



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT KAKAMEGA

ELC NO. 275 OF 2017

MANOAH LIKHANGA MUKASIALI.....PLAINTIFF

VERSUS

BENSON LUMUMBA IMBALI.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the registered owner of a parcel of land known as Kakamega/Shitoli/792, situated in Shitoli sub-location, South Idakho location, Ikolomani Division of Kakamega District. The plaintiff acquired the said land through succession cause number 1358 of 1997. On diverse dates between 1998 and 1999, the defendant entered and continues to trespass and cultivate the plaintiff's parcel of land herein, which he purportedly bought the same from the initial owner. The plaintiff has suffered and continues to suffer loss and damages. The plaintiff prays for orders restraining the defendant from entering, tilling the plot number and further orders restraining the defendant, his agents and/or servants from entering the suit premises as they are strangers to the said suit premises. Despite demands to desist from doing the aforesaid acts, the defendant has refused, neglected and/or failed to desist from the aforesaid acts, even after both of them had appeared before area sub-chief in October, 1998. The plaintiff prays for judgment against the defendant for;

1. Orders restraining the defendant, his servants and/or agents from trespassing, tilling the suit premises known as Kakamega/Shitoli/792.
2. General damages.
3. Costs of this suit with interest.

The defendant avers that if at all the plaintiff is the registered owner of the land parcel Kakamega/Shitoli/792 the said registration was fraudulently done as the plaintiff misrepresented himself as the rightful administrator to do the succession cause when he was merely a purchaser. This was by fraudulently filing succession number 1358 of 1997 at High Court Nairobi when he knew that the actual administrator Majisu Ikutwa had already filed succession cause No. 61 of 1993 at Kakamega High Court. He fraudulently misled the High Court Nairobi to transfer succession cause No. 61 of 1993 from Kakamega using Nairobi suit No. 2282 of 1994 which he had filed claiming his purchase price of Ksh. 9,000/= for the suit land. The plaintiff misrepresented himself as the rightful heir and filed a second succession cause when he knew that the proper administrator had filed succession cause at Kakamega. He fraudulently used suit HCCC. No. 2282 of 1994 to transfer a succession matter from Kakamega when the issue of that suit was not at all connected with the succession file. He fraudulently obtained orders of transfer in HCC 2282 of 1994 Nairobi without serving the said Laurent Induli Kutwa and Majisu Ikutwa who were defendants in that suit and being also petitioners in HCCC Succession Cause No. 61 of 1993. He fraudulently obtained letters of administration and confirmed certificate of grant and registered himself as the owner of land parcel Kakamega/Shitoli/792. The defendant denies ever trespassing the suit land between 1998 and 1999 but avers that he has been in full occupation of the suit land since 1993 the time he purchased it from Majisu Ikutwa whom at that time had filed succession cause No. 61 of 1993 at Kakamega and was after finalizing the said succession to transfer the said suit land to the defendant. DW2 corroborated the defendant's evidence and stated that the defendant has been in possession of the land for a long time.

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/Shikoti/792. The plaintiff produced the sale agreements and search certificate. On diverse dates between 1998 and 1999, the defendant has entered and continues to trespass and cultivate the plaintiff’s parcel of land. This court has perused the sale agreements and the same is dated 10th May 1985. The plaintiff acquired the said land through succession cause number 1358 of 1997 (PEx 5 and 6). This order still stands and has not been challenged. The defendant produced a sale agreement dated 5th January 1993. It is clear that there was no land for sell as the plaintiff’s agreement was way back in 1985. I find that the court in Nairobi had jurisdiction to entertain the matter and as to whether the beneficiaries were aware of its existence or not is a matter to be canvassed in that court. Indeed DW2 was a witness during the plaintiff’s sale agreement. The plaintiff’s title is indefeasible and can only be challenged if it was issued through a fraudulent scheme which the defendant has not proved. General damages were not proved and the same will not be awarded. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. Restraining order against the defendant, his servants and/or agents from trespassing, tilling the suit premises known as Kakamega/Shitoli/792.
2. Costs of this suit.

It is so ordered.

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

N.A. MATHEKA

JUDGE