



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 66 OF 2014

AMBOYE DANSTONE MUKAMI.....PLAINTIFF

VERSUS

LUKA PETER KUBAI AMBOYE.....DEFENDANT

JUDGEMENT

The plaintiff avers that at all material time relevant to these proceedings the parcel of land known as Kakamega/Shisejere/811 is duly registered in the name of the plaintiff as the sole absolute proprietor. The plaintiff avers that without any justifiable reason, the defendant has entered and settled in the said parcel of land. The plaintiff avers that in total disregard the defendant has turned violent and a serious threat to the plaintiff and has cut down the plaintiff's trees. Sometimes in the year 2011, the defendant buried his late mother on the subject land. The plaintiff avers and claims that the occupation of the defendant on the plaintiff's land is unlawful and that the defendant and anybody claiming under the defendant be evicted out of the plaintiff's parcel of land. As a result, the plaintiff has suffered loss and damages for loss of user of his land. The plaintiff prays the judgment be entered in the plaintiff's favour as follows:-

- (a) A declaration that the parcel of land known as Kakamega/Shisejere/811 belongs to the plaintiff.
- (b) The defendant jointly and severally be evicted from the parcel of land known as Kakamega/Shisejere/811 together with the defendant's agents, servants, relatives, or anyone claiming any interest in reference to the said subject matter on behalf of the defendant.
- (c) Costs of this suit.
- (d) The defendant be ordered to exhume the body buried on the subject land.
- (e) Loss of user.
- (f) Damages for the trees felled by the defendant.
- (g) Any other relief that this honourable court shall deem fit and just to grant.

The defendant avers that the said proprietorship was obtained by way of fraud. The defendant avers that land parcel number Kakamega/Shisejere/811 is their ancestral land and he has been in occupation since 1996 upon the death of the defendant's father. The defendant states that the plaintiff's father one Ernest Mukami Amboye was buried on land parcel number Kakamega/Shisejere/972 and his mother land parcel number Kakamega/Shisejere/811 as the said land parcel belonged to the plaintiff for it was being held in trust by his brother Ernest Mukami the plaintiff's father. The defendant stated that the plaintiff filed succession cause fraudulently and he has filed objection proceedings in succession cause No. 584 of 2012. The defendant avers that land parcel number Kakamega/Shisejere/811 lawfully belongs to the defendant and that no eviction claim can stand as the same was obtained fraudulently. The dispute was taken to the administration which ruled in his favour DEX3. DW2 the plaintiff's aunty and DW3 the defendant's brother stated that their brother Ernest held the land in trust for the defendant. DW3 confirms that the land is ancestral and the defendant has been there from the 1960s. DW4 and DW5 all relatives of the litigants corroborated the defendant's case.

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 that plaintiff is the registered proprietor of Land parcel No Kakamega/Shisejeri/811. PW1 testified that he obtained the land through succession in Succession Cause No. 584 of 2012 from his father. The plaintiff avers that without any justifiable reason, the defendant has entered and settled in the said parcel. The plaintiff avers that in total disregard the defendant has turned violent and a serious threat to the plaintiff and has further cut down the plaintiff’s trees. Sometimes in the year 2011, the defendant buried his late mother on the subject land. He maintains that the defendant is not his relative and is not a beneficiary. I find that the plaintiff is not being truthful. Indeed during the land dispute before the Chief Shikumu location on the 4th February 2014 it was confirmed that the defendant is the plaintiff’s uncle (DEX3) I find that the defendant has beneficial interest in the said suit land as the same is ancestral land and from his evidence he had raised an objection in Succession Cause No. 584 of 2012. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. They will be no orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE