



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA

ELC CASE NO. 41 OF 2016

ALBERT LUSIMBA RAGUE

VINCENT MUSUNGU RAGUE..PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA

MUSAA STORES DEFENDANTS

JUDGEMENT

The plaintiff's aver that the 1st plaintiff is the administrator of the estate of Juvenalis Rague who died on 27th April, 2002 at all times to this suit, the plaintiffs' father, Juvenalis (now deceased) was seized of and occupied land parcel number Isukha/Shirere/1074 before, at and after the time of land adjudication and registration of the said piece of land in 1973 and the plaintiffs have lived, built on, worked and tilled the land exclusively, peacefully, openly and continuously since the 1950s when they were born to-date. In the year 1973, the then Kakamega County Council fraudulently had the land registered in the Council's name for and as trustee for the 2nd defendant as beneficial owner. On discovery of the fraud committed by the said council, the plaintiffs' deceased father initiated a claim through inter alia the Office of the President, Kakamega County Council and the Ministry of Lands for correction of the fraud, which dispute had not been resolved by the time the deceased died in the year 2002. It is the plaintiffs' contention that the 1st defendant got registered as owner of Land Parcel No. Isukha/Shirere/1074 through fraud and the said title should be cancelled and the plaintiffs registered owners thereof. The plaintiffs aver that they have lived, worked, occupied and built houses on land parcel No. Isukha/Shirere/1074 from the 1950s, a period of over 50 years as of right, openly and without interruption or hindrance from anyone. The plaintiffs aver that recently the defendants, their servants, agents and employees have been threatening to come to the suit land parcel No. Isukha/Shirere/1074 with the intention of evicting the plaintiffs therefrom. The plaintiffs contend that the registration of the defendants as owners of the land is subject to the prescriptive rights the plaintiffs have acquired thereon under section 30 of the Registered Land Act, (Cap 300, Laws of Kenya (now repealed) and section 28 (h) of the Land Registration Act (No. 3 of 2012). The plaintiffs' claim against the defendant is for an order that the defendants acquired title to the said piece of land by fraud or in the alternative that the plaintiffs have acquired title to the suit land by adverse possession and the registration of the defendants as owners be cancelled and in lieu thereof, the plaintiffs be registered as owners and a title be accordingly issued to the plaintiffs. The plaintiffs pray for judgment against the defendants jointly and or severally for orders as follows:-

1. A declaration that the defendants were registered as owners of title No. Isukha/Shirere/1074 through fraud and an order that the registration of the defendants as owners of title No. Isukha/Shirere/1074 be annulled, revoked and cancelled forthwith and in lieu thereof the plaintiffs be registered as owners thereof and a title be accordingly issued in the names of the plaintiffs.
2. In the alternative an order be made that the plaintiffs have acquired title No. Land parcel No. Isukha/Shirere/1074 by adverse possession and an order that the registration of the defendants as owners of title No. Isukha/Shirere/1074 be accordingly cancelled and revoked and the plaintiffs be registered as owners thereof and a title thereto be accordingly issue in the plaintiffs' names.
3. An order of permanent injunction to stop and restrain the defendants, their servants and/or agents from trespassing onto, laying claim to, entering or encroaching upon or alienating land parcel Isukha/Shirere/1074 or in any manner damaging, demolishing or destroying crops, structures or buildings thereon or interfering with the plaintiffs' peaceful and exclusive occupation and use of the suit land.
4. Such further or other orders be made as may be just and expedient in the circumstances.
5. An order that the defendants do pay the costs of this suit.

PW1 produced a search certificate of land parcel Isukha/Shirere/1073 (PEx2) in the name of their late father and insists that the suit land was

illegally hived off from there.

DW1 a Director with the County Government testified that the 1st defendant denies that Land Parcel No. Isukha/Shirere/1074 has at any time been the property of the plaintiffs or their alleged father one Juvenalis Rague as alleged. The 1st defendant further denies that the plaintiffs are in occupation of the suit land Isukha/Shirere/1074. The 1st defendant avers that the then Kakamega County Council was lawfully registered as the owner of Land Parcel No. Isukha/Shirere/1074 in the year 1973 and therefore the plaintiff could not have been holding the title as it was a first registration (DEx1 is the green card). The 1st defendant maintains that Isukha/Shirere/1074 was lawfully registered in their name. He produced the Ndungu Report to show that this was public land which was grabbed by individuals (DEx2 is the Ndungu Report). DEx4 was the lease agreement of one Mcdonald Lijoodi Makaka the original allottee. He produced correspondence to show that the suit land was reserved for public use that is a rehabilitation center.

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.”

It is a finding of fact the 1st defendant is the registered proprietor of Land Parcel No. Isukha/Shirere/1074. PW1 testified that their father, Juvenalis (now deceased) was seized of and occupied land parcel number Isukha/Shirere/1074 before, at and after the time of land adjudication and registration of the said piece of land in 1973 and the plaintiffs have lived, built on, worked and tilled the land exclusively, peacefully, openly and continuously since the 1950s when they were born to-date. In the year 1973, the then Kakamega County Council fraudulently had the land registered in the Council's name for and as trustee for the 2nd defendant as beneficial owner. I have perused the exhibits before this court and indeed find that the 1st defendant is the registered proprietor of Land Parcel No. Isukha/Shirere/1074. The Ndungu Report was produced to show this was public land which was grabbed by one Mcdonald Lijoodi Makaka. The plaintiffs have not shown evidence of ownership of Land Parcel No. Isukha/Shirere/1074 but of Land Parcel No. Isukha/Shirere/1073. I find no evidence that the 1st defendant influenced surveyors to excise Land Parcel No. Isukha/Shirere/1074 from Land Parcel No. Isukha/Shirere/1073 and secretly and irregularly registering the same in the defendants' names when it should wholly have been registered in the deceased's name as Land Parcel No. Isukha/Shirere/1073. No evidence has been adduced that they secretly caused a big chunk of Title No. Isukha/Shirere/1073 to be hived off and registered as Isukha/Shirere/1074 in the defendant's name whilst knowing well that the land belonged to Juvenalis Rague now deceased. No evidence was shown that they registered private land as public land and held it in trust for undisclosed private individuals in order to mask the real fraudsters in name of Musaa Stores. That they grabbed the deceased's piece of land and having the same registered in the defendant's name for undisclosed persons and undisclosed reasons. I find that the 1st defendant that is the Kakamega County Council as it was known then) was lawfully registered as the owner of Land Parcel No. Isukha/Shirere/1074 in the year 1973. I find that Land Parcel No. Isukha/Shirere/1074 is public land and was first reserved for Musaa Stores and later surrendered to be a rehabilitation center as per the correspondence. The same being public land the plaintiffs cannot lay a claim for adverse possession. I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD MARCH 2021.

N.A. MATHEKA

JUDGE