



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 330 OF 2017

NICHOLUS ANGAVU IMINDE.....PLAINTIFF

VERSUS

HENRY SHIVOKO

FEMINA AYOMA SHIVOKO

SHIKANGA SHIVOKO

JOHN SHIVOKO.....DEFENDANTS

JUDGEMENT

The plaintiff avers that he is the registered as the sole absolute owner of Land title No. South Kabras/Shamberere/3345. The defendants have illegally encroached on the plaintiff's land without any colour of right and have declined to vacate. The plaintiff wishes to develop and use his land but despite numerous attempts the defendants have refused to vacate the land thereby depriving the plaintiff peaceful enjoyment of his land. The plaintiff avers that the defendants' use of the said land is without his consent, probable cause, is unlawful, illegal and intended to interfere with the plaintiff's rights and interest in the land. The plaintiff further avers that the defendants have no known right or interest whatsoever in Land Parcel LR. No. South Kabras/Shamberere/3345 and their continued use of the land is an act of trespass. The plaintiff's claim against the defendants is for an order that he is the absolute owner of the aforesaid land, further that an eviction order be given against the defendants. The plaintiff also claims against the defendants an order of injunction restraining them from interfering with the plaintiff's peaceful use of the said land in any way. The plaintiff prays for judgment against the defendant jointly and severally for:-

(a) An eviction order against the defendants, their agents, servants, heirs assigns or any other person claiming any interest on their behalf and a permanent injunction, restraining the defendants either by themselves, their servants, agents, heirs, assigns and any other person claiming interest on their behalf from interfering, trespassing or encroaching whatsoever on land parcel LR. No. South Kabras/Shamberere/3345.

(b) Costs of this suit.

PW1 the plaintiff testified that he bought the land from Abubakar through a sale agreement PEx1. He obtained the title PEx2. The 1st and 2nd defendants are the ones who introduced him to the seller and were witnesses to the agreement. The seller had obtained the land through a court order PEx5. PW2 the seller corroborated the plaintiff's evidence. The 1st 2nd and 3rd defendants all witnessed the sale agreement and agreed to move thereafter but have now refused.

The defendants state that the plaintiff has no good title to land parcel number South Kabras/Shamberere/3345 since the title held by the plaintiff was obtained fraudulently. The defendants state that they have been occupying land parcel number South Kabras/Shamberere/3345 since their birth and marriage a period of more than twelve (12) years and hence they have acquired title to the same by adverse possession as against the plaintiff. The defendants state that they have been in occupation of land parcel number South Kabras/Shamberere/3345 and they have been using the same without any interference from the plaintiff and or any other person and hence the plaintiff is not entitled to interfere with their continued use of the same. The defendants state that the plaintiff bought land parcel number South Kabras/Shamberere/3345 while he was fully aware that the defendants were in occupation of the same and hence he is estopped from his allegation. The defendants state that the plaintiff is not entitled to orders of eviction against them since they have acquired title to land parcel number South Kabras/Shamberere/3345 by way of adverse possession and hence the plaintiff is only holding title in respect of the parcel of land in trust for them. DW1, the 2nd defendant testified that she witnessed the sale agreement PEx1 but the land belongs to her husband and not the plaintiff. PW1 bought a portion of it and not everything. DW3 and 4 corroborated her evidence.

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. South Kabras/Shamberere/3345. It is not in dispute that the plaintiff bought the suit land from Abubakar through a sale agreement PEx1. He obtained the title PEx2. The 1st and 2nd defendants are the ones who introduced him to the buyer and were witnesses to the agreement. The seller had obtained the land through a court order PEx5. PW2 the seller corroborated the plaintiff’s evidence. The 1st 2nd and 3rd defendants all witnessed the sale agreement. The seller obtained the land through a court order in Kakamega Chief Magistrate’s court Misc. Award No. 200 of 2000. This order has not been challenged. The proceedings of the Provincial Land Disputes Tribunal have been produced in court (PEx5). The defendants pleaded fraud in their defence and they did not state the particulars of fraud nor did they prove the same. The plaintiff title is indefeasible and can only be challenged if it was obtained through a fraudulent scheme which the defendants have failed to prove. 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 Kabras/Shamberere/3345 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