



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 459 OF 2014

JOHN H. MWANZI.....PLAINTIFF

VERSUS

RICHARD LUANGALI AMITA.....DEFENDANT

JUDGEMENT

The claim is that at all material time the plaintiff is the owner and proprietor of Land Parcel No. Isukha/Shiswa/1506. That the plaintiff avers that he was adjudged to be the rightful owner of a portion of land that the defendant had unlawfully annexed from the plaintiff's aforesaid parcel as his own land vide Kakamega CMC Misc. Award No. 185 of 2005. That however the defendant has adamantly remained on the said land and gone ahead to construct thereon structures and is using it contrary to the plaintiff's right and interest therein. That the defendant has also unlawfully blocked the road of access to the plaintiff's said land. That unless restrained by the court the defendant will continue with his unlawful acts aforesaid and thus continue to subject the plaintiff to irreparable loss and harm. The plaintiff prays for judgment against the defendant for:-

1. Orders of eviction be issued against the defendant and or his family members, and or agent to move out of the plaintiff's portion of land comprised in Isukha/Shiswa/1506 on which he has invaded and all structures erected on the plaintiff's portion of land be demolished.
2. Orders be issued for the District Surveyor to visit the said portion of land and establish the blocked access road between parcels Isukha/Shiswa/1506 and 1505.
3. Costs of this suit.

PW1 the plaintiff testified that the suit land parcel is a subdivision of land parcel L.R. Isukha/Shiswa/706 pursuant to Kakamega CMC Misc. Award No. 185 of 2005. He produced the consents search court order and mutation as exhibits.

It is the defendant's contention that the ruling and or determination in the said Kakamega CMC Misc. Award No. 185 of 2005 was in favour of the defendant and it is the plaintiff who misinterpreted the court order to suit his own position when the true position was that it was the decision of the Western Province Appeals Committee which should have been adopted as the final judgment of the court. That the proper interpretation of the decision of the Western Province Appeals Committee was to the effect that common boundary between the two land parcels Isukha/Shiswa/705 and 706 be determined using the existing map and not the annexation of part of defendant's land parcel L.R. Isukha/Shiswa/706 to create the suit property herein. The defendant counterclaims to be entitled to the whole suit property being his inheritance from the estate of his late father Paul Amita Mwanzi who was the registered proprietor of the original land parcel L.R. Isukha/Shiswa/706 and the prays that the illegal cancellation of the original land parcel be revoked and the suit property ordered herein L.R. Isukha/Shiswa/1505 and 1506 ordered to revert to the original L.R. Isukha/Shiswa/706.

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 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 parcel of land known as Isukha/Shiswa/1506 is registered in the name of the plaintiff. The plaintiff testified that the suit land parcel is a subdivision of land parcel L.R. Isukha/Shiswa/706 pursuant to Kakamega CMC Misc. Award No. 185 of 2005. I have perused the court documents and exhibits adduced as evidence in great detail. The surveyors report dated 22nd January 2008 which was ordered by the court is clear that the portion of land which is the suit land belonged to the plaintiff and had been taken by the defendants. Both parties in this case were parties in that suit. The findings of the surveyor were as follows;

1. *“The area was actually taken by the applicants before the adjudication process.*
2. *At the time when the first survey was done the portion was already on the side of the defendant.*
3. *The determination of the proper boundaries of the two said parcels of land could only be done using the map, which was found to be favoring the defendant.”*

The defendant in this case Kakamega CMC Misc. Award No. 185 of 2005 was one of the applicants and the plaintiff was one of the defendants. I find that the said land was subdivided subject to the award by the court which the defendant herein did not appeal. The court then ordered as follows;

1. *The District Land Surveyor, Kakamega to survey the disputed portion marked in the surveyors report dated 22.01.2008.*
2. *That the said portion be combined with the Land parcel No. Isukha/Shiswa/705 after the process of mutation and consent of the relevant Land Contro Board.*
3. *That the Executive Officer of this court be and is hereby directed to execute all the requisite documents to facilitate the process.”*

I find that it is the defendant who has misinterpreted the award and find that he has failed to establish his counterclaim on a balance of probabilities and I dismiss it. I find that the plaintiff did not obtain his title through fraud or misrepresentation but by a court order. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the defendant and or his family members, and or agent do vacate the plaintiff’s portion of land comprised in Isukha/Shiswa/1506 within the next 90 (ninety) days from the date of this judgement and indefault eviction order to issue.
2. Thereafter the District Surveyor Kakamega to visit the said portion of land and establish the blocked access road between parcels Isukha/Shiswa/1506 and 1505 and open the same.
3. No orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE