



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 246 OF 2018**

**KARISA NGARI KOMBE.....PLAINTIFF**

**VERSUS**

**ESTHER NZINGO KALUME.....1<sup>ST</sup> DEFENDANT**

**BERNARD OCHIENG OLUOCH.....2<sup>ND</sup> DEFENDANT**

**POLA KALUME KITSAUMBI.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

It is the Plaintiff's case that at all material times, he has been in possession of Plot Number MN/III/3858 situated along Mombasa/Malindi road having acquired the same from Sheban Kalume. In August, 2017 the 1<sup>st</sup> Defendant caused a resurvey of the land adjacent to the Plaintiff's plot to be done and he unlawfully interfered with earlier beacons as erected by her deceased brother. The Plaintiff together with others have moved to court to contest the title held by the 1<sup>st</sup> Defendant. That on or about 19<sup>th</sup> January 2018, the Defendants threatened to carry out demolitions of a portion of the Plaintiff's house on the Plot of Land belonging to the Plaintiff. The Plaintiff avers that he owns the land and has been occupying the parcel for over 37 years and he has invested heavily on the Parcel by constructing commercial premises and has seven rent-paying tenants. The Plaintiff avers that the Defendants intend to evict him from Plot No. MN/III/3858 by carrying out the said demolitions. The Plaintiff's claim against the Defendants is permanent injunction restraining them from demolishing and evicting Plaintiff from Plot registered as L.R. Number 10215 (Originally Number 3860/2) situated within Mtwapa and a declaration and a declaration that the Plaintiff is entitled to the portion of land. Despite directions having been given by government offices, the Defendant has refused, neglected and/or otherwise failed to abandon his intention of carrying out demolitions on the Plaintiff's plot. The Plaintiff prays for judgment to be entered against the Defendant for:

- a. A permanent injunction restraining the Defendants by themselves, servants and/or agents from demolishing the house and evicting the Plaintiff from Plot No. MN/III/3858 situated within Mtwapa.
- b. A declaration that the portion of land occupied by the Plaintiff and registered under the 1<sup>st</sup> Defendant being L.R. No. 10215 (originally number 3860/2) belong to the Plaintiff by virtue of adverse possession.
- c. Costs of the suit with interest thereon at court rates
- d. Such other or further reliefs as this Honourable court may deem fit and proper.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that to the extent that the Plaintiff has not demonstrated that the boundaries of the alleged Plot Number MN/111/3858 are noted in the register, this court is expressly barred from entertaining this action by virtue of Section 18 (2) of the Land Registration Act, 2012. That the Plaintiff occupies a portion of land that borders the 1<sup>st</sup> Defendant's parcel known as Plot Number 10215/III/MN (Original Number 3860/2 Section III Mainland North). The particulars of the portion of land and acquisition as alleged by the Plaintiff are unknown to the 1<sup>st</sup> Defendant. That sometime in the year 2014, her Plot Number 10215/III/MN (Original Number 3860/2 Section III Mainland North) was resurveyed by a licensed surveyor for formal titling and boundary beacons positioned. That the 1<sup>st</sup> Defendant has never interfered with the beacons placed by the licensed surveyor and endorsed by the Director of Surveys. That the Plaintiff without any colour of right has erected temporary/semi- permanent structures that overlap the boundary's beacons and encroach into the 1<sup>st</sup> Defendant's Plot Number 10215/III/MN (Original Number 3860/2 Section III Mainland North). She has numerously requested the Plaintiff to remove the structures that offend the boundary beacons but her request has been ignored by the Plaintiff. She has, acting in good neighbourliness and without prejudice to her absolute proprietorship rights, acceded to the Plaintiff's request not to interfere with one permanent dwelling house that similarly encroaches upon her Plot Number 10215/III/MN (Original Number 3860/2 Section III Mainland North) which acceding is conditional on the Plaintiff removing the other offending temporary/semi-permanent structures.

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 court 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 1<sup>st</sup> Defendant is the proprietor of parcel of land known a L.R. Number 10215 (Originally Number 3860/2). The plaintiff testified that he has been in possession of Plot Number MN/III/3858 situated along Mombasa/ Malindi road having acquired the same from Sheban Kalume. In August, 2017 the 1<sup>st</sup> Defendant caused a resurvey of the land adjacent to the Plaintiff’s plot to be done and she unlawfully interfered with earlier beacons as erected by her deceased brother. After Sheban Kalume died he was instructed to pay the ground rent to the 3<sup>rd</sup> Defendant and has been doing so to date. He confirms that he is leasing the land and that the 1<sup>st</sup> Defendant has sold the land to the 2<sup>nd</sup> Defendant. No evidence has been adduced before this court to show that the 1<sup>st</sup> Defendant acquired the suit land fraudulently or through misrepresentation. I have reviewed the plaintiff’s exhibits and I find no survey report to show that the 1<sup>st</sup> Defendant has encroached on the land which the Plaintiff possesses. Indeed as admitted I find that the plaintiff is a licensee and cannot now turn around and claim adverse possession. Be that as it may, I find that this was a boundary dispute under section 18 of the Land Registration Act and in the absence of any report from the Land Registrar the encroachment and or alleged shifting of the beacons cannot and has not been proved. I find that the 2<sup>nd</sup> Defendant is an innocent purchaser. For these reasons I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs to the Defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH 2022.**

**N.A. MATHEKA**

**JUDGE**