



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 127 OF 2012

BENJAMIN ELIJAH OYWOKO.....PLAINTIFF

VERSUS

PATRICK LISAMULA MATENDE

KAKAMEGA COUNTY LAND REGISTRAR

THE KAKAMEGA COUNTY LAND SURVEYOR

THE HON ATTORNEY GENERAL.....DEFENDANTS

JUDGEMENT

The plaintiff avers that on or about the year 2007 purchased the said portion of land from land reference No. Isukha/Shirere/3254 from Vincent Shinali who is the beneficial owner of the said parcel of land measuring 0.10 Ha and took possession of the land immediately and began cultivating the land where he grew Napier grass. The plaintiff avers that land parcel No. Isukha/Shirere/5311 shares a common boundary with land parcel Isukha/Shirere/5312. The plaintiff avers that land parcel No. Isukha/Shirere/5312 was purportedly sub divided into 5664 and 5665. The plaintiff avers that the defendant is the purported registered owner has a purchaser's interest in land parcel No. Isukha/Shirere/5664. Subsequently before the subdivision of land parcel Isukha/Shirere/3254 a dispute arose between the beneficiaries of the said parcel of land and one Gideon Alumasa with regard to the boundaries since the location was not clear and other people felt that the other were encroaching on other persons parcel, the matter was referred to the Land Disputes Tribunal for adjudication land via case No. 8 of 2007 and it was decreed that the plaintiff be granted his rightful portion (suit land) as per the boundaries on ground which portion the defendant has unlawfully taken possession upon the same being illegally transferred to the 1st defendant by the said Gideon Alumasa. Further the tribunal ordered that a survey be done as per the indications on the ground which meant the plaintiff was to occupy the disputed portion of the said parcel and that the relevant authority including the survey office was to conduct a survey as per the order and title be issued thereto. The plaintiff avers that on 20/5/2012 while on a visit to the suit land on Isukha/Shirere/5311 he found the 1st defendant's agent constructing a semi permanent structure on the suit land. On or about the month of May, 2012, the plaintiff having been growing napier grass for years embarked in the process of developing the said parcel where he had begun depositing construction material for construction and had transported construction materials to deposit in the suit land when he was unlawfully stopped and or denied access or entry to the land to enable him deposit the materials by one Regina Musavi Masinde and Edward Musambai. It is during the process of carrying out this

exercise that the plaintiff discovered that the 2nd and 3rd defendants had jointly and severally curved out and caused land parcel number Isukha/Shirere/3254 to be surveyed and disentitled the plaintiff his rightful portion (suit land) as ordered by the Kakamega Lands Disputes Tribunal.

The plaintiff's claim against the defendant jointly and severally is therefore for a declaration that the suit parcel of land was not available for alienation to the 1st defendant under the provisions of the Lands Act and that the earlier original title land reference No. Isukha/Shirere/3254 be surveyed afresh in accordance with the Kakamega Land Disputes Tribunal decision. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) A declaration that the subdivision already done based on the 28/10/2009 sub division map registered by the land registrar on 6/7/2010 in respect to Isukha/Shirere/3254 is null and void and all titles issued as per the map be and is hereby cancelled.
- (b) A declaration that the plaintiff be issued with title deed based on the Kakamega Lands Disputes Tribunal Decision dated the 15th day of March, 2010 and adopted by the Chief Magistrate's Court in Award No. 14 of 2010 as final judgment.
- (c) A declaration that the plaintiff is the lawful owner of the disputed portion measuring 40 meters by 26.5 meters (0.10 Ha) as per the ground currently designated as Isukha/Shirere/5311.
- (d) An order of eviction and or demolition as against the defendant from the disputed portion where the defendant is currently occupying.
- (e) The plaintiff finally prays for an injunction permanently restraining the 1st defendant, his/her servants and or agents from trespassing into, constructing upon, selling, transferring, leasing and or in any other manner whatsoever interfering with the plaintiff's use of the disputed land.
- (f) Costs of this suit.

PW1, Vincent Ukang'a Shinali testified that he inherited the land and he produced the decree and the proceedings from the land disputes tribunal. PW2 the plaintiff testified that he bought the land in 2007 which was a subdivision of parcel No. Isukha/Shirere/3254 his land is parcel No. Isukha/Shirere/5311 (PEx5 is his title). He bought the land from PW1 and they are third parties on his land. PW3 testified that his land is NO. 5310 and he lives on the same. He bought the same from PW1's brother.

The 2nd and 3rd defendant deny that they ever curved out parcel No. Isukha/Shirere/3254 nor caused the same to be surveyed. In their written submissions the 1st, 2nd and 3rd defendant submitted that the suit does not raise any cause of action against them and that they have played any part in the purported encroachment. The plaintiff also did not produce any of the purported forged documents.

This court has carefully considered the plaintiff's and the defendant's cases. 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.”

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, absolute, of whole that land better known as parcel No. Isukha/Shirere/5311. The plaintiff avers that land parcel No. Isukha/Shirere/5311 shares a common boundary with land parcel Isukha/Shirere/5312. The plaintiff avers that land parcel No. Isukha/Shirere/5312 was purportedly sub divided into 5664 and 5665. The plaintiff avers that the defendant is the purported registered owner has a purchaser’s interest in land parcel No. Isukha/Shirere/5664. Subsequently before the subdivision of land parcel Isukha/Shirere/3254 a dispute arose between the beneficiaries of the said parcel of land and one Gideon Alumasa with regard to the boundaries since the location was not clear and other people felt that the other were encroaching on other persons parcel, the matter was referred to the Land Disputes Tribunal for adjudication land via case No. 8 of 2007 and it was decreed that the plaintiff be granted his rightful portion (suit land) as per the boundaries on ground which portion the defendant has unlawfully taken possession upon the same being illegally transferred to the 1st defendant by the said Gideon Alumasa. No evidence has been adduced to prove this ownership of the 1st defendant. The green cards produced as exhibits disclose different parties. The said Gideon Alumasa has not been enjoined in this suit. I concur with the submissions by the 2nd, 3rd and 4th defendants that no evidence has been adduced to prove their role in the alleged encroachment of the plaintiff’s parcel of land by the 1st defendant. This appears to be a boundary dispute and the same should be settled by the Land Registrar and not this court. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY 2020.

N.A. MATHEKA

JUDGE