



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 187 OF 2015

JOHN OKOTH OBARE

MARIA ONYANGO OBARE.....PLAINTIFFS

VERSUS

MARY A. AKUMU

SARAH A. AKUMU

MORRIS AKUMU

OCHIENG AKUMU

OTIENO AKUMU.....DEFENDANTS

JUDGEMENT

The plaintiffs aver that they are the registered owners of land parcel No. South Wanga/Bukaya/749 and they hold absolute title without any encumbrances. The defendants unlawfully occupy the plaintiff's land and continue to utilize same and they destroy crops and trees wantonly to detriment and exclusion of the plaintiffs. The plaintiffs state that the efforts of their family to seek possession and lay claim to the suit land was dismissed by this honourable court vide Kakamega PMCC Case No. 498 of 1991. The plaintiffs pray for judgment in their favour as for orders:-

1. The defendants by themselves and/or agents be and are hereby evicted from suit land South Wanga/Bukaya/749 and all their illegal development on the land be forfeited to the plaintiffs without any compensation.
2. Costs and interest.

The defendants jointly aver that though the plaintiffs are the registered proprietors of land parcel number South Wanga/Bukaya/749, they are so registered and do hold half of the land in trust for the family of the late Thomas Akumu. The defendants jointly and severally aver that land parcel number South Wanga/Bukaya/749 was family land which was registered initially in the name of Obare Oloo who was the elder brother of Thomas Akumu. That the late Obare Oloo was the true husband of the plaintiffs while all the defendants are wives and/or children of the late Thomas Akumu. That the 1st defendant herein has occupied and used the 12.5 hectares since she was married in 1955 to the late Thomas Akumu. That the 2nd defendant has occupied jointly and severally with the 1st defendant the 12.5 hectares since 1971 when she got married to the late Thomas Akumu. That the 3rd defendant was born to the late Thomas Akumu and the 2nd defendant in the year 1975 and has all along known land parcel number South Wanga/Bukaya/749 to be his home. That the 4th defendant was born to the late Thomas Akumu and the 1st defendant in the year 1976 and has all along known parcel number South Wanga/Bukaya/749 as his home. The 5th defendant was born to the late Thomas Akumu and the 2nd defendant in the year 1979 and has all along known land parcel number South Wanga/Bukaya/749 as home. The defendants aver that the plaintiffs are barred by statute of limitation of actions to bring this suit as the defendants have been in quiet and open occupation on the 12.5 hectares for a period exceeding 12 years. Consequently the defendants shall pray for declaratory orders that they have acquired 12.5 hectares of the land by adverse possession. The defendants pray for the following orders:-

- a. That 12.5 hectares of land parcel number South Wanga/Bukaya/749 be transferred to the defendants.
- b. Dismissal of the plaintiff's suit.
- c. Costs.

d. Any other order.

DW1 the 2nd defendant testified that she cultivates the said land parcel number South Wanga/Bukaya/749 and counterclaims for the same.

This court has carefully considered the evidence and submissions therein. The 2nd plaintiff and the 3rd 4th and 5th defendants died before the suit was heard and determined hence the suit is the 1st plaintiff against the 1st and 2nd defendants only. The 2nd plaintiff was not substituted and the suit against the 3rd 4th and 5th defendants abated. 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. South Wanga/Bukaya/749 (PEX1). It is the plaintiff’s case that the defendants unlawfully occupy the plaintiff’s land and continue to utilize same as they destroy crops and tree wantonly to detriment and exclusion of the plaintiffs. The plaintiffs state that the efforts of the defendants’ family to seek possession and lay claim to the suit land was dismissed by this honourable court vide Kakamega PMCC Case No. 498 of 1991 (PEX3 are a copy of the proceedings). It is his evidence that the defendants land is Land parcel No. South Wanga/Bukaya/736 and that they are relatives. The defendants pleaded in their defence that the plaintiffs are registered and do hold half of the land in trust for the family of the late Thomas Akumu, they did not prove the same. The plaintiff title is indefeasible and can only be challenged if it is obtained through a fraudulent scheme which the defendants have failed to prove. The defendants have failed to prove their counterclaim on a balance of probabilities and I dismiss the same. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendants, their servants, agents and relatives are to vacate the suit Land Parcel No South Wanga/Bukaya/749 within the next six (6) months from the date of this judgement and indefeasible order to issue.
2. 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