



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 349 OF 2014**

**TIMOTHY SHIVAJI MWANJE..... PLAINTIFF**

**VERSUS**

**HORRY AKALO NG'ANGA.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 16<sup>th</sup> May 2011, the plaintiff is the absolute proprietor of all that parcel known as Kakamega/Soy/1059. As the absolute proprietor of the aforesaid suit property, the plaintiff has all the rights derived from the said title in exclusion of any other person. The plaintiff avers that the defendant has without any lawful excuse, and without any equitable interest refused to vacate the said parcel so as to give vacant possession to the plaintiff. The plaintiff therefore prays for an order of eviction against the defendant. Similar suits against the defendant i.e. Kakamega Miscellaneous Award No. 21/08, Kakamega High Court Miscellaneous Application No. 3 of 2009 and Kakamega CMCC No. 223 of 2006 were struck out and the present suit is therefore not res judicata. The plaintiff prays for judgment against the defendant for:-

1. Eviction.
2. Costs
3. Interest
4. Any other remedy that this court shall deem fit to grant.

PW2 testified that she sold land to the defendant who refused to pay the full amount and she went to court and refunded the money. She then sold the land to the plaintiff. PW3 who is PW2's son testified that his mother sold land to the defendant in 1993 who could not pay the full purchase price. They were ordered to refund which they did through their Advocates Birech . In 1998 they sold 1.8 acres to the plaintiff and he has been unable to take possession because the defendant is living there. PW4 and Advocate from the firm of Birech Advocates testified that the purchase price was refunded as per the court order and she produced the copies of the letter and cheque.

The defendant states that he has been in occupation of the suit land since time immemorial. The defendant states that there is case Kakamega CMC Award No. 195 of 2007 pending for determination. He testified that he bought the land from PW2 who refused to transfer the title to him. The defendant testified that he bought land from PW2 and they had an agreement (DEx1) he was never refunded his money and has been living there since 1993. The defendant confirms that they have had numerous cases concerning the suit land.

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/Soy/1059. PW1 the plaintiff adduced evidence that he bought the suit land from PW2 and produced the sale agreement PEx1. He later obtained the title PEx2 but has been unable to take possession as the defendant has refused to vacate. PW2 confirms selling the land to the plaintiff. She testified that prior to that sell she had sold 5 acres to the defendant who was unable to complete payment and after going to court she was ordered to refund the same through her advocates PW4. PW3 and PW4 corroborated her evidence. The copy of the cheque refund and the court ruling were produced as exhibits. I find that the defendant was refunded his money after he breached the sale agreement and was to vacate as per the court orders. The plaintiff’s title is indefeasible and can only be challenged if it is fraudulent scheme which the defendant have failed to prove. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant, his servants, agents and relatives are to vacate the suit Land Parcel No. Kakamega/Soy/1059 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. Each party to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**