



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 203 OF 2014

EDWIN SHISIA OSUNDWA.....PLAINTIFF

VERSUS

MARTIN ODINGA WALUCHO.....DEFENDANT

JUDGEMENT

The plaintiff is and was at all material times the registered proprietor and entitled to the possession of Title No. S/WANGA/LUREKO/1731. On or about the 25th day of August, 2003, the Defendant wrongfully entered upon the said title, fenced part thereof and deposited building stone thereon and has thereby trespassed and is still trespassing thereon. The defendant threatens and intends unless restrained by this honourable court to continue trespassing upon the said title. By reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said title and has thereby suffered loss and damage. The plaintiff claims:-

- (a) Possession of the said title;
- (b) An injunction to restrain the defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said title.
- (c) Damages.
- (d) Further or any other relief.

On the 12th March 2018 the plaintiff's case was dismissed for non-attendance and the court proceeded with the defence and counterclaim. The defendant testified that the Government acquired the land which included No. S/WANGA/LUREKO/1731 and converted it into trust land. The area was gazetted and individuals applied for plots. The defendant was allocated plot 14 which was later registered under Registration of Titles Act as grant No. 5936 – Mumias Municipality 8056/325. DW2 the lands Officer corroborated the plaintiff's evidence and confirmed that the documents were in his original file. The defendant produced a copy of the certificate grant, allotment letter, copy of the Kenya Gazette Notices and a copy of the deed plan among others.

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. 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.”

The defendant testified that the Government acquired the land which included No. S/WANGA/LUREKO/1731 and converted it into trust land. The area was gazette and individuals applied for plots. The defendant was allocated plot 14 which was later registered under Registration of Titles Act as grant No. 5936 – Mumias Municipality 8056/325. DW2 the Lands Officer corroborated the plaintiff's evidence and confirmed that the documents were in his original file. His title has not been challenged and no evidence of fraud has been adduced.

This evidence has not been challenged. I find that the defendant has proved the counter claim on a balance of probabilities and I grant the following orders;

1. Vacant possession
2. An injunction to restrain the plaintiff by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said suit land.
3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 2ND JULY 2019.

N.A. MATHEKA

JUDGE