



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 41 OF 2018

ELISHA OYUGI

BISHOP JOSEPH SAMOEI

FREDRICK MUMIA (*Suing as the registered Trustee of*

FULL GOSPEL CHURCHES OF KENYA.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS

KHWISERO GIRL'S HIGH SCHOOL.....DEFENDANTS

JUDGEMENT

The plaintiff avers that he was the registered owner of all that parcel of land known as Kisa/Wambulishe/1141 measuring approximately 5.5. Ha ('the suit land') from 2nd October, 1982 until 12th February, 2008 when the suit land got registered in the name of the 1st defendant without the knowledge and consent of the plaintiff. The plaintiff was the sole founder of Khwisero Girls Secondary School and the school is entirely the plaintiff's brain child. As part of the plan to form the school, the plaintiff allocated and utilized part of the suit land for the construction of classroom and other structures using its own resources while the remainder of the suit land continued to be utilized for its church activities and structures. Later on the plaintiff transferred only its key administrative roles in the day-to-day running of the school to the government of Kenya as the plaintiff retained its role as the main sponsor of the school and the licensor in respect of part of the suit land utilized by the school. At no time did the plaintiff assign its entire stake in the school or transfer any part of the suit land to the government or to any other separate entity such as the 1st defendant. The legal status of the 1st defendant in relation to the suit land since the formation of Khwisero Girls Secondary School has been that of a bare licensee having no ownership rights in the suit land or any part thereof with the plaintiff being the licensor and sole owner. In or about the year 2008 the 1st defendant acting through registered trustees encroached upon that part of the suit property utilized by the plaintiff for its church activities and structures while alleging that the same had been granted by the plaintiff. On or about the 8th of December, 2008 the 1st defendant fraudulently acquired title to the suit property through collusion with the 2nd and 3rd defendants thereby disinheriting the plaintiff of its lawful ownership. The particulars of the alleged fraud are;

- (i) Invading the plaintiff's property without prior consent of the registered trustees.
- (ii) Sneaking behind the plaintiff's back to obtain the Land Board Consent (if at all it was obtained) or, in the alternative, securing the transfer of the suit land without a legally valid Land Board Consent.
- (iii) Using persons who had no interest in the property to secure the transfer.
- (iv) Misrepresenting to the Land Board and the Registrar of Lands that the masqueraders were actually registered Trustees of the plaintiff.
- (v) The 2nd defendant concocting a fictitious fraudulent claim to ultimately secure the transfer of the suit land to the 1st defendant with the 1st defendant's full knowledge of the fraudulent nature of the claim and the illegality of the sale and transfer process.
- (vi) The 1st defendant taking advantage of its status as a bare licensee to learn and understand the administrative weaknesses of the unsuspecting plaintiff and to thereafter capitalize on the minor lapses in the plaintiff's land-right enforcement machineries to grab the suit land through collusion with the 2nd and 3rd respondent.

(vii) The 3rd defendant conducting an irregular sale of the suit land in secrecy with a view to concealing crucial information such as the place and time of the alleged auction, the proceeds of the auction and the appropriation thereof so as to solely serve the narrow selfish interests of the defendants to the exclusion of other affected parties.

The 1st defendant acting through its secretary is now interfering with the plaintiff's affairs blocking the peaceful enjoyment of its facilities and has gone further to destroy property within the plaintiff's premises and felling down trees without the plaintiff's permission. The plaintiff's claim against the defendants is for an order cancelling the registration of the suit land in the 1st defendant's name and reverting the same to the plaintiff. The plaintiff's further claim is for an order of permanent injunction restraining the defendants from any further interference with the plaintiff's business in the suit land and encroachment into the plaintiff's property without consent. The plaintiff prays for judgment against the defendants for:-

(a) (i) A declaratory order that all judicial and quasi-judicial proceedings, orders or decisions that resulted in the sale and registration of the suit land in the name of the 1st defendant are null and void.

(ii) An order cancelling the registration of land title No. Kisa/Wambulishe/1141 in the 1st defendant's name and reverting the same to the plaintiff.

(b) Permanent injunction.

(c) Mesne profits.

(d) Costs of the suit.

The defendants stated that they never invaded the plaintiffs' property without consent sneaking behind the plaintiff's back to obtain the land control board consent using unknown persons to seek transfer and or misrepresenting to the land control board. It is the defence case that in 2001 one Atsali Nambwenya filed a case before the Khwisero Land Disputes Tribunal No. 111 of 2001 against the plaintiffs. The same was determined and the plaintiffs were ordered to pay Kshs 300,000/- for the suit land. A decree was issued in Kakamega Misc. Application No. 171 of 2001. The plaintiff's never appealed and filed an application in 2002 being Kakamega HC Misc. application No. 35 of 2002. The same application was dismissed by a judgement dated 11th March 2003 (DEx8). The said Atsali Nambwenya proceed with execution through Sadique Enterprises. DW1 the principal of the plaintiff school testified how the school acquired the land through an auction and paid the full purchase price and obtained the title deed (DEx 6). The school is now a County school with over 700 students. The church had started the school 7 years earlier. DW2 the chairman of the PTA of the school corroborated DW1's evidence. The defendant prays for the dismissal of the plaintiffs' suit with costs to the defendant.

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 defendant is the registered proprietor of Land parcel No. Kisa/Wambulishe/1141. The defendants testified how in 2001 one Atsali Nambwenya filed a case before the Khwisero Land Disputes Tribunal No. 111 of 2001 against the plaintiffs. The same was determined and the plaintiffs were ordered to pay Kshs 300,000/- for the suit land. A decree was issued in Kakamega Misc. application No.

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It is so ordered.

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

N.A. MATHEKA

JUDGE