



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 209 OF 2017

PRISCILLA MUHONJA.....PLAINTIFF

VERSUS

HESBON JAHONJA.....DEFENDANT

JUDGEMENT

The plaintiff is the beneficial and/or registered owner of that parcel of land known as Kakamega/Mudete/198 following her succession of the estate of Agneda Chambula Adulu deceased who owned land title No. KAKAMEGA/MUDETE/198 measuring more or less 0.9 hectares. Before her demise on 6th June, 1985, the said Agneda Chambula Adulu lived in a semi-permanent house on the said piece of land title No. KAKAMEGA/MUDETE/198. As beneficial and/or registered owner of the said parcel of land and as a daughter of the said Agneda Chambula Adulu, the plaintiff is and has at all the material times been entitled to possession and ownership of the said piece of land title No. KAKAMEGA/MUDETE/198. On or about December, 2003, the defendant without consent of the plaintiff and without any colour of right entered upon the said property and took possession of it and commenced, together with his family to reside in the said semi-permanent house thereon. The said acts amounted to a trespass by the defendant and the trespass is continuing. By reason of the matters aforesaid, the plaintiff has been deprived of the use and enjoyment of the said property and has thereby suffered loss and damage. The defendant threatens and intends, unless restrained by this honourable court to continue to remain in and repeat the wrongful acts complained of herein above. The plaintiff claims:-

(a) Possession.

(b) An order that the defendant is not entitled to enter, remain or use the suit property title NO. KAKAMEGA/MUDETE/198 or any portion thereof and should be evicted therefrom with his family, servants, agents, relatives or otherwise howsoever.

(c) An injunction to restrain the defendant whether by himself, his servants, agents, relatives or otherwise howsoever once evicted from entering remaining or using land title No. KAKAMEGA/MUDETE/198.

(d) Damages for trespass.

(e) Costs of this suit.

(f) Interest.

(g) Further or other relief.

PW1 the plaintiff testified that the defendant was her step brother's son. She obtained the land through succession and she is now the registered owner, she produced the official search, certificate of confirmation of grant title deed as PEx 1 to 3.

The defendant in his statement of defence, denied that the plaintiff is the beneficial and/or registered owner of all that parcel of land known as Kakamega/Mudete/198 following her succession of the estate of Agneda Chambula Adulu deceased who owned land title No. KAKAMEGA/MUDETE/198 measuring more or less 0.9 hectares as alleged or at all, avers that, there is pending an application in Kakamega High Court Succession Cause No. 41/2005 over the estate of Agneda Cambula Adulu – deceased-which application has not been heard and determined to ascertain his entitlement to the deceased's estate comprising L.R. NO. KAKAMEGA/MUDETE/198.

The defendant denied that as beneficial and/or registered owner of the said parcel of land and as the daughter of the said Agneda Chambula Adulu, the plaintiff is and has at all material times been entitled to possession and ownership of the said piece of land title NO. KAKAMEGA/MUDETE/198 as alleged or at all, avers that he is entitled to ownership of the land as a beneficiary to the estate of Agneda Chambula Adulu as grandson save that succession cause No. 41/2005 is not yet concluded. The defendant denies that on or about December, 2003, he, without consent of the plaintiff and without any colour of right entered upon the said property and took possession of it and commenced, together with his family to reside in the said semi-permanent house thereon as alleged and avers that he is in possession and

occupation of the land as of right as from year 2002. Without prejudice to the foregoing, the defendant avers that one Agneda Chambula Adulu – deceased- in whose name L.R. NO. KAKAMEGA/MUDETE/198 was registered, was his step grandmother and there is pending Kakamega High Court Succession Case No. 41/2005 over her estate through which he is entitled to inherit the land. The defendant gave evidence in court that he bought the land from one Lena for Kshs. 3000,000/= and took possession in 2003 and paid in installments. He produced a sale agreement 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 Nyang'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 that the plaintiff is the beneficial and/or registered owner of that parcel of land known as Kakamega/Mudete/198 following her succession of the estate of Agneda Chambula Adulu deceased who owned land title No. KAKAMEGA/MUDETE/198 measuring more or less 0.9 hectares. PW1 the plaintiff testified that the defendant was her step brother's son. She obtained the land through succession and she is now the registered owner, she produced the official search, certificate of confirmation of grant title deed as PEx 1 to 3. It is the plaintiff's evidence that on or about December, 2003, the defendant without consent of the plaintiff and without any colour of right entered upon the said property and took possession of it and commenced, together with his family to reside in the said semi-permanent house thereon. The said acts amounted to a trespass by the defendant and the trespass is continuing. The defendant in his written defence stated that one Agneda Chambula Adulu – deceased- in whose name L.R. NO. KAKAMEGA/MUDETE/198 was registered, was his step grandmother and there is pending Kakamega High Court Succession Case No. 41/2005 over her estate through which he is entitled to inherit the land. The defendant gave evidence in court that he bought the land from one Lena for Kshs. 3000,000/= and took possession in 2003 and paid in installments. He produced a sale agreement DEx1. The court wonders which defence he wishes to rely on. The defendant never raised any objection in the succession proceedings in Kakamega High Court Succession Case No. 41/2005 and the letters of administration were subsequently confirmed. On the issue of the sale agreement the said Lena was not the registered proprietor of the suit land in 2013 and had no capacity to sell the same to him. The defendant submitted that the plaintiff obtained the title through fraud, this however was not pleaded and particulars were not given to this court. The matter is also not time barred as the plaintiff commenced succession proceedings in 2005 and obtained her title in 2017. Damages for trespass were not proved and the same will not be awarded. I find that the plaintiff has established her case on a balance of probabilities and I grant the following orders;

1. The defendant, his family, servants, agents and relatives are to vacate the suit land parcel No. KAKAMEGA/MUDETE/198 within the next six (6) months from the date of this judgement and in default eviction order to issue forthwith.
2. An injunction to issue to restrain the defendant whether by himself, his servants, agents and relatives once evicted from entering remaining or using land title No. KAKAMEGA/MUDETE/198.
3. Each party to bear its own costs as they are relatives.

It is so ordered.

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

N.A. MATHEKA

JUDGE