



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 89 OF 2016

PETER ELI KAGIA.....PLAINTIFF

VERSUS

JONIFA MWAMUKA LUKAZO.....1ST DEFENDANT

FRED MUHODO.....2ND DEFENDANT

NEWTON VIGEDI.....3RD DEFENDANT

JUDGEMENT

It is the plaintiff's case that at all material times relevant to this suit, the plaintiff is the registered owner, absolute, of whole of that parcel of land better known as L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 measuring approximately 0.40 Ha and/or thereabouts. The defendants have wilfully, unlawfully, without justifiable cause of action, permission, consent, any colour of right and/or otherwise trespassed and/or encroached upon the plaintiff's parcel of land better known as L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647. The plaintiff avers that the defendants have denied him peaceful occupation as they have vowed for physical confrontation should the plaintiff step on the suit land. The plaintiff's claim against the defendants jointly and severally is for an order of eviction of the defendants by themselves, their agents, servants and/or anybody acting and/or claiming for and on their behalf from the plaintiff's parcel of land better known as L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647. The plaintiff avers that there is no other suit pending and that there have no previous proceeding in any court between the plaintiff and the defendants over the same subject matter. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. An order of eviction of the defendants by themselves, their agents, servants and/or anybody acting and/or claiming for and on their behalf from the plaintiff's parcel of land better known as L.R. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647.
2. Costs of this suit.
3. Any other relief this honourable court may deem just and expedient to grant.

The defendants were served but they did not file a defence. They entered appearance in person and sought for time to file a defence but still failed to do so despite being granted sufficient time.

The plaintiff then testified as PW1 and called one witness. It was his evidence that sometime in the year 2000, he appointed his brother Joseph Lukalo to take care of his land now L.R. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 while he was away. That the said Joseph Lukalo brought his family that is his wife, the 1st defendant and his children, the 2nd and 3rd defendants who stayed there with him awaiting the return of the plaintiff. That in 2015, the plaintiff came back and on 22nd September 2015, his brother, Joseph Lukalo handed over the land back to him.

That in appreciation the plaintiff bought for his brother Joseph Lukalo another piece of land where he relocated to. That unfortunately, the defendants refused to go with Joseph Lukalo to the new parcel and his several attempts to have them vacate were not successful prompting him to institute the suit herein against them. In support of his case, he produced an agreement dated 22nd September, 2015 between him and Joseph Lukalo where Joseph Lukalo was handing over the land back to him. He also produced an official search for L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 as proof of ownership and a demand letter dated 5th May, 2016 showing his attempts to have the defendants move out.

PW2, Joseph Lukalo corroborated the evidence of the plaintiff. He confirmed that 1st defendant is his wife while 2nd and 3rd defendants are his children. That his brother, the plaintiff assigned him duty to take care of his parcel of land L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 in the year 2000. That the plaintiff came back in the year 2015 and he handed the land back to him. That the plaintiff in appreciation bought him another parcel where he relocated to with part of his family. That the defendants refused to move to the new land

despite knowing very well that they had no claim on the subject land. He requested the court to have the defendants move out of the plaintiff's land and join him with the other family members.

This court has carefully considered the case and the submissions herein. 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.”

Looking at the facts of this case, ownership of the said parcel of land has been passed on to the plaintiff. 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. Hon Justice Munyao Sila 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 the plaintiff sometime in the year 2000, appointed his brother Joseph Lukalo to take care of his land now L.R. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 while he was away. That the said Joseph Lukalo brought his family that is his wife, the 1st defendant and his children, the 2nd and 3rd defendants who stayed there with him awaiting the return of the plaintiff. That in 2015, the plaintiff came back and on 22nd September 2015, his brother, Joseph Lukalo handed over the land back to him.

That in appreciation the plaintiff bought for his brother Joseph Lukalo another piece of land where he relocated to. That unfortunately, the defendants refused to go with Joseph Lukalo to the new parcel and his several attempts to have them vacate were not successful prompting him to institute the suit herein against them. In support of his case, he produced an agreement dated 22nd September, 2015 between him and Joseph Lukalo where Joseph Lukalo was handing over the land back to him. He also produced an official search for L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 and the title deed as proof of ownership and a demand letter dated 5th May, 2016 showing his attempts to have the defendants move out. This evidence has not been challenged in any way. I find that, the Defendants have no right and interest recognized by the law in the subject matter. The three are trespassers. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the defendants either by themselves, their agents, employees, heirs and/or assigns are to vacate the suit parcel L.R. NO. LUGARI/LIKUYANI BLOCK 1/VIHIGA/647 within the next 3 (three) months from the dated of this judgement and in default eviction order to issue forthwith.

2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE