



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 223 OF 2017

HEZRON SUDI INDENGEZI.....PLAINTIFF

VERSUS

THOMAS SUTI MALUHA

BERNAD TECHU BEYO.....DEFENDANT

JUDGEMENT

The plaintiff avers that the defendant is the registered proprietor of title number Kakamega/Kapsotik/287 measuring approximately 1.9 hectares. The plaintiff avers that sometime in the year 1980 he purchased title number Kakamega/Kapsotik/287 together with the defendant from their Aunt Rosa Lukhaji. The plaintiff avers that the consideration for the purchase of the land was Ksh. 1,000.00 of which he paid an equivalent of Ksh. 650.00 thereof and thereby became entitled to half of the land, measuring 0.95 Ha. The plaintiff avers that he took possession of his portion, and transfer forms were filled out, and the consent procured for the transfer. The plaintiff has been in occupation of his portion of the parcel from the time he purchased it. The plaintiff avers that unknown to him, the defendant has not taken steps to get the parcel subdivided and a separate title document issued, and has continued to own the whole parcel as the sole proprietor. The plaintiff avers that the defendant has attempted to hive off most of the parcel and sell it to a certain purchaser, who has however failed to successfully take possession because the plaintiff is in possession of half of the possession. There have been mediation proceedings presided over by the area chief, which have resolved that the plaintiff is entitled to half the parcel of land jointly purchased, and the defendant has been prevailed upon by the local administration to honour the contract, but he has declined. The plaintiff prays for a permanent injunction restraining the defendant from transferring, alienating or selling title number Kakamega/Kapsotik/287 or any part thereof to any other person other than the plaintiff. The plaintiff also prays for a mandatory injunction to compel the defendant to subdivide title number Kakamega/Kapsotik/287 and effect a transfer of an equivalent of 0.095 Ha thereof to the plaintiff. The plaintiff prays that this honourable makes a declaration that he, the plaintiff, is the bonafide proprietor of half of title number Kakamega/Kapsotik/287. The plaintiff prays for judgment against the defendant for:

- (a) An order for a permanent injunction.
- (b) An order for a mandatory injunction.
- (c) A declaration.
- (d) Costs and interest at court rates.

The 1st defendant states that the plaintiff has never purchased any portion of the suit land in person or jointly with the defendant from the said Rosa Lukhaji who is not an aunt to the plaintiff. The defendant avers that he was registered as the first absolute owner of the suit land on 17/9/1973 during the land adjudication and that neither the plaintiff nor the said Rosa Lukhaji had and or has good title to the suit land. The defendant states that the plaintiff is a mere licensee on the suit land and that he has not obligation to transfer any portion of the suit land to the plaintiff. The defendant avers that on or about 11/10/1997 he sold a portion of the suit land to Bernard Beyo at Ksh. 550,000/= and that the buyer has been in full occupation of the said portion of the suit land since then to date in total exclusion of the plaintiff. Without prejudice to the foregoing the defendant avers that the suit herein is statutory time barred, incompetent, does not disclose a reasonable cause of action, is an abuse of the due process of the court, frivolous and the defendant shall raise a preliminary objection that the same should be struck out with costs.

The 2nd defendant states that land parcel LR. Kakamega/Kapsotik/287 is registered in the name of Thomas Suti Maluba. The interested party purchased a portion measuring 4 acres of the subject matter in 1997 and took possession. The defendant Thomas Suti Maluha, upon giving him vacant possession migrated to Nandi County where he resides to date. There has been no dispute between him and the plaintiff as regards the subject matter. The plaintiff Hezron Sudi Indengezi occupies only ½ acre of the subject matter and there are clear demarcated boundaries. That he filed suit Kakamega High Court, ELC No. 104 of 2017 which was concluded on 7/3/2018 when judgment was entered in his favour.

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 1st defendant is the registered proprietor of Land parcel No. Kakamega/Kapsotik/287. The 1st defendant produced a copy of the green card and the title. The plaintiff avers that sometime in the year 1980 he purchased title number Kakamega/Kapsotik/287 together with the defendant from their Aunt Rosa Lukhaji. The plaintiff avers that the consideration for the purchase of the land was Ksh. 1,000.00 of which he paid an equivalent of Ksh. 650.00 thereof and thereby became entitled to half of the land, measuring 0.95 Ha. The plaintiff avers that he took possession of his portion, and transfer forms were filled out, and the consent procured for the transfer. The plaintiff has been in occupation of his portion of the parcel from the time he purchased it. In 2013 he was told that the land had been sold and hence he came to court. DW1 testified that he got the land from his uncle and later sold it and went to live in Nandi. The plaintiff is his step brother and he had no place to live and he allowed him to live on half an acre and he is still there. DW2 a neighbour corroborated his evidence. The 2nd defendant confirms that he is bought and is using the 4 acres while the plaintiff stays on half an acre. I believe the defence. The defendant’s title is indefeasible and can only be challenged if it is fraudulent scheme which the plaintiff has not done. I find from the evidence that the plaintiff has failed to prove any contribution towards the purchase of the suit land. He is therefore a mere licensee and resides on half an acre. I find that the 2nd defendant is a bonafide purchaser for value. 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 19TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE