



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 647 OF 2014

RICHARD MOMANYI KONDO.....PLAINTIFF

VERSUS

WYCLIFFE AMBETSA OPARANYA.....DEFENDANT

JUDGEMENT

The plaintiff avers that is the absolute registered proprietor of L.R. No. Marama/Lunza/1826 measuring 0.81 Ha that partly borders L.R. No. Marama/Lunza/705 registered in the name of the defendant. On or about 1st June 2013, without the express consent of the plaintiff, the defendant trespassed upon L.R. No. Marama/Lunza/1826 owned by the plaintiff and took possession of the same, fenced it off and ploughed part of it and planted sugarcane, constructed buildings thereon, drilled a bore hole, created an illegal road thereon and constructed toilets on the other part and without any justifiable cause held on to it to date claiming that it forms part of his L.R. No. Marama/Lunza/705 and has refused to vacate despite several demands to do so to the plaintiff's detriment. The plaintiff's claim against the defendant, by himself, agents, servants, representatives, assignees, or anybody claiming through him in whatsoever manner is an order of eviction from L.R. No. Marama/Lunza/1826 and a permanent injunction restraining him, his agents, servants, assignees, representatives or anybody claiming through him in whatsoever manner from going back to the land. The plaintiff's other claim against the defendant by himself, his agents, servants, assignees, representatives or anybody claiming through him in whatsoever manner is an order of demolition of the structures he erected on L.R. No. Marama/Lunza/1826 and closure of an illegal road created thereon. The plaintiffs further claim is mesne profits from 1/6/2013 to the conclusion of this case. The plaintiff prays judgment against the defendant by himself, his agents, servants, assignees, representatives or anybody claiming through him in whatsoever manner for:-

- (a) An order of eviction from L.R. No. Marama/Lunza/1826.
- (b) Demolition of buildings and/or structures erected on L.R. No. Marama/Lunza/1826 and closure of an illegal road created thereon.
- (c) Mesne profits from 1/6/2013 to the conclusion of this case.
- (d) A permanent injunction restraining the defendant by himself, agents, servants, assignees, representatives or anybody claiming through him from going back and/or trespassing upon or interfering in whatever manner with L.R. No. Marama/Lunza/1826.
- (e) Costs of the suit and interest thereof.

The defendant admits being the absolute registered proprietor of L.R. No. Marama/Lunza/705 but denies the same borders L.R. No. Marama/Lunza/1826. The defendant avers that being the absolute registered proprietor of L.R. No. Marama/Lunza/705, he exercises his proprietary rights within the boundaries of the said land and has at no time entered, trespassed, intermeddled and/or had any dealing in L.R. No. Marama/Lunza/1826.

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 the plaintiff is the registered proprietor of Land parcel L.R. No. Marama/Lunza/1826. The plaintiff claim is that the defendant the registered proprietor of Land parcel L.R. No. Marama/Lunza/705 has trespassed into his land. DW1 the defendant testified that there was a boundary dispute between the parties which was resolved by the Land Registrar and the Surveyor as per the report filed in court. This court has perused the report from the Land Registrar and the Surveyor dated 19th January 2015 in which both the plaintiff and the defendant were present on the ground. It is clearly indicated that the two suit parcels of land namely Land parcel L.R. No. Marama/Lunza/1826 and Land parcel L.R. No. Marama/Lunza/705 are separated by a road of access therefore they do not share a common boundary. It was concluded that the boundary position of the two parcels of land along the access road should be maintained as they exist because they were intact. I adopt the surveyors report. For these reasons, I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE