



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 279 OF 2017

AMOS SHIKOMERA NDAKWA.....PLAINTIFF

VERSUS

SAMUEL ODHIAMBO LUMBASI.....DEFENDANT

JUDGEMENT

The plaintiff avers that at all material times he is the registered proprietor of parcel of land known as S/Kabras/Shamberere/3609. The plaintiff avers that the defendant on 15/6/2017 or thereabouts illegally and unlawfully without any colour of right or justification in law trespassed onto of suit land herein known as S/Kabras/Shamberere/3609 forcibly uprooted cane and proceeded to plough and plant thereon sweet potatoes and graze his cattle on the said suit land which action has deprived the plaintiff the use and peaceful enjoyment of the said parcel of land thereby causing him loss and damage. The plaintiff further avers that the defendant does not have any registrable and or beneficial interest over the suit land herein. The plaintiff further avers that he acquired acquisition and obtained title of the suit land legally and procedurally from Luka Muzami Sachita on 12th July, 2006 for a valuable consideration and since 2006 or thereabouts he has been growing cane delivered to ~West Kenya Sugar Company Ltd. The plaintiff further avers that he jointly with the said Luka Muzami Sachita and successfully lodged a complaint against the defendant before the then Malava Land Disputes Tribunal which was later challenged by the defendant herein in the then Western Provincial Lands Disputes Committee which upheld the decision of the then Malava land Disputes Tribunal adopted in Kakamega CMCC Award No. 87 of 2007 as the judgment of the court. The plaintiff further avers that the defendant herein appealed against the said judgment in Kakamega HCCA No. 25 of 2008 which was on 20th April, 2015 dismissed for want of prosecution. The plaintiff further avers that the defendant continues to trespass onto the suit land despite having been warned by the Area Chief. The plaintiff prays for an order of permanent injunction be issued to restrain the defendant whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/Kabras/Shamberere/3609. The plaintiff prays for orders:-

(a) The plaintiff prays for an order of permanent injunction be issued to restrain the defendant whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/Kabras/Shamberere/3609.

(b) Costs of this suit.

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 No. S/Kabras/Shamberere/3609. The plaintiff produced a copy of the title deed. The plaintiff testified that the defendant on 15th June 2017 or thereabouts illegally and unlawfully without any colour of right or justification in law trespassed onto of suit land herein known as S/Kabras/Shamberere/3609 forcibly uprooted cane and proceeded to plough and plant thereon sweet potatoes and graze his cattle on the said suit land which action has deprived the plaintiff the use and peaceful enjoyment of the said parcel of land thereby causing him loss and damage. The defendant failed to attend court to give oral evidence and offered no defence. The plaintiff title is indefeasible and can only be challenged if it was obtained through a fraudulent scheme which the defendant has not done. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

(c) An order of permanent injunction be issued to restrain the defendant whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/Kabras/Shamberere/3609.

1. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE