



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ENVIRONMENT AND LAND CASE NO. 74 OF 2013

ANNA INDONDE IMBOBA.....PLAINTIFF

VERSUS

VINCENT SHINGWANA INJEDE.....DEFENDANT

JUDGMENT

1. **ANNA INDONDE IMBOBA**, (the Plaintiff), filed a Plaint in this court dated 29/1/2013 against **VINCENT SHINGWANA INJEDE**, (the Defendant), seeking an eviction order, injunction and general damages against the Defendant relating to parcel of land no. ISUKHA/SHITOTO/269.
2. The Plaintiff pleaded in her Plaint that she is the registered proprietor of the suit land; that the plaintiff and her late husband, one ERNEST IMBONDA MUNIKA, purchased the suit land from the late Stephen Mukala and took possession and started living on the land and reside on the land to-date.
3. The Plaintiff further pleaded that in 2005, the Defendant trespassed onto her parcel of land and put up a house thereon and has continued to reside and develop part of her land.
4. The Defendant filed a defence and raised a counter claim. He pleaded that he is a stranger to the Plaintiff's claim to be the registered owner of the suit land, and denied that the plaintiff together with her husband purchased the land from Stephen Mukala. The Defendant further pleaded that the land occupied by both the Plaintiff and Defendant has no official boundary and that it is family land.
5. The Defendant pleaded further that the suit is *res-judicata* and generally denied the Plaintiff's claim. The Defendant claimed that the suit land was acquired by the Plaintiff in a fraudulent manner and that the plaintiff does not reside on the land. He prayed that the suit be dismissed and that an injunction be issued to restrain the Plaintiff from entering the suit property.
6. The suit was listed before me on 30/10/2014 and I directed parties to file agreed issues within 14 days and fixed the matter for hearing on 9/12/2014, I also directed that the Defendant's counsel who was absent be served. On 9/12/2014 the suit was listed for hearing but again the Defendant and his counsel were absent. Upon being satisfied that the Defendant's counsel had been served, the matter proceeded ex-parte at 2.45 p.m.
7. The Plaintiff (PW1) testified that she is a resident of Shidodo Sub-location and had sued the Defendant in this suit. She told the court that she purchased the suit land together with her husband in 1986 from Stephen Mukala who was the Plaintiff's uncle and signed an agreement on 31/10/1986. She produced the title Deed as P.Ex.1. After payment of the last instalment, they again signed the agreement on 5/12/1989.

The agreement in Isukha, its translation and certificate were produced as PEx.2, 3'a' and 3'b' respectively.

8. The Plaintiff testified that initially the land was registered in her husband's name and after he passed away on 21/11/2008, the land came into her name as the administratrix of her husband's estate through Succession Cause No. 431/2009. She produced the Grant of Administration as PEx.4. The Plaintiff told the court that there had been an award by Shinyalu Land Disputes Tribunal made against her husband but that award was stayed by an order of the Chief Magistrate's Court Kakamega in Misc. Award No. 112 of 2006. She told the court that they purchased the land at Kshs.1500/= from Stephen Mukala Chimwani who was her husband's uncle and that the seller did not have a family. The order of stay was produced as PEx.5.

9. According to the plaintiff, the Defendant entered the suit land in 2005 and constructed a house thereon by force. A demand letter was sent to the Defendant on 3/1/2005 and was produced as PEx.6. A reminder was also sent and was produced as PEx.7. A third letter was sent to the Defendant and produced as PEx.8, all to no avail. The Plaintiff denied the Defendant's claim that he had lived on the land for more than twelve years. She also denied that the land was acquired in a fraudulent manner. She prayed that the Defendant be evicted from the land and that she also be awarded damages and costs of the suit.

10. At the close of the Plaintiff's case, the Plaintiff's counsel elected to put in written submissions which are on record.

11. Mr. Osango, counsel for the Plaintiff, submitted that the Plaintiff is the registered proprietor of the suit land measuring about 0.8 Hectares which was registered in her name through transmission following the demise of her late husband. Counsel submitted that the Defendant invaded the Plaintiff's land in 2005 and put up structures on the land in 2011 without the Plaintiff's permission.

12. Counsel further submitted that the Plaintiff being the registered proprietor of the land she is protected by law as the absolute owner of the land. Counsel cited Section 24 (a) of the Land Registration Act (No. 3 of 2012) and a decision of this court in **Ernest Kodia Shistili –vs- Leonidah Achitsa Wangula [2014] eKLR** to fortify his arguments.

13. Regarding the Defendant's defence, counsel submitted that the suit was not *res-judicata* since there had never been any other suit over the same subject matter and between the same parties that had been heard and finally determined. It was counsel's view that the matter could not therefore fall under Section 7 of the Civil Procedure Act as being *res-judicata*. Counsel further submitted that the defendant could not claim adverse possession over the suit land since he had not been on the land for more than 12 years so as to entitle him to a claim for adverse possession. He relied on the case of **Joseph Ngahu Njiru & 3 Others –vs- Zakayo Macheru Kariuki & 8 Others [2010] eKLR** on this point. And even then counsel submitted that a claim for adverse possession could only be raised through an Originating Summons in terms of **Order 37 rule 1 (1) of the Civil Procedure Rules, (2010)**.

14. Finally, counsel submitted that the plaintiff is entitled to general damages for unlawful use of the land by the Defendant, and relied on the decision in **Philip Ayaya Alluchio –vs- Chrispinu Ngago [2014] eKLR**.

15. It is against this background that I have to decide whether the plaintiff's has proved his case as required in law.

16. The Plaintiff has pleaded as well as adduced evidence that she is the proprietor of the parcel of land known as ISUKHA/SHITOTO/269 having purchased the land from one Stephen Mukala and produced the title Deed and sale agreement as PEx.1 and 2 respectively. From the exhibits especially PEx.1, the Plaintiff is indeed the registered owner of the suit land. What was produced as PEx.2 (Sale agreement) is a document which was written in front of the Assistant Chief saying that the Plaintiff's husband would succeed Stephen Mukala's piece of land and should Stephen Mukala die, Ernest was to meet his burial

expenses. On 5/12/1989, Stephen Mukala acknowledge to have received purchase price of Kshs.1,500/=.

17. It is important to note here that the document did not appear as a sale agreement and did not indicate the parcel of land number. Nevertheless, the Plaintiff became registered as proprietor of parcel No. ISUKHA/SHITOTO/269 on 28/9/2012 in what she says was through transmission as the Administratrix of her late husband's estate.

18. The Plaintiff also produced an order of stay as PEx.5 which shows that the dispute was between Defendant herein and Ernest Munika, but does not show the parcel of land. No other documents were produced and I am unable to confirm whether the proceedings related to the suit land herein. Exhibits PEx.6, 7 and 8 are Demand letters sent to the Defendant and they clearly refer to the suit land herein.

19. The Defendant and his counsel did not attend court and therefore did not adduce evidence to prove the claim of Adverse Possession and *res-judicata*. The defendant's case therefore remains unsubstantiated and the Plaintiff's evidence that she is the owner of the suit land which they purchased from Stephen Mukala remains uncontroverted.

20. The Plaintiff is the registered Proprietor of the suit land. The Plaintiff was registered as proprietor of the suit land on 08/9/2012 and with this registration, she became the indefeasible owner of the suit land and has the right to enjoy ownership and possession of the land. The possessory rights of the Plaintiff cannot be defeated in any other manner but in accordance with the law.

21. The ownership of the suit land by the Plaintiff is protected both by the Constitution and the relevant statutes. Article 40 of the Constitution provides as follows;

Article 40 (1) "Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property –

a. of any description, and

b. In any part of Kenya."

22. By dint of the Title Deed, (PEx.1), the Plaintiff has acquired and now owns parcel No. ISUKHA/SHITOTO/269. This acquisition is for now constitutionally protected and the plaintiff must enjoy this protection. The Plaintiff's protection is further amplified by the Land Registration Act (No. 3 of 2012) which provides at Section 25 as follows;

S. 25 (1) "The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject;

a)

b) to such liabilities rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register..."

23. The Plaintiff's right of ownership to the suit land though absolute can only be defeated as provided for under the Act. The court has an obligation to accept the title Deed issued to the Plaintiff as evidence of her ownership of the suit property unless the contrary is shown. That is why Section 26 of the Act provides as follows;

S. 26 (1) "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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,

subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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 party;
or**

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24. The Plaintiff's ownership of the suit land is indefeasible but can and may be challenged on grounds of misrepresentation, fraud which, as the owner, must be proved to have been party to, or if the property was acquired illegally, unprocedurally or through corruption. All these must however be proved by evidence.

25. The Defendant alleged in his defence, that the suit land was not properly acquired and also put up some claim of adverse possession and that the suit was *res-judicata*. However, the Defendant did not attend court and therefore did not adduce evidence to prove these allegations. As it is, they remain just allegations. Allegations without proof are not enough to make the court find otherwise than in favour of the plaintiff.

26. From the evidence adduced and exhibits produced, I am satisfied that the plaintiff has proved his case on a balance of probability and must succeed.

27. The Plaintiff has asked that she be paid damages for unlawful use of her land by the Defendant. She did not however, show how much land the Defendant has illegally occupied and used. This would have enabled the court assess the damages, if any, payable. I do not think the plaintiff has laid a basis for payment of general damages, and I disallow this part of the claim.

28. In the end, I allow the plaintiff's suit and enter judgment in favour of the plaintiff against the Defendant as follows;

1. An order of eviction is hereby issued directing the Defendant to vacate parcel of land known as ISUKHA/SHITOTO/269 within six (6) months from the date hereof and demolish all his structures erected and being on the land and in default the Defendant be forcefully evicted and those structures demolished.

2. A permanent injunction is hereby granted restraining the Defendant , his workers, family members and or any person claiming under him from interfering with the plaintiff's occupation and or enjoyment of the parcel of land No. ISUKHA/SHITOTO/269.

3. Costs of the suit to the plaintiff.

Dated and delivered at Kakamega this 17th day of March, 2015

E. C. MWITA

J U D G E