



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 225 OF 2016

EMMAN IMBURI OKANGA.....PLAINTIFF

VERSUS

ERIC ONDEGO

ERNEST KOMBO MAGERO.....DEFENDANTS

JUDGEMENT

It is the plaintiff's case that he is the registered owner of land parcel number Butso/Shikoti/8221 and hence entitled to possess, use and occupy the same without any interference from any other person. The defendant trespassed into the plaintiff's parcel of land and build structures therein without the plaintiff's consent and or any legal authority. The plaintiff's efforts to remove the defendant from his land parcel number Butso/Shikoti/8221 voluntarily have been fruitless. The plaintiff's claim against the defendant is for an order of eviction of the defendant and his family from his land parcel number Butso/Shikoti/8221. The defendant has refused, neglected and or failed to move out of the plaintiff's land despite demand and notice of intention to sue being served upon himself. The plaintiff prays for judgment against the defendant for the following orders;

- i. Eviction from land parcel number Butso/Shikoti/8221.
- ii. Costs of this suit.

The first defendant states that he has never met the plaintiff and the plaintiff has never set foot in the said suit parcel. In the alternative and without prejudice to the foregoing, the first defendant states that he purchased the suit parcel from one Ernest Kombo the second defendant while it was still part of a title of land known as Butso/Shikoti/2891 and still registered in the name of Ernest Kombo's father. That it was expected that upon succession the parcel would be transferred to the name of the first defendant. The first defendant avers that there is indeed another ongoing suit regarding the same subject matter vide Kakamega CMCC No. 44 of 2016 seeking the same prayers herein. The first defendant states that the suit herein lacks merit and prays it be dismissed with costs to the first defendant. The first defendant states that the sale agreement entered between the plaintiff and the second defendant whereby the plaintiff purported to dispose off the portion of land that had been purchased previously by the first defendant was fraudulent and the same should be declared null and void. The plaintiff and the second defendant knew at the time of the said sale agreement that the first defendant was in occupation of the suit parcel since 2006 to date and has constructed thereon a permanent house. The plaintiff's father had permitted the first defendant to purchase the suit land which was then still registered in the name of the plaintiff's father Joseph Omolo Makero and comprised in title No. Butso/Shikoti/2891 and that the plaintiff subsequently fraudulently sub divided the original land above without succession and illegally transferred the suit parcel which belongs to the first defendant to the second defendant. The plaintiff had no legal capacity to sale and transfer the suit land to the second defendant without succession. In the alternative and without prejudice to the foregoing the first defendant states that he has extensively developed the suit parcel and stands to suffer irreparable loss and damage and that the plaintiff and the second defendant are liable to compensate him for such loss which includes refund of the purchase price of Ksh. 40,000/= and the estimated developments on the suit land to be assessed during the hearing of the suit. The first defendant counterclaims for orders that:-

1. A declaration that the sub division of the original parcel No. Butso/Shikoti/2891 and the resultant sub divisions including the suit parcel comprising land parcel No. Butso/Shikoti/8221 are null and void and the same be cancelled and restored in the name of the original owner Joseph Omolo Makero and be subjected to succession where the first defendant should be included as a beneficiary.
- b. In the alternative the plaintiff and the second defendant to immediately refund the first defendant the purchase price of the suit parcel with interest at court rates from 2006 until full payment and compensate the first defendant for all the developments carried out by the first defendant on the said parcel.

c. Costs of the counter claim.

The 2nd defendant states that the 1st defendant should move to his portion on land parcel number Butsotso/Shikoti/8050 which he sold to him. The 2nd defendant states that the 1st defendant has no right to stay on the plaintiff's portion of land when the portion he bought from him is vacant. The 2nd defendant prays that the plaintiff's claim be allowed against the 1st 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 plaintiff is the registered proprietor of Land parcel No. Butsotso/Shikoti/8221. The plaintiff testified that he purchased the land from the second defendant in 2014 by a sale agreement (PEx1) and obtained the title (PEx2). The first defendant was already on the land and he was told that the latter was a tenant and would move out. The first defendant testified that he purchased the suit parcel from one Ernest Kombo the second defendant in 2006 while it was still part of a title of land known as Butsotso/Shikoti/2891 and still registered in the name of Ernest Kombo's father. That it was expected that upon succession the parcel would be transferred to the name of the first defendant. The first defendant has a matter vide Kakamega CMCC No. 44 of 2016 seeking the same prayers herein. He took possession in 2006 and occupies the same to date. The 2nd defendant states that the 1st defendant should move to his portion on land parcel number Butsotso/Shikoti/8050 which he sold to him. The 2nd defendant states that the 1st defendant has no right to stay on the plaintiff's portion of land when the portion he bought from him is vacant. The 2nd defendant prays that the plaintiff's claim be allowed against the 1st defendant. I find that the 2nd defendant is a fraudulent individual as he has sold the same parcel of land to two individuals. I find that there was no land to be sold to the plaintiff in 2014 as it has already been sold to the 1st defendant who took possession in 2006. I find that the title held by the plaintiff was obtained through misrepresentation. I find that the plaintiff has failed to prove his case on a balance of probabilities. The 1st defendant has established his counterclaim and I grant the following orders;

1. A declaration that the sub division of the original parcel No. Butsotso/Shikoti/2891 and the resultant sub divisions including the suit parcel comprising land parcel No. Butsotso/Shikoti/8221 are null and void and the same be cancelled and restored in the name of the original owner Joseph Omolo Makero and be subjected to succession.
2. No orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE