Shinamwenyuli/1854 and/or started to work on the land and puts the plaintiff to strict proof. The defendant admits having sued the plaintiff vide Bungoma HCCC No. 233 of 2013 (OS) claiming title to land parcel No. Marama/Shinamwenyuli/1854 by adverse possession of the land openly, peacefully, continuously, uninterrupted for a period of over 45 years which suit was struck for being res judicata. Land parcel numbers Marama/Shinamwenyuli/1854 and 1855 are both subdivisions of and comprised what was Marama/Shinamwenyuli/373 which was originally registered in the names of the defendant's father namely Khaisio Kweyu as the first registered proprietor. In the year 1995 the plaintiff herein fraudulently transferred the title to Marama/Shinamwenyuli/373 to himself illegally obtained subdivision of the title into two namely 1854 and 1855. He states that the plaintiff has never been in possession of the land.

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. 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 not in dispute that the plaintiff is the registered owner of the suit land parcel known as Marama/Shinamwenyuli/1854, PEx 9 is a copy of the title deed. The plaintiff testified that land parcel now known as L.R. No. Marama/Shinamwenyuli/1854 was purchased by his deceased father Zablon Wanyungu Khatembu from land parcel No. Marama/Shinamwenyuli/373 which was the subject of Mumias District Magistrate’s Court Succession Cause No. 4 of 1970 and Kakamega High Court Succession Cause No. 169 of 1995 wherein it was held that land parcel No. Marama/Shinamwenyuli/373 be sub-divided into two which was done with the plaintiff getting L.R. No. Marama/Shinamwenyuli/1854 whereas the defendant and his brother Opana Khaisio being entitled to land parcel no. Marama/Shinamwenyuli/1855 whose transfer costs the defendant and his brother were to incur. I have perused the proceedings in these cases PEx 1 and PEx 5 and indeed they state that the plaintiff was to get half of land parcel No. Marama/Shinamwenyuli/373. The plaintiff has been awarded the suit land by a court of competent jurisdiction and the decision still stands. Indeed the defendant admits having sued the plaintiff vide Bungoma HCCC No. 233 of 2013 (OS) claiming title to land parcel No. Marama/Shinamwenyuli/1854 by adverse possession of the land openly, peacefully, continuously, uninterrupted for a period of over 45 years which suit was struck for being res judicata. The latter decision also still stands. The defendant cannot now claim in this matter that in the year 1995 the plaintiff herein fraudulently transferred the title to Marama/Shinamwenyuli/373 to himself illegally obtained subdivision of the title into two namely 1854 and 1855. I see no evidence of fraud in the process as this was the decision of the court. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. An order that the plaintiff being the rightful owner of land parcel No. Marama/Shinamwenyuli/1854 is entitled to exclusive, peaceful and unimpeded possession and use thereof and to issue an order for the eviction from the said parcel of land of the defendant, his relatives, agents, servants, employees or anybody claiming through him.
2. That a permanent injunction do issue restraining the defendant either by himself and or through his relatives, employees, agents and or any other person claiming under him from alienating, laying claim to, trespassing onto, utilising, developing, carrying out any works on, constructing on or in any other manner dealing with land parcel No. Marama/Shinamwenyuli/1854 and or interfering with the plaintiff’s peaceful and exclusive ownership, possession and use thereof.
3. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE