



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 99 OF 2017**

**NICHOLAS CHIMOMA TMBUKWA.....PLAINTIFF**

**VERSUS**

**BEATRICE MMBOGA MAGALASIA.....DEFENDANT**

**JUDGEMENT**

At all material time the plaintiff avers that he was the owner of parcel of land better described as Isukha/Mukulusu/1107 within Kakamega County. That on or about 1<sup>st</sup> March, 2016 without notice or any information, the defendant trespassed upon the plaintiff parcel of land and started farming and molding bricks. The orders sought by the plaintiff are injunction orders to protect the property from being totally wasted and destroyed by the defendant. The plaintiff prays that the judgment to be entered against the defendant jointly and severally for the following orders:-

- (a) Permanent injunction orders restraining the defendant from interfering, selling, wasting, destroying, trespassing or any other way interfering with the plaintiff parcel of land either by herself or themselves.
- (b) The honourable court to issue an order to Kakamega/Shinyalu Police Station to arrest and accuse the defendant, agent, clerks, servants or any other person in contempt of court orders after determination of this suit.
- (c) The defendant to refund money sold in bricks 10,000 pcs at Ksh. 7/= each a total of Ksh. 70,000/=, the cost of farming Ksh. 15,000 and the cost of 15 bags of maize could have been harvested during that time Ksh. 45,000 and the cost of glass windows Ksh. 17,000/=.
- (d) That the honourable court do grant orders sought to protect and prosecute the property.
- (e) Costs of this suit be in the court.

PW1 produced the sale agreement as an exhibit(PEx1). He stated that he purchased the said suit land from the defendant's husband in the year 2000.

DW1 the defendant states that the plaintiff has never purchased or occupied land parcel known as Isukha/Mukhulusu/1107. (DEx1 is a copy of search). She stated that her husband Harun Mugalasia is deceased and produced the death certificate (DEx3). That the defendant has been using the said parcel of land since her late husband's demise, and has been in continuous usage of the same to date. She stated that the plaintiff bought a portion of the land and not the entire parcel. DW2 and DW3 corroborated her evidence. The defendant prays for dismissal of the plaintiff's suit with costs.

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 Harun Mugalasia now deceased is the registered proprietor of Land parcel No. Isukha/Mukulusu/1107 as per the search certificate dated 29th November 2010. The plaintiff testified that he purchased the land from the deceased. The current registered ownership of the land cannot be ascertained. This court has no jurisdiction to adjudicate over land belonging to a deceased person. No confirmation of grant has been adduced in this court instead there seems to be a succession matter going on concerning this property. The sale agreement PEx1 also talks of a portion of Land Parcel No. Isukha/Mukulusu/313. There is no evidence to show this portion is now Land parcel No. Isukha/Mukulusu/1107. The title is indefeasible and if it belongs to a dead person then the claim should be pursued in the correct court which has jurisdiction. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss the same with no orders as to 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**