



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 393 OF 2017

ZEPHANIAH HILLARY MWAWONGO..... PLAINTIFF

VERSUS

JONATH SOWA MSHIMBA

THE CHIEF LAND REGISTRAR.....DEFENDANTS

JUDGMENT

This the application is of Zephaniah Hillary Mwawongo for the following orders:

1. That his summons be served on Jonathan Sowa Mshimba and the Chief Land Registrar by affixing a copy thereof on the court notice board in the court house.
2. That the 1st respondent's title to Plot Title No. Mbale/Msau- Shigaro/3643 was improperly issued and the same be cancelled.
3. That the register of the plot Title No. Mbale/Msau-Shigaro/3643 be rectified so as to remove the entries in favour of Jonathan Sowa Mshimba and the title to revert back to the proprietorship of Zephaniah Hillary Mwawongo.
4. That the costs of this Originating Summons be provided for.

It is based on the grounds that the plaintiff is the owner of all the parcels of land known as Mbale/Msau Shigaro/3643 and Mbale/Msau Shigaro 158 measuring 0.35 ha and 0.3 ha respectively. That the applicant purchased the said properties from one Amraphael Mwalufu and thereafter planted trees round the property as the boundary. The applicant noticed strange happenings, only to find the trees he planted as boundaries had been uprooted by unknown people, and the respondent herein was farming and adversely dealing in part of the land. That when titles were issued the applicant's title indicated the property as Plot No. 158 and Title for Plot No. 3643 in favour of the respondent. That the applicant states that he has never sold or otherwise consented to the respondent entering in the parcel. The respondent is currently in occupation of the applicant's parcel of land namely Plot No. 3643, albeit unlawfully and is a trespasser. The effect of the said occupation is that the respondent is now at liberty and indeed is continuing to farm on the applicant's land and is in the process of selling and/or subdividing to third parties. That the respondent's actions are greatly prejudiced to the applicant as his property being Plot No. Mbale/Msau Shigaro/3643 which was essentially subdivided into 2 to give him to Plot No. Mbale/Msau Shigaro/3643 which given to the respondent fraudulently and unlawfully as he has not sold and/or subdivided to the respondent. The applicant remains with Plot No. Mbale/Msau Shigaro/158 being the other half hence he has been dispossessed of half of his property. That it is in the interest of justice that the respondent's title be revoked and the same be returned to the applicant. The respondent will not be prejudiced if the orders sought herein are granted as prayed.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court of file any defence. 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 Land Parcel No. Mbale/Msau/Shigaro/3643 is registered in the name of the 1st defendant herein. The plaintiff stated that he is the owner of the suit land. That he purchased the properties from one Amaraphael Mwalufu and thereafter planted trees round the boundary (PEX3 is a copy of the sale agreement). That when the titles were issued Mbale/Msau Shigaro/3643 was registered in favour of the 1st respondent and Mbale/Msau Shigaro/158 in the name of the plaintiff (PEX1 is a copy of the title deed and PEX2 a copy of the search). That the respondent was farming and adversely dealing with the land after unknown people uprooted the trees. That he never sold the said suit land Mbale/Msau Shigaro/3643 to the 1st respondent. The plaintiff witness statements corroborated his evidence.

I have perused the sale agreement and it does not indicate what land the plaintiff was buying or what acreage. The same is not even dated. I find that it is impossible for this court to determine that the same included the 1st defendant’s parcel of land. Indeed it has come out in evidence that the plaintiff is not in possession of the suit land nor has he ever cultivated or used the same. I find that the plaintiff has failed to establish that the 1st defendant obtained the said title through fraud and or acquired it illegally, unprocedurally or through a corrupt scheme. For these reasons, I find that the plaintiff has failed to established his case on a balance of probabilities against the defendants and I dismiss it with no orders as to costs as the same was not defended.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH OCTOBER 2021.

N.A. MATHEKA

JUDGE