



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 79 OF 2019

ALI MASAYI KWEYU.....PLAINTIFF

VERSUS

NATHAN M. WANZABASI

JOSEPH ADAGO.....DEFENDANTS

JUDGEMENT

This is the application of Ali Masayi Kweyu who claims that he is entitled to a portion measuring approximately 3 acres of L.R. No. East Wanga/Eluche/604 registered in the names of the respondents by virtue of having been in exclusive, continuous and uninterrupted possession, occupation and open use of the suit land for a period in excess of 12 years and in a peaceful manner and for the determination of the following questions;

1. That the applicant be declared the owner of a portion of measuring approximately 3 acres of L.R. No. East Wanga/Eluche/604 which he is entitled by virtue of adverse possession and that the respondents be ordered to transfer the said portion of land to the applicant;
2. That this court declare that the respondents are holding a portion of measuring approximately 3 acres of L.R. No. East Wanga/Eluche/604 in trust for the applicant;
3. That this court declare that the respondents beneficial interest in a portion of measuring approximately 3 acres of L.R. No. East Wanga/Eluche/604 being occupied by the applicant got extinguished by operation of the law.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court of file any defence. 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 court 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.”

This court has perused the documents produced as exhibits by the plaintiff to ascertain ownership of the suit land. The plaintiff produced the search certificate and the green card of the suit land (PEX3&4). It is not in dispute that L.R. No. East Wanga/Eluche/604 registered in the names of Nathan Wanzabisi (1st defendant), Francis Adago, Albert Adago and Joseph Adago (2nd defendant) through succession. Each of them was to get one and a half acres. However, the plaintiff did not sue the said Francis Adago and Albert Adago who are joint owners. According to his plaint in paragraph 11 the two are deceased. No evidence has been adduced to prove this. Be that as it may the plaintiff ought to have sued their estates. This court cannot issue orders against parties who are not enjoined in the suit. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE