



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 552 OF 2014

GABRIEL MARTIN OPONDO.....PLAINTIFF

VERSUS

AGGREY SHIRUMBA WATAKO

VINCENT WASICHE WATAKO.....DEFENDANTS

JUDGEMENT

The plaintiff states that at all material time herein referred, the plaintiff is the duly registered proprietor of the whole of that parcel of land known as L.R. No. South Wanga/Lureko/3426 and the plaintiff holds title deed for the same. On or about the month of December, 2010 the defendants jointly and severally without any colour of right trespassed into the plaintiff's land registration number South Wanga/Lureko/3426 and erected permanent houses thereon and have continued to stay thereon without the plaintiff's consent. The plaintiff avers that the action by the defendants to trespass into the plaintiff's aforesaid parcel of land is unlawful and unprocedural. The plaintiff's claim against the defendants jointly and severally is for an order that the defendants be evicted from the parcel of land known as South Wanga/Lureko/3426. The plaintiff prays for judgment against the defendants for:-

1. Eviction order.
2. Costs and interest at court rates.

The defendants aver that land parcel No. S/Wanga/Lureko/3426 appears to be a sub-division of either land parcel No. S/Wanga/Lureko/456 or S/Wanga/Lureko/457. The defendants' father (deceased) was entitled to more or less three (3) acres of the said land titles S/Wanga/Lureko/456 and S/Wanga/Lureko/457 upon which the defendants were born in 1957 and 1958 respectively and have resided to date complete with homes, families and other property. In the premises the defendants aver that the plaintiff's claim, if any, which is denied, is false and stature barred in any event and any or sub-division of land titles S/Wanga/Lureko/456 and S/Wanga/Lureko/457 done in disregard of the defendants' interest would be fraudulent and malafide. The defendants would rely on the pleadings in Kakamega RMCC No. 58 of 2007 filed against the defendants by Joseph Okumu Washika, the plaintiff's brother but withdrawn. The defendant would further rely on arbitration proceedings between the defendants' father and the said Joseph Okumu Washika and their adoption as judgment in Kakamega HCCC No. 382 of 1988.

This court has considered the evidence and the 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 a finding of fact that the suit land L.R. No. South Wanga/Lureko/3426 is registered in the name of Francis Swaga Washika deceased and the administrator is now the plaintiff (the copy of the title is produced as PEx1). The plaintiff testified that he obtained the land through succession but found the defendants had trespassed. PW2 corroborated the plaintiff's testimony. The litigants are cousins and the land belonged to his father who never gave it to the defendants' father. He admits that they are houses on the suit land and the defendants reside there. The defendants testified that their father took possession of the land in 1964 when adjudication was done. The defendants are brothers and they occupy two acres from 1982. Their father went for arbitration and the award was adopted by the High Court in 1991. The case was between their father and Joseph Okumu Washika the plaintiff's brother. The proceedings were produced in court as exhibits (DEX1 & 2). Their father was awarded the land. Their father was not aware of the succession which was done by the plaintiff. I find that the defendants are in occupation of the suit land from 1964 and the matter had been litigated upon and an award confirming their ownership way back in 1991. The defendants are therefore beneficiaries of the suit land and should have been included in the succession by the plaintiff. The suit land was therefore not available for distribution to the plaintiff. I find that the plaintiff has failed to prove his claim on a balance of probabilities and the same is dismissed with no orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021.

N.A. MATHEKA

JUDGE