



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 220 OF 2017

BAKARI MAKOKHA.....PLAINTIFF

VERSUS

SYLVESTER ODHIAMBO WABUYABO

ALI ABDALLA ALI.....DEFENDANTS

JUDGEMENT

The plaintiff avers that at all materials act to suit he occupies and utilizes L.P. No. N/W/Mayoni/1109 and the defendants L.P. No. N/W/Mayoni/845 and 1108 respectively. The plaintiff avers that the 1st defendant has without any colour of right, consent or any valid document interfered with the boundaries in respect to L.P. No. N/W/ Mayoni/1109, 1108 and 845 and fraudulently registered the name of deceased father Nicholas Wabuyabo as the sole proprietor of L.R. No. N/W/Mayoni/845. The plaintiff's claim against the defendants jointly and severally is an order inviting the County Land Registrar and Surveyor of Kakamega to visit L.P. No. N/W/Mayoni/1109, 845 and 1108 to determine and correct the boundaries and an order deregistering the deceased father of 1st defendant as the sole proprietor of L.P. No. N/W/Mayoni/845 and the same be registered in the plaintiff name. And the plaintiff claims damages. The plaintiff prays for judgment against the defendant jointly and severally for:-

- (a) An order inviting the Kakamega County Land Registrar and Surveyor to determine and correct boundaries between LP Nos. N/W/Mayoni/1109, 845 and 1108.
- (b) An order correcting land register by deleting the deceased father of 1st defendant name from the LP No. N/W/Mayoni 845 and to be registered in the plaintiff's name.
- (c) General damages for trespass to property.
- (d) Costs and interest on (c) above.

The 1st defendant testified that land parcel No. N/W/Mayoni 845 belongs to his father and he has not done succession. He maintains that he has not trespassed and has no objection to the surveyor visiting the site and marking the boundary. The 2nd defendant join issue with the plaintiff in respect to allegations and that the County Land Registrar and Surveyor be invited to visit L.P. Nos. N/W/Mayoni/1109, 1108 and 845 respectively to safeguard his interest of 1.0 Ha. That in the year 2010, he bought 1.0 Ha of land from the plaintiff's father Issa Matere Munyanya now deceased and was issued with title deed for L.P. No. N/W/Mayoni/1108. The 2nd defendant's counter-claims against the 1st defendant is for an order curving 1.01 Ha from L.P. No. N/W/Mayoni/845 being his share. That the 1st defendant has taken advantage that he does not stay next to the suit land and trespassed on the same and he utilizes the same. The 2nd defendant prays that judgment be entered as prayed for in the plaint and 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 that a third party one Nicholas Wabuyabo now deceased is the registered proprietor of Land parcel No. N/W/Mayoni/845. His administrators if any were not made parties in this suit. This court cannot make orders against them. The plaintiff and 2nd defendant did not provide any documentary evidence to prove ownership of their parcels of land as alleged. Indeed this matter appears to be a boundary dispute and parties are advised to solve the dispute with the Land Registrar. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. I find that the 2nd 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 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE