



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 50 OF 2018

ISSA EGESA WAKHANU

OKOYANA KHALEED RAMADHAN

SALEH KHALEED WAKHANU.....PLAINTIFFS

VERSUS

HENRY EFUMBI WAKHANU

CORNEL MASINDE WAKHANU.....DEFENDANTS

JUDGEMENT

The plaintiffs aver that they have at all material times been the owners, respectively, and entitled to possession of the property known as Land Title Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709. The said titles measure more or less 1.10 ha, 1.0 ha and 1.0 ha respectively. The plaintiffs acquired the said Land Titles Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709 from their father Kaliti Wakhanu Sikhira, now deceased, in the year 2005 and got registered as proprietors thereon each on 4th October, 2005. That the said Kaliti Wakhanu Sikhira died on 10th August, 2007 having set aside Land Title Nos. Bunyala/Budonga/1711 measuring more or less 1.0 ha and Bunyala/Budonga/1712 measuring more or less 1.0 ha for the defendants respectively. The said Land Title Nos. Bunyala/Budonga/1711 and Bunyala/Budonga/1712 are in the name of the said Kaliti Wakhanu Sikhira and the defendants need to acquire the same by transmission. The 1st defendant has without consent of the 2nd plaintiff stuck upon and retained possession of the whole of the 2nd plaintiff's said Land Title No. Bunyala/Budonga/1710 and has houses and cultivates sugar cane and other crops thereon. The 2nd defendant has on his part without consent of either the 1st or the 3rd plaintiffs stuck upon and retained possession of parts of both the 1st and 3rd plaintiffs' said land Titles Bunyala/Budonga/1708 and Bunyala/Budonga/1709 and has houses and cultivates sugar cane and other crops thereon. The said acts amount to a trespass by the defendants and the trespass is continuing. By reason of the matters aforesaid, the plaintiffs have been deprived of the use and enjoyment of their said property and have thereby suffered loss and damage. The plaintiffs pray for judgment against the defendants for reliefs as follows:-

(a) Possession.

(b) Alternatively, an eviction order of the defendants, their relatives, servants, agents or otherwise howsoever from the said Land Title Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709.

(c) A declaration that the defendants are not entitled to enter, remain or use the said Land Title Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709 or any portion thereof.

(d) A permanent injunction to restrain the defendants by themselves, their relatives, servants, agents or otherwise howsoever from entering, remaining or using the said Land Title Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709.

(e) Costs of this suit.

The defendants in their statement of defence state that they have stayed on the said parcel of land for over thirty years and that the same was apportioned to them by their late father. The defendants state that if the said title deed was obtained then the same was fraudulently obtained by the plaintiffs herein without the defendants' consent. The defendants state that they are beneficiaries to the said estate and entitled to a share of the said parcel of land.

PW1, the 1st plaintiff Issa Egeessa Wakhanu testified that the plaintiffs are his brothers and the defendants his step brothers that his parcel of land is Bunyala/Budonga/1708 (PEx1 is the certificate of search) and the defendants have trespassed. PW2, the 2nd plaintiff Khaleed Ramathan Okoyana testified that his land parcel is Bunyala/Budonga/1710 (PEx3 is the certificate of search) and the 1st defendant has trespassed. PW3 Saleh Khaleed Wakhanu testified that his land parcel is Bunyala/Budonga/1709 (PEx5 is the certificate of search) and the 2nd defendant has trespassed.

This court has carefully considered the evidence and submissions therein. The defendants failed to attend court and offered no evidence. 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 court 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 not in dispute that the plaintiffs are the proprietors of parcel of land known as Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709 (PEx1,2&3). The plaintiffs testified that they acquired the said Land Titles Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709 from their father Kaliti Wakhanu Sikhira, now deceased, in the year 2005 and got registered as proprietors thereon each on 4th October, 2005. That the said Kaliti Wakhanu Sikhira died on 10th August, 2007 having set aside Land Title Nos. Bunyala/Budonga/1711 measuring more or less 1.0 ha and Bunyala/Budonga/1712 measuring more or less 1.0 ha for the defendants respectively. Their evidence has not been controverted and remains unchallenged. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1.The defendants are to vacate the said Land parcels No. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709 within the next 90 (ninety) days from the date of this judgement and in default eviction order to issue.

2. Thereafter a permanent injunction to issue to restrain the defendants by themselves, their relatives, servants, agents or otherwise howsoever from entering, remaining or using the said Land Title Nos. Bunyala/Budonga/1708, Bunyala/Budonga/1710 and Bunyala/Budonga/1709.

3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH JULY 2021.

N.A. MATHEKA

JUDGE