



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 43 OF 2018**

**ALICE MUTULI KOLA.....PLAINTIFF**

**VERSUS**

**HANNINGTONNE AMBATISI**

**MOSES ANDATI AMBATSI .....DEFENDANTS**

**JUDGEMENT**

The plaintiff avers that, at all material times of this suit, she is the registered owner of the whole of that land known as Butsotso/Shibeye/759 measuring 17 acres. The plaintiff avers that the defendants have without any colour of right trespassed onto her land parcel No. Butsotso/Shibeye/759 and have unlawfully planted sugarcane and food crops on it without the plaintiff's consent and the plaintiff claims mesne profits from 30<sup>th</sup> June, 2010 till giving vacant possession. The defendants' unlawful actions have denied the plaintiff her legal right of possession and peaceful use of her land parcel thereby occasioning the plaintiff great loss and damage. Further the plaintiff avers that attempts to have the defendants peacefully vacate land parcel No. Butsotso/Shibeye/759 has been met with great hostility from the defendants necessitating this suit. The plaintiff prays for judgment against the defendant for:-

- a. An eviction order from Land Parcel No. Butsotso/Shibeye/759.
- b. An order of permanent injunction restraining the defendants, their agents, servants, employees or anybody claiming through them from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff's land parcel No. Butsotso/Shibeye/759.
- c. Mesne profits.
- d. Costs of this suit.
- e. Any other relief this honourable court deems fit to grant.

The defendant denies that the plaintiff is the registered proprietor of land parcel number Butsotso/Shibeye/759. The defendant avers that if the plaintiff is the registered proprietor of land parcel number Butsotso/Shibeye/759 (which is denied) then the said registration was done fraudulently and without the participation of the defendant. The defendant avers that he has all along used the land for a period of over 12 years since the plaintiff's husband was registered as a proprietor. That now the title of the plaintiff and her husband got extinguished long time ago. Consequently, the defendant avers that the plaintiff holds land parcel number Butsotso/Shibeye/759 in trust for the defendant and same should be ordered be transferred to the defendant. The defendant prays for the dismissal of the plaintiff's case with costs and for orders:-

- a. That land parcel number Butsotso/Shibeye/759 be retransferred back to the defendant's name.

This court has carefully considered the evidence therein. The defendant was served but failed to attend court. 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. Butso/Shebeye/759. The plaintiff produced the green card PEx3. The plaintiff avers that the defendants have without any colour of right trespassed onto her land parcel No. Butso/Shebeye/759 and have unlawfully planted sugarcane and food crops on it without the plaintiff’s consent and the plaintiff claims mesne profits from 30<sup>th</sup> June, 2010 till giving vacant possession. PW1 testified that her husband now deceased bought the suit land through an auction from KCB Bank. She then undertook succession proceedings and the same was registered in her name. The defendant avers that if the plaintiff is the registered proprietor of land parcel number Butso/Shebeye/759 (which is denied) then the said registration was done fraudulently and without the participation of the defendant. The defendant avers that he has all along used the land for a period of over 12 years since the plaintiff’s husband was registered as a proprietor. DW1 stated that the plaintiff’s husband had loaned him some money which he refunded as he had taken a loan from KCB. DW2 his son states that he has been living there for a period of over 12 years. I find that the defence is unsustainable and I reject it. I find that the plaintiff’s husband did buy the suit land and is a bonafide purchaser. The defendants cannot claim adverse possession as there was a dispute over the suit land way back in 1994 before the Chief Magistrates Court. The claim for mesne profits has not been proved and the same will not be awarded. I find the counter claim has not been proved on a balance of probabilities and I dismiss it with costs. I find that the plaintiff’s title is indefeasible and can only be challenged if it was issued through a fraudulent scheme which the defendants have not proved. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. The defendants, their agents, servants and/or anybody acting for and on his behalf are to vacate the plaintiff’s parcel of land better known as L.R. No. Butso/Shebeye/759 within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.
2. An order of permanent injunction restraining the defendants, their agents, servants, employees or anybody claiming through them from trespassing, laying claim, tilling, cultivating or in any way interfering with the plaintiff’s land parcel No. Butso/Shebeye/759.
3. Costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL 2020**

**N.A. MATHEKA**

**JUDGE**