



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 52 OF 2013**

**GEORGE NDULA WAKHULE.....PLAINTIFF**

**VERSUS**

**RAJAB KAKWI MASINDE.....DEFENDANT**

**JUDGEMENT**

It is the plaintiff's case that, at all material times, the plaintiff was and still is the absolute registered proprietor of the parcel of land designated as L.R. No. East Wanga/Eluche/639 approximately 2.08 hectares which parcel of land is in Eluche sub-location and whose boundaries are clearly delineated on the ground which parcel of land he purchased from one George Odongo Ogola on 15<sup>th</sup> March, 2007. That initially the said parcel of land known as L.R. No. East Wanga/Eluche/639 belonged to the defendant who sold it to George Odongo Ogola in 1960's before land adjudication and subsequently the said George Odongo Ogola was registered as the proprietor thereof and the said George Odongo Ogola had exclusive and quiet possession, occupation and use of the said parcel of land from 1966 to 2007 when he sold and transferred it to the plaintiff herein. The plaintiff avers that upon purchasing land parcel No. East /Wanga/Eluche/639 the plaintiff took immediate vacant possession thereof and he has had exclusive, open, quiet and uninterrupted occupation and use thereof from 2007 till 2012 when the defendant, who lives and uses his different parcel of land at Emakhwale sub-location several kilometers away, started interfering with the plaintiff's peaceful possession and use of the suit land. That plaintiff avers that he was enjoying exclusive, peaceful and quiet possession and use of land parcel L.R. No. East Wanga/Eluche/639 until sometime in 2012 when upon ploughing the land ready for planting the defendant illegally, wrongfully, forcefully and without any colour of right, consent and or authority trespassed onto the plaintiff's L.R. No. East Wanga/Eluche/639 and started farming and or working on the said parcel of land. The plaintiff has on numerous occasions requested and pleaded with the defendant to vacate the suit land in vain and the plaintiff's attempts to seek intervention of the local provincial administration have borne no fruits as the defendant has remained adamant and refused and or failed to vacate the same and continues in such refusal thus necessitating this suit. That the plaintiff reported the matter to Mumias Police Station and upon investigations the defendant was arrested and charged with the offence of forcible detainer/entry vide Mumias SPM Criminal Case No. 685 of 2012 but this notwithstanding the defendant continues to arrogantly, forcefully and illegally trespass onto the suit land. The plaintiff further avers that the defendant has threatened and intends, unless restrained by this honourable court, to continue or remain in wrongful occupation of the suit land and or trespass thereon. By reasons of the defendant's acts of trespass the plaintiff has and continues to suffer loss and damage. The plaintiff prays for judgment against the defendant for orders that:-

(a) This honourable court does order and or declare that the plaintiff is the rightful owner of land parcel L.R. No. East Wanga/Eluche/639 and is entitled to exclusive, peaceful, quiet and unimpeded possession and use thereof and to issue an order that the defendant, his relatives, agents, servants, employees and or any other person claiming through him be evicted from the said parcel of land and all the structures erected on the suit land be demolished forthwith.

(b) This honourable court be pleased to issue a permanent injunction perpetually restraining the defendant either by himself or through his relatives, employees, servants and or agents or any other person claiming under him from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on and or in any other manner dealing with land parcel L.R. No. East Wanga/Eluche/639 and or interfering with the plaintiff's peaceful and exclusive ownership, possession and or use thereof.

(c) Costs of this suit and interest thereon.

(d) Any other or further reliefs deemed fit and just.

PW1 produced the title deed (PEX2) and the sale agreement (PEX3) as exhibits. PW2 the said George Odongo Ogola confirms selling the suit parcel to the plaintiff. He confirms that the defendant sold the land to him in 1973.

DW1 The defendant testified that he knows PW2 but has never sold land to him. He does not live on the suit land and does not use it. He however does not know how the plaintiff got the title and that it is a forgery.

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 L.R. No. East Wanga/Eluche/639. The plaintiff testified that he purchased from one George Odongo Ogola on 15<sup>th</sup> March, 2007. That initially the said parcel of land known as L.R. No. East Wanga/Eluche/639 belonged to the defendant who sold it to George Odongo Ogola in 1960’s before land adjudication and subsequently the said George Odongo Ogola was registered as the proprietor thereof and the said George Odongo Ogola had exclusive and quiet possession, occupation and use of the said parcel of land from 1966 to 2007 when he sold and transferred it to the plaintiff herein. The defendant pleaded fraud in his evidence and he did not state the particulars of fraud nor did they prove the same. The defence was a mere denial. The plaintiff title is indefeasible and can only be challenged if it is obtained through a fraudulent scheme which the defendant has failed to prove. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff is the rightful owner of land parcel L.R. No. East Wanga/Eluche/639 and is entitled to exclusive, peaceful, quiet and unimpeded possession and use thereof and to issue an order that the defendant, his relatives, agents, servants, employees and or any other person claiming through him be evicted from the said parcel of land and all the structures erected on the suit land be demolished forthwith.
2. A permanent injunction to issue to restrain the defendant either by himself or through his relatives, employees, servants and or agents or any other person claiming under him from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on and or in any other manner dealing with land parcel L.R. No. East Wanga/Eluche/639 and or interfering with the plaintiff’s peaceful and exclusive ownership, possession and or use thereof.
3. Each party to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**