



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 204 OF 2016

METHUSELA MAKONJO

EVANS SHITOTE

SAMUEL ANJANGA.....PLAINTIFFS

VERSUS

ABEL OMENJA NYABERI

NYAKWARA KARANI DENNIS DEFENDANTS

JUDGEMENT

The 1st, 2nd and 3rd plaintiffs aver that they are in use and occupation of plots No. 8, 9 and 10 at Shichirai Market. The plaintiffs aver that they developed the said plots as per the specifications given to them by the defunct County Council of Kakamega on 9th February, 1972. The plaintiffs aver that they equally built toilets in the rear part of the plot. The plaintiffs aver that at the time the plots were given to them the same had not been surveyed. The plaintiffs aver that they have been in open and continuous use of the aforesaid portion of land since 1972. The plaintiffs jointly and severally aver that on or about 9th August, 2016 the defendants and their agents caused to be excavated a plot next to their plots causing some latrines to collapse. The plaintiffs aver that after the excavation and on 9th October, 2016 the defendants and their agents moved onto the plots and started fencing the same. The plaintiffs jointly and severally aver that the defendants' actions are invasion of their rights to property. The plaintiffs' prayer against the defendants jointly and severally is for orders of permanent injunction restraining the defendants jointly and severally from alienating, trespassing and in any other manner interfering with the plaintiffs' occupation and use of plots No. 8, 9 and 10 at Shichirai Market and a declaration that the 1st and 2nd defendants have no interest in plots Nos. 8, 9 and 10 at Shichirai market. The plaintiffs pray jointly and severally for the following orders;

- a. Permanent injunction restraining the defendants jointly and severally from alienating, trespassing and in any other manner interfering with the plaintiffs' occupation and use of plots No. 8, 9 and 10 at Shichirai Market and a declaration that the 1st and 2nd defendants have no interest in plots Nos. 8, 9 and 10 as the plaintiffs have been in open and continuous use of the plots since 1972 a period more than 40 years.
- b. Costs of the suit.

The defendants hold that the plaintiffs are instead, knowingly or unknowingly, in occupation of the defendants' LR. No. Butso/Indangalasia/2211 (Plot No. 2211) and that the defendants intend to counter-claim for their eviction therefrom. The defendants deny that the developments alleged by the plaintiffs are on plot Nos. 8, 9 and 10 as stated, but that rather, the same are upon plot No. 2211 and therefore the County Government of Kakamega through the defunct Kakamega County Council could not have allotted plots from the defendants' plot No. 2211. The defendants aver that the toilets referred to therein have actually been built on plot No. 2211 and not plot Nos. 8, 9 and 10. The defendants hold that the position taken by the plaintiff cannot be factual since plot No. 2211 has been in existence since the land adjudication exercise on the dawn of independence. That the portion of land which the plaintiffs allege to be plot Nos. 8, 9 and 10 is in actual sense plot No. 2211. The defendants pray for judgment upon the counter-claim as against the plaintiffs severally and/or jointly for:

1. Declaration that the 4th defendant lacks authority to allot L.R. No. Butso/Indangalasia/2211 to any party.
2. Eviction of the 1st, 2nd and 3rd defendants from L.R. No. Butso/Indangalasia/2211.
3. Permanent injunction restraining the defendants from accessing or interfering with the user and occupation of the defendants' LR

No. Butso/Indangalasia/2211.

4. Costs of the counter-claim.

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 defendants are the registered proprietor of Land parcel No. LR. No. Butso/Indangalasia/2211. PW1 the 1st plaintiff produced an allotment letter stating that he was allocated plot number 10 at the market and has been there since 1972. PW2 the 2nd plaintiff states his plot is plot number 8. It belonged to his father since 1972. The 1st defendant testified that they are the joint proprietors of with the 2nd defendant. The 1st defendant produced both the search and the title (DEX1 & 2). This matter appears to be one of boundary dispute between in the litigants. Indeed by an order of this court dated 4th January 2018 the District Land Registrar and Surveyor were to conduct a survey and compile a survey report. I have peruse the court file and no such report was filed or produced in this court as at the time of writing this judgment. This court cannot make a determination on the same and advises the parties to settle the matter with the Land Registrar as this is boundary dispute. For these reasons, I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. The defendants as also failed to prove their counter claim and it is dismissed. They will be 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