



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 106 OF 2013

JOHN NANDWA ANGAYA

JOSEPH NYANGWESO CHAPIA.....PLAINTIFFS

VERSUS

PATRICK ALUKWE.....DEFENDANT

JUDGEMENT

By a plaint dated 15th April 2013, that the plaintiffs are the registered proprietors in respect of L.R. No. Marama/Shiraha/453. That the defendant has without any legal excuse moved into the said parcel of land and purported to have set up his homestead thereon. That despite numerous efforts and pleas, the defendant has declined to move out of the parcel of land. That the plaintiffs aver that there are neither past nor present proceedings with regard to the subject-matter herein between the parties to this suit. The plaintiffs pray for judgment against the defendant for:-

1. Eviction from the suit land.
2. Costs of the suit.

PW1, the 1st plaintiff testified that Reuben Lubanga Angaya (deceased) his brother never called the defendant to come and live on the suit land. That the defendant put up his house there after Reuben died. That he obtained his title in 2008. Reuben had no wife or child and hence had no land to give out.

The defendant states that it was on the 7th March, 2011 when title deed was issued in favour of the plaintiffs. That the defendant's uncle one Reuben Lubanga Angaya (deceased) called him to come and stay with him since he was not married and had no child of which the defendant accepted in 2008. In 2008, John Nandwa Angaya started succession proceedings for his father Peter Angaya and the list of beneficiaries were John Nandwa Angaya, Reuben Lubanga Angaya and Zakaria Chapia Angaya. Later in 2009, Reuben Lubanga Angaya died but before he died, he had shown the defendant where to build for himself. Before he died, he wrote a will, witnesses by the Area Assistant Chief, living everything to him. The defendant therefore seeks that:-

1. John Nandwa Angaya & Joseph Nyangweso Chopia to give him 1 ½ acres from Marama/Shiraha/453 to Patrick Alukwe.
2. Costs be borne by them John Nadwa Angaya & Joseph Nyangweso Chapia to Patrick Alukwe.

DW2 and DW3 who are relatives to the litigants corroborated the defendant's evidence. They stated that Reuben Lubanga Angaya had no wife or child. He took up the defendant as his child and gave him the land to build. The defendant put up his house and they lived together until he died. The defendant looked after Reuben until his death.

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 plaintiffs are the registered proprietor of Land Parcel No. Marama/Shiraha/453. PW1 testified that the defendant has without any legal excuse moved into the said parcel of land and purported to have set up his homestead thereon. That despite numerous efforts and pleas, the defendant has declined to move out of the parcel of land. DW1 testified that his uncle one Reuben Lubanga Angaya (deceased) called him to come to stay with him since he was not married and had no child of which the defendant accepted in 2008. In 2008, John Nandwa Angaya started succession proceedings for his father Peter Angaya and the list of beneficiaries were John Nandwa Angaya, Reuben Lubanga Angaya and Zakaria Chapia Angaya. Later in 2009, Reuben Lubanga Angaya died but before he died, he had shown the defendant where to build for himself. DW2 and DW3 corroborated his evidence. I believe the defence. I find that Reuben Lubanga Angaya (deceased) who died in 2009 invited the defendant onto his land and showed him where to build. He took him in as his child as he had none of his own. That Reuben Lubanga Angaya was a beneficiary of the estate of Peter Anagaya who was his father and the owner of the suit land. I find that the defendant took care of Reuben Lubanga Angaya's expenses including hospital bills and funeral arrangements. I find that Reuben Lubanga Angaya gifted the land to the defendant when alive and took him in as his own child. It has even come up in evidence that this was witnessed by the Assistant Chief and elders. I find that the plaintiffs have failed proved their case on a balance of probabilities and I dismiss it. I find that the defendant has proved his counter claim on a balance of probabilities and I grant the following orders;

1. The plaintiffs do transfer 1 ½ acres from Marama/Shiraha/453 to the defendant within the next 90 days from the date of this judgement and in default the Deputy Registrar to sign the transfer forms.

2. No orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22ND JUNE 2021.

N.A. MATHEKA

JUDGE