



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 604 OF 2019

JOHN B. VIKETO MARANGO.....PLAINTIFF

VERSUS

DINAH M. WAWIRE

MELISA WECHULI ASMAN

MUSA SIMBAUNI HAMISI..... DEFENDANTS

JUDGEMENT

By a plaint dated 8th February 2018, the plaintiff is the registered proprietor of that parcel of land designated as Bunyala/Namirama/335 which is contiguous with the defendant's land parcel No. Bunyala/Namirama/333, separated by a stream. The plaintiff avers that the defendants have since the year 2009 been trespassing on a portion of the plaintiff's land measuring approximately one acre and growing crops thereon. The plaintiff avers that there was dispute filed at Navakholo Land Disputes Tribunal vide case No. 2 of 2009 between the plaintiffs and the 1st and 2nd defendants' husband and the decision was adopted by the subordinate court vide Kakamega CMCC Award No. 13 of 2010. The aforesaid tribunal recommended that the District Surveyor and Land Registrar determine the boundary separating the two parcels of land which was done and found in favour of the plaintiffs. The respondent in the case at the tribunal, one Asman W. Hamisi, the husband of the 1st and 2nd defendants died before the decision was effected. The plaintiff's prayer against the defendants jointly and severally is for a mandatory injunction to issue restraining the defendants' either in person or through their children, relatives, workers, tenants or any other person acting under the defendants' instructions from trespassing, tilling, constructing or in any other manner interfering with the plaintiff's land parcel No. Bunyala/Namirama/335 and mesne profits of Ksh. 492,000/= since the year 2009 to date. The plaintiff prays for judgment to be entered against the defendants jointly and severally for:

(a) Mandatory injunction and mesne profits of Ksh. 492,000/=.

(b) Costs of this suit.

The defendants aver that there has been disagreement between the plaintiffs and the late Asman W. Hamisi who was the father in law of the 1st and 2nd defendants, and father of the 3rd defendant respectively but that before the dispute could be determined by the Navakholo Land Disputes Tribunal the said Asman W. Hamisi died. The defendants aver that the disputes emanate from the plaintiffs who allege that the defendants have trespassed onto the plaintiffs' parcel of land known as Bunyala/Namirama/335 which borders Bunyala/Namirama/333 which the defendants vehemently deny. Far from this the defendants avers that though the two parcels of land border, the defendants have never trespassed onto the parcel of land known as Bunyala/Namirama/333. The defendants state that to resolve this dispute once and for all the boundaries of the parcels of land known as Bunyala/Namirama/333 and Bunyala/Namirama/335 would better be determined by the District Lands Office Kakamega.

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 that the plaintiff is the registered proprietor of Land parcel No. Bunyala/Namirama/335. The plaintiff produced a copy of the title deed and the search certificate. The plaintiff avers that he has had a boundary dispute with the defendants and they cut his sugarcane. He produced the Surveyors report confirming that they had trespassed and the Agriculture report stating the value of the sugarcane. The Land Registrar and the Surveyor gave evidence that the accused one Aswani Hamisi had indeed trespassed on the plaintiff’s land. They produced the report as PEx4. PW6 the Agricultural Officer produced a report PEx9 putting the value of the sugarcane on the land in dispute as Kshs. 492,000/=. DW1, the 3rd Defendant testified that the said Aswani Hamisi now deceased was his brother and 2nd and 3rd Defendants are his brother’s wives. They all deny using the land and state that they are not administrators of his estate. DW2 and DW3 corroborated his evidence. I have perused the surveyors report and I indeed find that the said Aswani Hamisi has indeed trespassed onto the plaintiff’s land. I also find that he died before the matter at the tribunal was concluded. I find that the issue of trespass has been established on a balance of probabilities. However, the issue of mesne profits has not been proved as against the defendants. It has not been established whether or not they are the administrators of the said Aswani Hamisi’s estate and if they benefited from the sugarcane. Indeed they all state that they are not using the said land. This prayer will not be granted. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A mandatory injunction to issue restraining the defendants’ either in person or through their children, relatives, workers, tenants or any other person acting under the defendants’ instructions from trespassing, tilling, constructing or in any other manner interfering with the plaintiff’s land parcel No. Bunyala/Namirama/335.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE