



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 311 OF 2014**

**ANJELINE ANGUZUZU CHAGALA.....PLAINTIFF**

**VERSUS**

**GEORGE LIGAMI.....DEFENDANT**

**JUDGEMENT**

The plaintiff alleges that she is the owner/proprietor of L.P. No. Isukha/Shirere/3824. The plaintiff further alleges that the defendant herein is a neighbour. The plaintiff avers that the defendant is a grandson to one Enes Mutoka Kivagaji now deceased whom they bought the L.P. No. Isukha/Shirere/3824. That on or about 14<sup>th</sup> January, 1999 the plaintiff herein was issued with a title deed for L.P. No. Isukha/Shirere/3824. The plaintiff avers that the defendant herein is interfering with her L.P. Isukha/Shirere/3824 by cutting down fence and trees in her land parcel and ploughing it as well. The plaintiff further aver that the defendant's action caused her mental anguish and or torture. The plaintiff's prayer to court against the respondent is for an order of permanent injunction restraining the defendant, his agents, servants, employees and or anybody acting for an on behalf from alienating, encroaching, cultivating, constructing, contracting, cutting down fence, cutting down trees, ploughing and or dealing/interfering in any manner with the plaintiff's occupation of L.P. No. Isukha/Shirere/3824. The plaintiff prays for judgment to be entered against the defendant for:-

- a. An order of permanent injunction.
- b. Costs of the suit.
- c. Any other relief this Hon. Court may deem fit and just to grant.

PW2 corroborated the plaintiff's evidence.

The defendant avers that the plaintiff bought a portion of land measuring 59 steps by 35 steps by 16 steps from his late mother Eunice Mutuka Khavakali. That his mother put a boundary marks for the plaintiff for the portion of land that she bought. That the plaintiff bought a plot for purposes of constructing residential building. That the plaintiff never brought a surveyor to survey or portion of land. The plaintiff later brought a surveyor who surveyed the land without considering the boundary marks on the ground. That the surveyor prepared a mutation whereby the plaintiff was given more land than what she bought. The report of the County Surveyor confirms that the plaintiff has more land according to the survey map than what is on the ground. That in the above circumstances he prays that the plaintiff be ordered to surrender the title deed to the land's office so that it can be given proper acreage as per what is on the ground. DW2 confirmed that they used steps to measure the boundaries in the sale agreement DEx1.

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 owner/proprietor of L.P. No. Isukha/Shirere/3824. The plaintiff stated that the defendant herein is a neighbour. The plaintiff avers that the defendant is a grandson to one Enes Mutoka Kivagaji now deceased whom they bought the L.P. No. Isukha/Shirere/3824. That on or about 14<sup>th</sup> January, 1999 the plaintiff herein was issued with a title deed for L.P. No. Isukha/Shirere/3824. The plaintiff avers that the defendant herein is interfering with her L.P. Isukha/Shirere/3824. The plaintiff did not produce the sale agreement. The defendant avers that the plaintiff bought apportion of land measuring 59 steps by 35 steps by 16 steps from his late mother Eunice Mutoka Khavakali. That his mother put a boundary marks for the plaintiff for the portion of land that she bought. That the plaintiff bought a plot for purposes of constructing residential building. That the plaintiff never brought a surveyor to survey or portion of land. The plaintiff later brought a surveyor who surveyed the land without considering the boundary marks on the ground. That the surveyor prepared a mutation whereby the plaintiff was given more land than what she bought. He produced the sale agreement DEx 1. On the 25<sup>th</sup> June 2018 this court ordered the County Surveyor to visit the scene and ascertain the boundaries and make a report. The said report was filed in court on the 3<sup>rd</sup> April 2019. The findings were that;

“The ground measurements slightly vary from the map measurements.

The ground measurements totally varies from the measurements indicated in the sale agreement.

The sale agreement indicates a very small area compared to what is on the map.”

I find that the plaintiff’s title and the sale agreement are at variance and hence she cannot now claim more land then what she bought. I find that the title was obtained through a fraudulent scheme and the orders sought cannot be granted. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it. The defendant prays that the plaintiff be ordered to surrender the title deed to the land’s office so that it can be given proper acreage as per what is on the ground. However he did not establish locus standi or whether he is the legal representative of one Enes Mutoka Kivagaji now deceased who was the seller and his prayers cannot be granted. I find that the defendant has failed to prove his counter claim on a balance of probabilities and I dismiss it. They will be no orders as to costs.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**