



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 250 OF 2016

DARIYA SHINYANZWA

JANE ASISA LUSIMBA.....PLAINTIFFS

VERSUS

JOSEPHAT LISIOLA LISHENGA

MAURICE MITEKHO LISHENGA

JACKSON KHAYUMBI INZIANI T/A J.I. KHAYUMBI & CO. ADVOCATES

THE LAND REGISTRAR, KAKAMEGA

THE HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGEMENT

By a plaint dated 5th December, 2019, the plaintiffs aver that, the first plaintiff is the sole absolute proprietor of all that parcel of land known as Isukha/Shirere/1183 measuring approximately 0.9 Ha. within Kakamega County having inherited the same from her late mother Paulina Khashindu Seda who had in turn inherited the same from her husband the late Joseph Seda Bubiru (deceased). The first and second defendants are the sons of the late Alphonse Lishenga Shunza deceased who died on 26th August, 2010. The late Alphonse Lishenga Shunza together with the first and second defendants and other family members have been and continue to illegally occupy part of the first plaintiff's parcel of land registration number L.R. Isukha/Shirere/1183. By an agreement dated 16th March, 2012 signed between the first and the second plaintiff's respectively, the first plaintiff agreed to sell and the second plaintiff agreed to buy land reference number Isukha/Shirere/1183 at an agreed price of Ksh. 900,000.00 which has been paid in full. The first and second plaintiffs then instructed the third defendant to cause the ownership of the said parcel of land to be transferred from the first plaintiff to the second plaintiff and paid all the requisite legal fees as demanded by the third defendant. The third defendant did in fact transfer the suit property from the first plaintiff to the second plaintiff and handed over to the second plaintiff a title certificate in her favour. When the second plaintiff's husband attempted to conduct a search at the lands office in Kakamega to confirm that the property had indeed, been transferred and registered in her name, he was arrested for being in possession of a fake title deed and the same was taken away by the staff at the registry. The matter was reported to the police and after investigation and the second plaintiff's husband was released. In his place the third defendant was arrested and charged with among other offences, forgery and uttering a false documents vide Kakamega Chief Magistrates Court Criminal Case Number 665 of 2013 Republic vs. Jackson Khayumbi Inziani. The third defendant was however acquitted under section 210 of the Criminal Procedure Code. While the above criminal case was still pending, an attempt was made to have a title issued in favour of the second plaintiff but the fourth defendant declined to comply with the court order alleging that there was no evidence of the death of Alphonse Lishenga Shunza despite the overwhelming evidence adduced before him. That despite the fact that Alphonse Lishenga Shunza has passed away and that all the cases pending before court involving the first plaintiff and the said Alphonse Lishenga Shunza, the fourth defendant neglected to remove the caution lodged by the said Alphonse Lishenga Shunza on 29th December, 2006 but instead, on 8th August, 2014 the fourth defendant registered a restriction barring any dealings on said parcel of land pending resolution of Succession Cause number 52 of 2007 and 323 of 2007 cases which do not involve the first plaintiff who is the registered owner of the said parcel of land.

That the fourth defendant may have sought the registration the restriction on the basis of civil case number 323 of 2007 and High Court civil case number 52 of 2007 which were pending between the first plaintiff and the late Alphonse Lishenga Shunza which cases have since lapsed pursuant to his death and failure to substitute. On 14th August, 2014 the fourth defendant allowed the first and second defendants to lodge another caution over the first plaintiff's parcel of land claiming the same interest which their late father claimed prior to his death by lodging a caution on 29th December, 2006. The first and second defendants have on their part continued to illegally occupy a portion of the first plaintiff's parcel of land thereby denying the second plaintiff her constitutional right to own property lawfully acquired. The fourth defendant has on his part refused and/or neglected to return the documents and the money surrendered to him to facilitate the transfer of the subject parcel of land as he did not carry out the instructions given to him by the plaintiffs. The actions by the first, second and fourth defendants have made it impossible for the plaintiffs to discharge their obligations which they undertook when they signed the agreement

entered into on 16th March, 2012 and have denied the second plaintiff the right to own property and peacefully enjoy the same without interference. The first and second plaintiffs pray for judgment to be entered against the first, second, third and fourth defendants as follows:-

(a) A temporary injunction do issue restraining the first and second defendants, their agents, servants and/or employees or any other person acting under them or on their behalf from entering, ploughing, occupying or in any other manner dealing with land parcel number Isukha/Shirere/1183.

(b) A permanent injunction do issue restraining the first and second defendant, their agents and/or employees or any other person acting under them or on their behalf from entering ploughing, occupying or in any other manner dealing with land reference number Isukha/Shirere/1183.

(c) A mandatory injunction do issue against the first and second defendants, their agents, servants, employees or any other person acting under them or on their behalf to vacate land parcel number Isukha/Shirere/1183 failing which an order for which an order for eviction do issue against them.

(d) An order do issue against the third defendant to hand over to the first and second plaintiffs the following:-

(i) Ksh. 40,000.00 paid as legal fees.

(ii) Copies of the plaintiffs PIN number/cards.

(iii) Copies of the plaintiff's identity cards.

(iv) Original title deed to Isukha/Shirere/1183.

(e) An order compelling the fourth defendant to cancel entries registered as follows:-

(i) Entry number 5 dated 29th December, 2006 in favour of Alphonse Lishenga of P.O. 984 Kakamega.

(ii) Entry number 6 dated 8th May, 2014.

(iii) Entry number 7 dated 14th August, 2014.

(f) General damages against the first and second defendants for trespass on land reference number Isukha/Shirere/1183.

(g) Any other relief which this honourable court may deem fit to grant.

PW2 the 2nd plaintiff testified how she bought the suit land from the 1st plaintiff and paid the full purchase price. The 3rd defendant later gave her the title and it turned out to be a forgery. The 1st and 2nd defendants are cultivating the land and she has not taken possession of the same.

The 1st and 2nd defendants aver that they have an interest in the suit land and which interest they are seeking to enforce vide Kakamega HCCC No. 52 of 2007 (OS) in which there is a pending application to substitute the late Alphonse Lishenga and revive the same to proceed to its logical conclusion against the 1st plaintiff herein. In further response the 1st and 2nd defendants aver that they have acquired title of a portion of land known as Isukha/Shirere/1183 measuring 0.6 Ha or thereabouts by adverse possession. The 1st and 2nd defendants raise a preliminary point of law that the suit herein is statutory time barred, incompetent, fundamentally defective, does not disclose a reasonable cause of action and is a mere abuse of the due process of the court and the same should be dismissed and or struck out with costs. The 1st and 2nd defendants pray for dismissal of this suit with costs.

DW3 testified that he was instructed to reduce the sale agreement between the plaintiffs in writing which he did. He was later charged in a criminal court and acquitted. He has since returned all the documents in his possession to the 1st plaintiff including the original title. The parties appointed a certain James Imbenzi to facilitate the transfer.

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. 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 the 1st plaintiff is the registered proprietor of Land parcel No. Isukha/Shirere/1183. The 1st plaintiff testified that she inherited the same from her late mother Paulina Khashindu Seda who had in turn inherited the same from her husband the late Joseph Seda Bubiru (deceased). The first and second defendants are the sons of the late Alphonse Lishenga Shunza deceased who died on 26th August, 2010. The late Alphonse Lishenga Shunza together with the first and second defendants and other family members have been and continue to illegally occupy part of the first plaintiff’s parcel of land registration number L.R. Isukha/Shirere/1183. Prior to Alphonse Lishenga Shunza’s death the following cases were pending in court between himself and the first plaintiff. Kakamega chief Magistrates Court Civil Case Number 323 of 2007 Daria Shinyanzwa Shitiavayi S. Alphonse Lishenga in which the first plaintiff sought for the removal of the caution lodged on her parcel of land by Alphonse Lishenga Shunza. Kakamega High Court Civil Case Number 52 of 2007 (O.S) Alphonse Lishenga Shunza vs Daria Shinyanzwa Shitiabayi in which the late Alphonse Lishenga Shunza sought an order for adverse possession against the first plaintiff over part of the latter’s parcel of land known as Isukha/Shirere/1183. It is in evidence that Alphonse Lishenga Shunza, having passed away on 26th August, 2010 when the above quoted cases were still pending in court. I find that there not having been filed any application for substitution within one year of his death, the two quoted cases have since abated.

The 1st and 2nd defendants aver that they have an interest in the suit land and which interest they are seeking to enforce vide Kakamega HCCC No. 52 of 2007 (OS) in which there is a pending application to substitute the late Alphonse Lishenga and revive the same to proceed to its logical conclusion against the 1st plaintiff herein. In further response the 1st and 2nd defendants aver that they have acquired title of a portion of land known as Isukha/Shirere/1183 measuring 0.6 Ha or thereabouts by adverse possession. Having found that this case has abated I find that the 1st plaintiff is the registered proprietor of the suit land. The 1st plaintiff title is indefeasible and can only be challenged if it is fraudulent scheme which the defendants have failed to prove. The 2nd plaintiff has beneficial interest in this matter as she is a purchaser of the suit land.

DW3 testified that he was instructed to reduce the said sale agreement between the plaintiffs in writing which he did. He was later charged in a criminal court and acquitted. He has since returned all the documents in his possession to the 1st plaintiff including the original title. The parties appointed a certain James Imbenzi to facilitate the transfer. I find that he performed his professional duties and was paid for it. All the relevant documents have been returned to the 1st plaintiff and this has not been disputed. I find the case against him must fail and I dismiss it. Any complaint against an advocate as regards his professional undertakings should be channeled to the Advocates Complaints Commission. The prayer for general damages has not been proved and the same will not be awarded. I find the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. The 1st and 2nd defendants, their servants, agents and relatives are to vacate the suit Land Parcel No. Isukha/Shirere/1183 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. The cautions and restrictions placed on the suit land Parcel No. Isukha/Shirere/1183 be removed within the next six (6) months from the date of this judgement.
3. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE