



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 108 OF 2015

ISAAC ANYULA KHATETE.....PLAINTIFF

VERSUS

WILSON FRANCIS ONJUNGU

CHRISPINUS ODHIAMBO OLUOCH

THE LAND REGISTRAR

THE DISTRICT SURVEYOR KAKAMEGA.....DEFENDANTS

JUDGEMENT

The plaintiff avers that he is the absolute registered proprietor of land parcel No. BUTSOTSO/SHIKOTI/3366 measuring approximately 0.08 hectares and which was on 6/12/1989 registered by the 3rd defendant in the name of the plaintiff and title deed issued on 17/1/1990 while the 1st defendant is the registered proprietor of land parcel No. Butso/Shikoti/2763 which borders the plaintiff's said land. The plaintiff states that he has a long standing dispute with the 1st defendant over the boundary of the plaintiff's land aforesaid and the 1st defendant's said parcel No. BUTSOTSO/SHIKOTI/2763 and other neighboring parcels. The 3rd defendant has failed, refused or neglected to determine the boundaries between the plaintiff's aforesaid land and the bordering parcels of land based on claims that the plaintiff's said parcel is not plotted on the map despite the fact that the 3rd defendant is the one who registered the plaintiff and issued to him a title as aforesaid while the 1st defendant is the one who surveyed the plaintiff's land as the then District Surveyor. The 4th defendant and his office as custodians of the survey records of the plaintiff's land have failed to avail the mutation forms in respect of the said parcel on claims that the same cannot be traced in his office. The plaintiff states that he blames the disappearance of relevant survey records concerning his said parcel on the negligence of the 4th defendant or a conspiracy between the 4th defendant and the 1st defendant as the former District Surveyor. The 1st and 2nd defendants taking advantage of the failure of the 3rd defendant to establish the plaintiff's boundaries, trespassed onto the plaintiff's said parcel on 5th of August, 2014 and unlawfully damaged the crops planted thereon by the plaintiff. The crops damaged were bananas total number of banana plants damaged are 18 and maize 35 plants (stalks) all totaling to the value of Ksh. 8,850/=. The plaintiff states that as a result of the matters aforesaid the plaintiff has suffered loss and damage. The plaintiff states that the 3rd defendant has a legal duty and obligation to determine the boundary of the plaintiff's said land in conjunction with the 4th defendant but have in breach of that duty jointly and or severally failed to carry out such duties and thus exposing the plaintiff to damage of his property by his neighbours. The plaintiff states that the 1st and 2nd defendants will continue with their acts of trespass on the plaintiff's suit property because of the uncertainty unless restrained by this court. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order of a permanent injunction to issue against the first and second defendants restraining them from unlawfully entering onto and or in any way whatsoever from interfering with the plaintiff's use of his land parcel No. BUTSOTSO/SHIKOTI/3366.
- (b) An order that the first and second defendant to pay to the plaintiff the sum of Ksh. 8,850/= being the value of the damage occasioned to the crops planted by the plaintiff on land parcel No. BUTSOTSO/SHIKOTI/3366 aforesaid.
- (c) The third and fourth defendants to establish the proper measurements and boundaries of land parcel No. BUTSOTSO/SHIKOTI/3366 and land parcel No. BUTSOTSO/SHIKOTI/2763.
- (d) An order that the District Land Surveyor to rectify and plot land parcel No. BUTSOTSO/SHIKOTI/3366 on the relevant survey map sheet No. 18.
- (e) Costs of this suit.

The 1st defendant states that the area of land for Butso/Shikoti/3366 is not 0.08 Ha but is 50 ft by 108 ft (0.045 Ha). That he does not have

a long boundary dispute with the plaintiff. In 1990 when the plaintiff bought his land, he had already settled in Butso/Shikoti/2763 and he had planted Cyprus trees around it. These trees were cut about five years ago and made into timber. They were also cut because the plaintiff was complaining that they had grown very big and that they could fall onto his house. The stumps of these trees are still visible between the common boundary of the two parcels of land. It is the plaintiff who has been removing them with the view of making parcel Butso/Shikoti/2763 part of his land. He denies that there is a conspiracy between him and the 4th defendant to make the plaintiffs survey documents disappear from the survey office. The plaintiff in his letter of 25th August, 2014 to the District Land Registrar – Kakamega forwarded a copy of the document to the Land Registrar – Kakamega. This therefore proves that the plaintiff is the one holding the document. He denies trespassing into the plaintiffs land on 5th August, 2014 and unlawfully damaged, the plaintiffs' crops and if it was so, he should have reported the matter to police. By consent of the District Surveyor visited the suit parcels on the 14th March 2018 to establish the boundaries but according to him he could not do so as the mutation forms that generated land parcel Butso/Shikoti/3366 and other parcels could not be found. Land parcel Butso/Shikoti/3366 also does not exist in the PID map (DEx1).

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.”

This matter seems to basically a boundary dispute between the litigants. The By consent of the District Surveyor visited the suit parcels on the 14th March 2018 to establish the boundaries but according to him he could not do so as the mutation forms that generated land parcel Butso/Shikoti/3366 and other parcels could not be found. Land parcel Butso/Shikoti/3366 also does not exist in the PID map (DEx1). It is not disputed that both land parcels exist on the ground and it can only be the District Land Registrar and the County Land Surveyor who can assist the litigants to establish the boundaries. The plaintiff has proved that he is the absolute proprietor of Land parcel Butso/Shikoti/3366 and he physically occupies the said land. Be that as it may, having failed to establish the boundaries, it has not been established whether or not the alleged damaged to the crops valued at Ksh. 8,850/= where within Land parcel Butso/Shikoti/3366 and the same cannot be awarded. I therefore make the following orders;

1. District Land Registrar and the County Land Surveyor visit land parcel No. BUTSOTSO/SHIKOTI/3366 and land parcel No. BUTSOTSO/SHIKOTI/2763 to establish the proper measurements and boundaries using the physical areas on the ground and documents in their possession. The report to be filed in court within the next 60 (sixty) days from the date of this judgment.
2. 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