



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 273 OF 2017

BILHA GAHUYA AKATSA.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL

NELSON MULANDA

ANGELINA SHIKOKOTI (*legal representative of Nelson Mulanda*).....DEFENDANTS

JUDGEMENT

The plaintiff avers that by agreement dated 20th March, 1988 she purchased plot No. 3 by then along Were Road belonging to one Thomas Ganira Lung'aho (deceased) who then with consent of Kakamega Municipal Council agreed that once the survey was to be done, allotment letter and lease were to be issued directly in her name. The plaintiff then took possession of the said plot No. 3 with the developments to date and has developed it extensively and has tenants on the said plot who pay her monthly rent. The plot was later surveyed by the provincial physical planning officer who forwarded the sketch map to the Commissioner of Lands whereby the plot was given a new number as Kakamega town Block 1/636 which number the Commissioner of Lands was to process and have it registered in plaintiff's name as per the application papers the plaintiff had earlier forwarded to the 1st defendant. Sometimes in 1996 when the plaintiff started following up on her application with the 1st defendant, she was informed verbally at the Commissioner of Lands office Nairobi that her documents had gone missing and the entire file of the plaintiff could not be traced. Sometimes in April, 2001, the plaintiff went to the Lands office Kakamega to confirm the status of the said plot and was surprised to find out that the said plot had been fraudulently registered in the name of the 2nd defendant. On 24th September, 2001, the plaintiff while trying to find out why the said plot was registered in the 2nd defendant's name, she was informed that the said plot No. Kakamega Block 1/636 was fraudulently transferred into the 2nd defendant's name. As a result of the defendant's unlawful acts the plaintiff suffered great loss and damages since the 2nd defendant is threatening to evict her and has instructed the plaintiff's tenants not to pay her rent. The plaintiff's claim against the defendant is an order of declaration that plot No. Kakamega Block 1/636 belongs to the plaintiff and all the developments thereto. The plaintiff further claims that the transfer and registration done by the 1st defendant on 9th March 2000 in favour of the 2nd defendant in respect of plot No. Kakamega Block 1/636 giving him the lease hold with effect from 1st April 97 be cancelled and the register be rectified and inserted with the name of the plaintiff. Permanent injunction restraining the 2nd defendant from interfering with the suit land and costs of this suit. PW1 the administrator of the plaintiff's estate testified and produced the sale agreement PEx2. She took possession and made several attempts to obtain the title but all was in vain. She produced the correspondence with the Lands office. She kept tenants in the suit premises and produced a tenancy agreement PEx18. She later discovered the same was registered in the 2nd defendant's name and she produced the caution she placed and the green card (PEx18 and 19). PW2 testified that she has been the plaintiff's tenant at the suit premises since 2008 and pays kshs. 6000/- per month. She has never seen the 2nd defendant there. PW3 testified that he worked for the plaintiff from 1977 to 1991. The plaintiff bought the suit premises in 1988 and he worked there.

The 2nd defendant Anjelina Shikokoti is the legal representative of the estate of her said late husband. She avers that her late husband bought the parcel of land known as L.R. No. Kakamega/Town Block 1/636 from Tiba Musimbi and Manasse Kigame who were the widow and son respectively to Romano Kigame. That at the time of purchase of the said plot it was unsurveyed commercial plot. That later after survey a letter of allotment was issued in favour of Tiba Musimbi Mukoyani and Manasse Kigame on 26th March 1997. That the allottees applied to the Commissioner of Land to have the said plot transferred to her late husband Nelson Mulanda. That the Commissioner of Land approved the transfer and the said plot was registered into the name of her late husband on 9th March 2000. That her husband followed the due process and obtained the lease certificate in respect of LR. No. Kakamega/town

Block 1/636. That the plaintiff Bilha Gahuya is a stranger to her and has no interest whatsoever in LR. No. Kakamega/Town Block 1/636. She produced the sale agreement and the allotment letter (DEx2 and DEx3). She testified that the plaintiff was a tenant there.

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 defendant is the registered proprietor plot No. Kakamega Block 1/636. The plaintiff produced the green card PEx 20. The plaintiff testified that by agreement dated 20th March, 1988 she purchased plot No. 3 by then along Were Road belonging to one Thomas Ganira Lung'aho (deceased) who then with consent of Kakamega Municipal Council agreed that once the survey was to be done, allotment letter and lease were to be issued directly in her name. The plaintiff then took possession of the said plot No. 3 with the developments since then to date and has developed it extensively and has tenants on the said plot who pay her monthly rent. The plot was later surveyed by the provincial physical planning officer who forwarded the sketch map to the Commissioner of Lands whereby the plot was given a new number as Kakamega town Block 1/636 which number the Commissioner of Lands was to process and have it registered in plaintiff's name as per the application papers the plaintiff had earlier forwarded to the 1st defendant. Sometimes in April, 2001, the plaintiff went to the Lands office Kakamega to confirm the status of the said plot and was surprised to find out that the said plot had been fraudulently registered in the name of the 2nd defendant. PW2 and PW3 corroborated the plaintiff's evidence.

The 2nd defendant Anjelina Shikokoti stated that she is the legal representative of the estate of her said late husband. She testified that her late husband bought the parcel of land known as L.R. No. Kakamega/Town Block 1/636 from Tiba Musimbi and Manasse Kigame who were the widow and son respectively to Romano Kigame. That at the time of purchase of the said plot it was unsurveyed commercial plot. That later after survey a letter of allotment was issued in favour of Tiba Musimbi Mukoyani and Manasse Kigame on 26th March 1997. That the allottees applied to the Commissioner of Land to have the said plot transferred to her late husband Nelson Mulanda. That the Commissioner of Land approved the transfer and the said plot was registered into the name of her late husband on 9th March 2000. That her husband followed the due process and obtained the lease certificate in respect of LR. No. Kakamega/town Block 1/636. She produced the sale agreement and the allotment letter (DEx2 and DEx3). She testified that the plaintiff was a tenant there. I have perused the sale agreement and the same is dated 1996 the allotment letter is dated 1997 this is a material discrepancy. How did the defendant buy a plot which was not existing? The description of the land on the said allotment letter has also been altered and this court cannot ascertain which plot it refers to (DEx3). What is strange also is that the 2nd defendant is not collecting rent from the tenants in the suit premises. The fact that the file has been missing from the lands office is clear to me that there was fraud in the way the title was issued. I find that the plaintiff bought the suit land and the developments way back in 1988 and in 1976 the same was not available for sale. From the allotment letter on record I find the first allottee was one Thomas Ganira Lung'aho who sold the land to the plaintiff (PEX8 is the allotment letter). The plaintiff took possession and has been collecting rent from the tenants to date. I find that the plot was later surveyed by the provincial physical planning officer who forwarded the sketch map to the Commissioner of Lands whereby the plot was given a new number as Kakamega town Block 1/636. I find that the defendant's title was issued through a fraudulent scheme. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. That the transfer and registration done by the 1st defendant on 9th March 2000 in favour of the 2nd defendant in respect of plot No. Kakamega Block 1/636 giving him the lease hold with effect from 1st April 97 be cancelled and the register be rectified and inserted with the name of the plaintiff.
2. Permanent injunction restraining the 2nd defendant from interfering with the suit land.
3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE