



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 15 OF 2020

SAMUEL MUTINGU AKIBAYA..... PLAINTIFF

VERSUS

EZINA E. AKIBAYA..... DEFENDANT

JUDGEMENT

The plaintiff avers that, at all material times, the plaintiff and the defendant are the registered proprietors of land parcel Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228, on which parcels of land stands a permanent commercial building. The plaintiff avers that the said commercial building has a bar and restaurant and lodges in the name and style of North End. The plaintiff further avers that it was an understanding between the plaintiff and the defendant, who is a step mother to the plaintiff that they will alternate in running the businesses on the said building. The plaintiff avers that he left the business to the defendant in the year 2000 when the plaintiff left for Germany. The plaintiff avers that he left the business to the defendant who has exclusively run the business from 2000 to date and the defendant has totally denied the plaintiff access the premises, thereby denying the plaintiff right of user. The plaintiff's claim against the defendant is for access to run the business on the said building situated on the said parcels of land, mesne profits and general damage. The plaintiff prays for judgment to be entered against the defendant for:-

- (a) That the plaintiff do access the said premises on land parcel Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228 and run the business for such a period as the court may deem expedient and just and mesne profits and general damages for loss of user.
- (b) Costs and interests.
- (c) Any other relief this honourable court may deem just and expedient to grant.

The defendant admits being a joint registered owner of land parcel Nos. North Maragoli/Mbale/11320 and Kakamega/Mbale/1228 with the plaintiff. The defendant avers that the plaintiff has no interest of whatever description whatsoever in the running, management or occupation of any of the premises described. The plaintiff's claim is both misplaced, untenable and lacks merit.

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 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.”

It is not in dispute that the plaintiff and the defendant are the registered proprietor of land parcel Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228, on which parcels of land stands a permanent commercial building. It is not disputed that the said commercial building has a bar and restaurant and lodges in the name and style of North End. The plaintiff avers that it was an understanding between the plaintiff and the defendant, who is a step mother to the plaintiff that they will alternate in running the businesses on the said building. The plaintiff avers that he left the business to the defendant in the year 2000 when the plaintiff left for Germany. The plaintiff avers that the defendant has exclusively run the business from 2000 to date and the defendant has totally denied the plaintiff access to the premises and to run the business, thereby denying the plaintiff right of user. The defendant admits to running the business and stated that the plaintiff lives in Germany. She stated that she has been running the bar since 1974 and the plaintiff has not contributed anything. I find that the suit properties are jointly owned by the plaintiff and the defendant as joint tenants. Section 91 (4) of the Land Registration Act which provides as follows:

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently

(a) disposition may be made only by all the joint tenants,

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly, or

(c) each tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

In the case of **Kivuitu vs Kivuitu in 1991 eKLR 248** where the court observed,

“the fact that the property is registered in the joint names means that each party owns an undivided equal share therein. – Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership”.

In the case **Isabel Chelangat vs. Samuel Tiro (2012) eKLR** the court on the principal of joint ownership relied on the following position:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

i) The unity of possession

ii) The unity of interest

iii) The unity of title

iv) The unity of time.”

In the instant case I find that the plaintiff is entitled to possession of the suit land parcels Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228, and the right to enjoy them jointly with the defendant. The defendant cannot deny him access to the businesses therein. Indeed when the suit properties were gifted to the litigants jointly in 2000 the commercial building therein already existed and so did the business. In the decision in **Bull vs. Bull (1955) 1WB 234** Lord Denning stated that:

“Each co-owner is entitled to possession of the land and enjoy it; that no co-owner can turn out the other and in the event of one doing so, the other can bring an action for account and trespass.”

For, these reasons I find that the plaintiff has proved his joint ownership and interest on the suit parcels. The claim for general damages and mesne profits has not been proved and the same will not be awarded. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the plaintiff do access the said premises situate on land parcel Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228 and run the business jointly with the defendant.

2. That alternatively, the parties do engage a licensed property agent to sell their land parcel Nos. North Maragoli/Mbale/1320 and Kakamega/Mbale/1228, and share the proceeds thereof equally.

3. Each party to bear their own costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE