



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 43 OF 2019

JAPHETH WELEKHASIA.....PLAINTIFF

VERSUS

STEPHEN MUKABWA

LAND ADJUDICATOR

ATTORNEY GENERALDEFENDANTS

JUDGEMENT

The plaintiff avers that he is the legal proprietor of all that parcel of land under title No. Kakamega/Lugari/309 being part of the settlement scheme 21 within Lugari while the first defendant occupies a neighbouring parcel of land designated as Kakamega/Lugari/35 within the same scheme. The plaintiff avers that during the process of adjudication of the said settlement scheme, the first defendant colluded with the second defendant to defraud and dispose the plaintiff that portion of land measuring approximately 11.5 acres and misappropriated the same to the plaintiff which said piece of land was supposed to form part of the plaintiff's title No. Kakamega/Lugari/309 as shown and indicated under Registry Map Sheet No. TPA/SET/65/210. That the first defendant had himself appropriated the said portion of land measuring 11.5 acres being part of the plaintiff's parcel of land No. Kakamega/Lugari/309 in total disregard to the interest of the plaintiff. The first and second defendants colluded to dispossess the plaintiff quite unlawfully the aforesaid 11.5 acres knowing too well the same was lawfully entitled to the plaintiff. The second defendant using his powers as an adjudicator to improperly and unlawfully disposes the plaintiff of the aforementioned 11.5 acres allotted to the plaintiff under allotment No. 309 and fraudulently appropriated the said portion of land to the first defendant. Consequently, the first defendant fraudulently took possession of the plaintiff's said portion of land measuring approximately 11.5 acres and has continued to trespass thereon without any colour of right so to do. As a result of the first defendant's action of fraudulence and trespass on the said portion of land the plaintiff has suffered general damages which he claims against the first defendant. By reason of the matters hereinabove complained of the plaintiff has been deprived of his interest in the said portion of land measuring approximately 11.5 acres which was supposed to be part of the parcel of land No. Kakamega/Lugari/309. The first defendant has since then remained in occupation of the suit land and has refused and failed and or neglected to vacate the subject portion of land to the detriment of the plaintiff. The plaintiff prays for judgment against the first, second and third defendants both severally and jointly for the following reliefs:-

1. A declaration that the portion of land measuring approximately 11.5 acres belonged to the plaintiff as it formed part of the plaintiff's parcel of land under title No. Kakamega/Lugari/309.
2. An order for cancellation of the 1st defendant's title to apportion 11.5 acres in favour of the plaintiff.
3. General damages for trespass by the 1st defendant.
4. Interest thereon at court's rate.
5. Costs of this suit.

The 1st defendant states that at no time did he collude with the land adjudicator to defraud the plaintiff of his alleged land measuring 11.5 acres. The 1st defendant states that he was duly awarded his land No. Kakamega/Lugari/35 by the Lugari Settlement Scheme 21 on 15th January, 1964, and further that he played no role whatsoever in the adjudication process.

The 2nd and 3rd defendants aver that at no time did they collude with the 1st defendant to defraud the plaintiff of his alleged land measuring 11.5 acres. The 2nd and 3rd defendants contend that this action as taken out drawn and filed is bad in law, incurably defective and discloses no cause of action against them and the 2nd and 3rd defendants and the entire suit should be dismissed with costs.

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/Lugari/309. The plaintiff produced the title as PEx13. The plaintiff testified that he was allotted 115 acres but when his title came out on the 18th May 1998 but he was given 104 acres which he disputes. The said allotment letter was never produced as evidence. He took the matter to the Land Disputes Tribunal and won the case. The 1st defendant testified that he was allocated his Land parcel No. Kakamega/Lugari/35 in 1964 measuring 35 acres which was before the plaintiff was allocated his. He appealed against the decision of the tribunal and the court quashed the same in Kakamega High Court Misc Application No. 12 of 1998. On the 17th September 2014 the court ordered the plaintiff to pay for a surveyor's report and this has not been done to date. I find that the plaintiff's land parcel No. Kakamega/Lugari/309 is 40.5 HA that is 104 acres and not 115 acres as demanded. The defendant's title is indefeasible and can only be challenged if it was issued through a fraudulent scheme which the plaintiff has not proved. 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 AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE