



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 246 OF 2017

JULIUS SAVA MUGALITSI.....PLAINTIFF

VERSUS

CHARLES IMBWANGA BUSUTU.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the registered owner of LR. No. Kakamega/Lumakanda/4159. The plaintiff avers that he acquired the said land for valuable consideration vide Land Sale Agreement dated 20th August 2011 and sold to him by Philomena Avisu Busutu and Everlyne Maiti Asiligwa. The plaintiff avers that the defendant has without any colour of right and or authority from the plaintiff entered and planted sugarcane on the said land and refused to move out and has defied all attempts, legal or otherwise to have him peacefully move out of the subject property. The plaintiff further avers that the defendant has gone ahead and erected a structure on the said parcel of land for burial of his deceased son Zakaria Kimoi who was buried on 17th July, 2017 without the consent of the plaintiff to carry and or conduct the said burial and or bury the deceased's remains on the said parcel of land. The plaintiff avers that he has not in any way consented to the defendant's entry and or occupation of a portion of the said parcel of land. The plaintiff avers that the defendant's actions are an impediment to the plaintiff's right to own, occupy and peacefully use the subject property. The plaintiff's claim against the defendant is for:-

- (a) A permanent injunction restraining the defendant by himself and or through his servants, employees, agents and or any person claiming through him from entering, occupying, interfering and or in any way dealing with the suit land known as Kakamega/Lumakanda/4159 whatsoever upon exhumation of the late Zakari Kimoi.
- (b) An order for the defendant herein be compelled to exhume the remains of the late Zakaria Kimoi from the land parcel known as Kakamega/Lumakanda/4159 and be preserved at County Referral Hospital Mortuary Kakamega to await the same to be reburied by the elsewhere by the defendant and a further order that the exhumation process to be supervised by the incharge Medical Supretendant County Referral Hospital Kakamega in the presence of the incharge Lumakanda Police Station to provide adequate security.
- (c) An order against the defendant, his family and or any other person acting on his behalf to be evicted from land parcel known as Kakamega/Lumakanda/4159.
- (d) Costs of this suit.

The defendant avers that he has resided on the land since 1963 with his late father Hezron Vusutu and he inherited the same. That he is not aware of the said sale agreement. That the agreement and title deed were fraudulently acquired. That he has buried his son Zakaria Kimoi on the said piece of land on 12th July, 2017. That he had buried four (4) of his siblings prior to this.

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 plaintiff is the registered proprietor of Land parcel No. Kakamega/Lumakanda/4159. The plaintiff testified that he acquired the said land for valuable consideration vide Land Sale Agreement dated 20th August 2011 and it was sold to him by Philomena Avisu Busutu and Everlyne Maitsi Asiligwa (PEX3). The plaintiff produced the title deed (PEX2).

The defendant avers in his defence that he inherited the land from his father and that he has lived there from 1963. That he is not aware of the said sale agreement. That the agreement and title deed were fraudulently acquired. That he has buried his son Zakaria Kimoi on the said piece of land on 12th July, 2017. That he had buried four (4) of his siblings prior to this. The register of the suit land was not produced or any transfer documents to enable this court ascertain the history of the land. For example who was the registered proprietor prior to the plaintiff being registered? Who is Philomena Avisu Busutu and Everlyne Maitsi Asiligwa? Why did the plaintiff not get vacant possession in 2011 when he allegedly bought the land? This could only mean that the defendant was already in occupation and hence has beneficial interest on the suit land. It was not until 2014 when the plaintiff sent a demand letter (PEX2). None of the witnesses in the said sale agreement gave evidence. Everlyne Maitsi Asiligwa is not mentioned in this agreement. for these reasons I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with no orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE