



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 302 OF 2014

JUSTUS S. OBADIAH.....PLAINTIFF

VERSUS

JOSHUA OUMA ONGECHE.....DEFENDANT

JUDGMENT

1. By plaint dated 16th November 2011, the plaintiff averred that he was the registered proprietor of the parcel of land known as Marama/Lunza/2984. That the defendant invaded the suit property and started cultivating it and uprooting his tree seedlings. He therefore prayed for judgment against the defendant for:

- a. An order of injunction restraining the defendant/his agents, servants from interfering with the land parcel No. Marama/Lunza/2984.*
- b. Recovery of Ksh. 20,500/= as special damages.*
- c. Costs of the suit and interest of [a] above.*
- d. Any other orders this Hon. Court may deem fit to grant.*

2. The defendant filed a defence in which he averred that the plaintiff fraudulently acquired the suit property. He denied the plaintiff's allegations and stated that the suit property was given to him by his father and that he had lived on it all his life. He urged the court to dismiss the suit with costs.

3. The plaintiff testified as PW1 and told the court that he is the registered proprietor of the parcel of land known as Marama/Lunza/2984, the suit property. That the suit property is a subdivision of Marama/Lunza/1556 which was subdivided into 2 plots. That he later purchased the suit property from Reuben Manyasa Shitote who had earlier bought it from Joseph Onguche Odera, the defendant's father. He went on to testify that the defendant trespassed into the suit property, constructed a house on it, cut trees and interfered with the common boundary.

4. Reuben Manyasa Shitote testified next as PW2. He stated that he purchased the suit property from the defendant's father through an agreement dated 24th June 2006. That he later it to the plaintiff. He added that land was surveyed and that the plaintiff acquired it lawfully without any fraud.

5. The defendant testified as the sole defence witness. He stated that his father owned Marama/Lunza/1556 which was subdivided into Marama/Lunza/2983 and Marama/Lunza/2984. He added that as at the time of his testimony, he was residing on Marama/Lunza/2984, the suit property and that he constructed on it in 1990 and that resides on it with his two wives. That his father did not involve any family member in the subdivision. He added that his father wanted to sell only 2 acres but the plaintiff acquired a bigger portion of over 5 acres without his father's consent. He further stated that his wish is that the suit property be resurveyed and that the excess land on the ground be returned to his family. He also stated that his father passed away in 2017, some six years after this suit was filed and that his father never filed any case against Reuben Manyasa Shitote or the plaintiff while he was alive.

6. The parties filed and exchanged submissions. The plaintiff argued that he is the registered proprietor of the suit property and that the defendant has admitted trespassing on and occupying a portion of the suit property. He argued that he has proven his case and urged the court to grant the reliefs sought.

7. On his part, the defendant argued the land should be resurveyed since the plaintiff is occupying more land on the ground than he purchased. He further argued that the plaintiff's title is tainted by fraud and urged the court to dismiss the case with costs.

8. I have considered the pleadings, the evidence and the submissions. The only issue that arises for determination is whether the plaintiff is entitled to the reliefs sought.

9. The defendant admits that the plaintiff is the registered proprietor of Marama/Lunza/2984, the suit property. Indeed, from the material placed before the court, the plaintiff became proprietor of the suit property on 19th February 2008 and a title deed was issued to him on 20th February 2008. According to the title, approximate area of the property is 1.2 hectares which translates to approximately 2.96 acres.

10. As a registered proprietor, the plaintiff is entitled to the rights, privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept the certificate of title of such a proprietor as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are established. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) 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;

26. Certificate of title to be held as conclusive evidence of proprietorship

(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. ...

11. Although the defendant claimed in his statement of defence and in his evidence that the plaintiff's title is tainted by fraud, he did not mount any counterclaim to nullify the title either on account of fraud or for any other reason. It has been stated many times that fraud is a serious allegation which must be pleaded, particularised and strictly proven. See **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**. The requirement of pleading fraud where it is sought to be the basis of impeaching title to land extends beyond simply alleging fraud to specifically praying for nullification of title on account of fraud. In this case, the defendant was content to stop at merely alleging fraud. That is not good enough.

12. The defendant has admitted occupying a portion of the suit property and even constructing on it. He seems to be justifying such occupation by arguing that the land belonged to his late father and that his father sold it without involving the family. He conceded that his father passed away in 2017, some six years after this suit was filed and that his father never lodged any case against the plaintiff in regard to the suit property while he was alive. I further note that the plaintiff became the registered proprietor of the suit property some nine years before the defendant's father passed away. If the defendant ever had any issues over the transfer to the plaintiff or his predecessor in title, he should have pursued such issues against his father in his lifetime. In any case, the defendant's father had full rights to deal with his property in his lifetime. See **Nahashon Karengi & another v Lawrence Karengi [2014] eKLR**.

13. The defendant has also claimed that the plaintiff is occupying more land on the ground than reflected on his title and has urged the court to order a resurvey. His claims on that score are not supported by any survey report but are based entirely on his visual observation as a layman. As noted earlier, he has not lodged any counterclaim seeking orders against the plaintiff's title. His claims regarding the size of the suit property are thus neither here nor there.

14. In view of the foregoing discussion, I am persuaded that the plaintiff has established his case for an injunction in terms of prayer a of the plaint.

15. The plaintiff also prayed for special damages of KShs 20,500. The law is that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR**. Besides praying for the sum of KShs 20,500, the plaintiff neither particularised the sum in his plaint nor proved it in evidence. I will therefore not award the said amount.

16. In the end, I enter judgment in favour of the plaintiff as follows:

a) I grant an injunction restraining the defendant/his agents, servants from interfering with the land parcel No. Marama/Lunza/2984.

b) The plaintiff shall have costs of the suit and interest thereon at court rates.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant: E. Juma