



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 33 OF 2018**

**ARTHUR PAUL MUTSUNE.....PLAINTIFF**

**VERSUS**

**MESHACK OKUKU.....1<sup>ST</sup> DEFENDANT**

**THOMAS MAKOKHA.....2<sup>ND</sup> DEFENDANT**

**FREDRICK ONIALE MAKOKHA.....3<sup>RD</sup> DEFENDANT**

**KEVIN MAKOKHA.....4<sup>TH</sup> DEFENDANT**

**CHRISTOPHER OBERA MAKOKHA.....5<sup>TH</sup> DEFENDANT**

**J U D G E M E N T**

1. The plaintiff brought this suit against the defendants stating that he is the registered owner of land parcel Marachi/Ebukhalalire/1423 through purchase from the father of the defendants. That the defendants took advantage of the absence of the plaintiff and unlawfully entered and continued to work and plough the suit land and has denied the plaintiff its use.

2. Because of the continued trespass, the plaintiff is seeking the court for judgment against the defendants jointly and severally for;

**(a) Permanent injunction stopping the defendants and their household servants and agents and any other person related to their interests from interfering with land parcel No. Marachi/Ebukhalalire/1423.**

**(b) A declaration that land parcel number Marachi/Ebukhalalire/1423 belongs to the plaintiff who should be left to exercise his rights therein.**

**(c) Damages for trespass to land and costs of his suit.**

**(d) Any other orders that this court shall deem necessary.**

3. The defendants entered appearance by filing a joint statement of defence dated 4<sup>th</sup> January 2018. They pleaded that their brother Benard Makokha passed on in Ukunda and bringing back his body home for burial involved the Marachi association members. That the plaintiff represented the association during the raising of funds for the funeral. The defendants deny that any sale of land took place. The defendants plead that their father only agreed to lease land to the plaintiff. The defendants further pleaded that the plaintiff surveyed the land without their knowledge and put the plaintiff to strict proof how he obtained the title deed.

4. The matter proceeded for hearing of the main suit on 16/2/2021 with the plaintiff, **PW1**, giving his evidence in chief. He stated he bought the land in August 1995 and the agreement was reduced into writing a copy of which is as produced *Pex 1 (a & b)*. After the purchase, he processed the title for the sold portion into his name from the original title number 622 after subdivision. The plaintiff produced the Mutation form as *Pex 2*, application for Land Control Board as *Pex 3*, Letter of Consent as *Pex 4*, Transfer Form as *Pex 5*, Copy of Title Deed issued on January 1997 as *Pex 6*. He continued that after he got the title documents, he left the land to his brother to use since he did not live at home. However, the defendants chased away his brother claiming he did not buy the land to which he reported the matter to the area chief. The chief wrote the letter dated 3/11/2017 he produced as *Pex 7*. He prays for the orders of permanent injunction against the defendants from using the land. He also prayed for damages for trespass and costs of the suit.

5. The plaintiff filed written submissions which I have looked at and considered. The learned counsel for the plaintiff cited the case of **Michael Githinji Kimotho v. Nicholas Muratha Mugo (1997) eKLR**, where the Court of Appeal held that a party in occupation of land as a squatter without title in his favour is in no position to resist the registered proprietor's claim.

6. The issues up for determination before this court are;

- (i) *Whether the plaintiff is entitled to the order of permanent injunction against the defendants.*
- (ii) *Whether the plaintiff is entitled to damages for trespass.*
- (iii) *Who pays the costs of the suit?*

7. Although the defendants challenged how the plaintiff acquired title to the suit plot, the particulars of the fraud were not pleaded. Order 2 rule 4(1) provides thus;

**“(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –**

**(a) Which he alleges makes any claim or defence of the opposite party not maintainable.**

**(b) Which, if not specifically pleaded, might take the opposite party by surprise; or**

**(c) Which raises issues of fact not arising out of the proceeding pleading.**

8. Further, Section 26 of the Land Registration Act provides the grounds upon which titles of a registered owner can be challenged. The section states thus;

**“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”**

9. The plaintiff gave an account of how he came to be the proprietor of the suit land stating that he was approached by the defendant's deceased father for a loan of Kshs.70,000 to help him organise for his son's funeral. The deceased offered to refund him by apportioning him 2 acres of his land. After the funeral, he was shown the portion of land and he followed up and got a surveyor. The sold portion was issued with a parcel number and finally was registered in the plaintiff's name as the owner on 7/1/1997 and a title deed issued. The plaintiff's evidence is unchallenged and is supported by documents produced as exhibits 1-7 showing that he followed due process to legally acquire the suit land.

10. Consequently, as registered owner of the title, the plaintiff is entitled to enjoy his bundle of rights on the suit land free from disturbance. It is incumbent upon this court to protect his rights and it is for this reason I do find that the plaintiff is entitled to an order of permanent injunction against the defendants. The plaintiff stated in his witness statement that the defendants entered the land in 2014 and have been tiling the land communally and simultaneously every season to his detriment. He has been denied user without any justifiable cause therefore it is my considered opinion that he is entitled to damages for trespass.

11. Accordingly, this court finds that the plaintiff has proved his case and do hereby enter judgment in his favour against the defendants as prayed as follows:

**(a) An order of a permanent injunction be and is hereby issued restraining the defendants and/or their servants', agents in any way from interfering, encroaching, or dealing with the plaintiff's parcel of land known as MARACHI/EBUKHALALIRE/1423.**

**(b) An order of declaration be and is hereby made declaring that land parcel No. MARACHI/EBUKHALALIRE/1423 belongs to the plaintiff who should be left to exercise his rights therein.**

**(c) The costs of this suit awarded to the plaintiff.**

Dated, signed & delivered at BUSIA this 24<sup>th</sup> day of June, 2021.

A. OMOLLO

JUDGE