



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 78 OF 2017

PATRICK MALONGO LIDOVOLO.....PLAINTIFF

VERSUS

LUICE ASANG'ASA

ACTON MUSII KHALAMBUKHA

SABETI KHALAMBUKHA.....DEFENDANT

JUDGEMENT

By a amended plaint dated 16th May 2019, the plaintiff avers that he is the registered owner and entitled to possession of the property known as land title No. Tiriki/Shamakhokho/1442 measuring approximately 0.12 Ha. The plaintiff acquired the said land title No. Tiriki/Shamakhokho/1442 after buying it from one Enisi Khavere Kilaini and got registered as proprietor thereon after obtaining the relevant Land Control Board consent and the due registration process being undertaken and a title deed thereof issued to him on 28th April, 2015. That the said land parcel title No. Tiriki/Shamakhokho/1442 was originally part of Kakamega/Shamakhokho/369, which was sub-divided thereon into five portions with the said Enisi Khavere Kilaini acquiring title No. Tiriki/Shamakhokho/1442 which she later lawfully sold to the plaintiff and the remaining four portions, namely Tiriki/Shamakhokho/1443, 1444, 1445 and 1446 being beneficially transmitted to a one Hesborne Angesa, Laban Muyala, Solomon Khalambukha and Luke Asang'asa respectively by the said Enisi Khavere Kilaini. That Luke Asang'asa the 1st defendant herein, instead of occupying and residing on his portion Land Parcel No. Tiriki/Shamakhokho/1446, demolished his residential structure thereon and unlawfully and without the plaintiff's consent entered and retained possession and put up a semi permanent residential structure and todate still resides, and has remained in use of Land Parcel No. Tiriki/Shamakhokho/1442 which is lawfully owned by the plaintiff. That Acton Musii Khalambukha, the 2nd defendant herein and Sabeti Khalambuka, the 3rd defendant herein who are the son and widow respectively of Solomon Khalambukha (now deceased) instead of occupying and residing on land parcel No. Tiriki/Shamakhokho/1445 that they are beneficially entitled to that belonged to the said Solomon Khalambukha (deceased), they demolished their residential structures thereon and unlawfully and without the plaintiff's consent entered upon and retained possession and put up a semi permanent residential structure and todate still reside and have remained in use of Land parcel No. Tiriki/Shamakhokho/1442 which is lawfully owned by the plaintiff. That, the said Enisi Khavere Kilaini who sold and lawfully transferred title to Land parcel No. Tiriki/Shamakhokho/1442 has already demolished her semi permanent residential structure thereon and moved elsewhere where she is residing with an intention to give vacant possession and use of the said parcel of land Tiriki/Shamakhokho/1442 to the plaintiff as the lawfully registered owner. That despite the efforts of the plaintiff up and until 24th June, 2014 to have Luke Asang'asa, Acton Musii Khalambukha and Sabeti Khalambukha, the 1st, 2nd & 3rd defendants respectively to demolish their residential structures unlawfully erected and/or put up on his said Land Parcel No. Tiriki/Shamakhokho/1442 and give vacant possession and use thereof to the plaintiff they have todate failed, refused and/or neglected to do the same and they have unlawfully remained in occupation and use of the said land parcel No. Tiriki/Shamakhokho/1442. That the aforesaid acts by the defendants herein amount to trespass and the trespass is continuing and have deprived use and enjoyment of the said property known as Land Parcel No. Tiriki/Shamakhokho/1442 by the plaintiff who is the lawfully registered owner and the plaintiff has suffered loss and damage. The plaintiff prays for judgment against the defendants jointly and severally for reliefs as follows:-

- a. Possession of the said land parcel title No. Tiriki/Shamakhokho/1442.
- b. Alternatively, evictions order of the defendants, their relatives, servants, agents or otherwise howsoever from the said land parcel title No. Tiriki/Shamakhokho/1442.
- c. An order compelling the 2nd and 3rd defendants to exhume the bodies of the 1st defendant and Flora Ayega both deceased from the land parcel title No. Tiriki/Shamakhokho/1442 and for them to bury the bodies elsewhere and in default the exhumation and preservation or burial to be carried out at their own cost.
- d. A declaration that the defendants are not entitled to enter, remain or use the said land parcel title No. Tiriki/Shamakhokho/1442 and a permanent injunction to restrain the defendants by themselves, their relatives, servants, agents or otherwise howsoever from

entering, remaining or using the said land parcel title No. Tiriki/Shamakhokho/1442.

e. Costs of this suit and further or other relief as the honourable court deems fit.

The defendants jointly denies that the plaintiff bought part of L.P. No. Kakamega/Shamakhokho/369 and was issued with title deed in respect to Tiriki/Shamakhokho/1442. The defendants deny that the defendants have unlawfully occupied L.P. No. Tiriki/Shamakhokho/1442 and that Enisi Khavere Kilaini has moved giving vacant possession to the plaintiff. The defendants counter claim for;

1. That the register be rectified by deleting L.P. No. Tiriki/Shamakhokho/1442, 1444 ,1445 and 1446 and/or any other created from Kakamega/Shamakhokho/369.
2. The defendants pray that the plaintiff suit be dismissed with costs and judgment be entered as per the counter-claim.

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. Tiriki/Shamakhokho/1442 measuring approximately 0.12 Ha. The plaintiff testified that he acquired the said land title No. Tiriki/Shamakhokho/1442 after buying it from a one Enisi Khavere Kilaini and got registered as proprietor thereon after obtaining the relevant Land Control Board consent and the due registration process being undertaken and a title deed thereof issued to him on 28th April, 2015. PW2 and PW3 children of the said seller corroborated the plaintiff’s evidence. The plaintiff produced the sale agreement, letter of consent, transfer document, copy of the title deed and mutation form PEX1 to 5 as exhibits. The 1st defendant died and the case was withdrawn against him. The 2nd and 3rd defendants offered no oral evidence and their joint statement of defence is a mere denial. The counter claim was not proved and the same is dismissed. 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. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The 2nd and 3rd defendants, their relatives, servants, agents or otherwise howsoever to vacate the suit land parcel No. No. Tiriki/Shamakhokho/1442 within the next 90 (ninety) days from the date of this judgement and in default eviction order to issue forthwith.
2. Thereafter an order compelling the 2nd and 3rd defendants to exhume the bodies of the 1st defendant and Flora Ayega both deceased from the land parcel title No. Tiriki/Shamakhokho/1442 and for them to bury the bodies elsewhere and in default the exhumation and preservation or burial to be carried out at their own cost.
3. Thereafter a declaration that the 2nd and 3rd defendants are not entitled to enter, remain or use the said land parcel title No. Tiriki/Shamakhokho/1442 and a permanent injunction to restrain the 2nd and 3rd defendants by themselves, their relatives, servants, agents or otherwise howsoever from entering, remaining or using the said land parcel title No. Tiriki/Shamakhokho/1442.
4. Each party to bear its own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE