



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 128 OF 2017**

**HABIBU MAKOKHA WAMURWA.....PLAINTIFF**

**VERSUS**

**ALI KUSINYO MUSA FITONJE.....DEFENDANTS**

**CHURCH OF GOD IN EAST AFRICA.....THIRD PARTY**

**JUDGEMENT**

By a plaint dated 24<sup>th</sup> April 2017, the plaintiff was and is the registered proprietor of Land Parcel No. North/Wanga/Matungu/1130 measuring one (1) acre with clear boundaries demarcated thereon which the plaintiff sold to the defendant on or sometimes in early 2003 at consideration sum of Ksh. 60,000/= (Sixty thousand) which the defendant paid Ksh. 57,000/= (fifty-seven thousand) leaving a balance of Ksh. 3,000/= (Three thousand). The plaintiff avers that the defendant without any probable cause and or jurisdiction trespassed onto the plaintiff's parcel of Land North Wanga/Matungu/1130 plot measuring 100ft x 100ft by selling it to the Church of God who constructed therein structures without the defendant paying the plaintiff any amount and the plaintiff's efforts to stop the illegal actions has borne no fruits. The plaintiff further avers that he has on several occasions approached and pleaded with the defendant to vacate the said plot No. N. Wanga/Matungu/1130 without success. The plaintiff further avers that he has on numerous occasions implored the local administrators to remove the defendant from the plaintiff's land but has failed. The plaintiff avers that despite demand and notice to sue against the defendant he has ignored, refused and/or neglected and instead the defendant insisted that the Church of God constructs the church in the plaintiff's land. By reason of the aforesaid the plaintiff has suffered loss and damage and holds defendant liable. The plaintiff's claim against the defendant is for an order of eviction and permanent injunction so that the defendant should move from the said land parcel No. North/Wanga/Matungu/1130. The plaintiff prays for judgment against the defendant for:-

- a. An order of eviction against the defendant herein from land parcel No. North Wanga/Matungu/1130 as well as an order of permanent injunction restraining the defendant from ever laying claim trespassing and/or defrauding with the plaintiff peaceful occupation in respect of plot measuring 100 ft x 100ft by selling to Church of God who are supposed to move from the plaintiff's land.
- b. Cost and interest.
- c. Any other relief this honourable court may deem just and fit to grant.

The defendant testified that he purchased 1 acre of land from the plaintiff from Land Reference the then North Wanga/Matungu/1130 now known as North Wanga/Matungu/1823 and paid the full purchase price. The defendant avers that upon sub-division of the parent title North Wanga/Matungu/1130, the acreage was erroneously stated above the 1 acre purchased, by mistake and not fraudulently as alleged by the plaintiff. The defendant avers that a 3<sup>rd</sup> party, Church of God Mukhweya subsequently acquired the excess acreage of land lumped together with his measuring approximately 100ft x 100ft and any such claim by the plaintiff should be directed thereto.

The interested party stated that the plaintiff had earlier on prior to his transaction with the defendant, sold to the interested party ¼ acre of land parcel North Wanga/Matungu/1823 on 1<sup>st</sup> April, 2002. The interested party avers that later the defendant also purchased a portion of the suit property and instead of having the property sub-divided and transferred to all who purchased portions of it, the defendant in questionable circumstances transferred the entire land parcel North Wanga/Matungu/1823 to himself. This compelled the interested party to lodge a complaint with the police at Mumias police station who preferred criminal charges against the plaintiff and the defendant in Mumias SRMCR No. 987 of 2014. On 7<sup>th</sup> September, 2016 the court convicted the defendant and gave him a suspended sentence to allow him subdivide and transfer what rightfully belongs to the interested party. That at the land control board the plaintiff interfered with the process of subdivision of the land to the interested party and later instituted this suit. The interested party/counter-claimants pray that the plaintiff's suit be dismissed with costs and that judgment be entered against the respondents jointly and severally in the counter claim as follows:-

- a. A declaration that the counter claimant has acquired registrable interests on the ¼ acre it is occupying of land parcel North Wanga/Matungu/1823 and it be declared an adverse possessor of the same.
- b. An order compelling the Kakamega County Land Registrar to sub-divide ¼ acre of the portion the counter claimant is occupying in land parcel North Wanga/Matungu/1823 and the same be registered in the name of the counter claimant.
- c. Costs of the suit.
- d. That any such other or further relief as this honourable court may deem appropriate to be made.

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 defendant is the registered proprietor of Land parcel No. North Wanga/Matungu/1823 (DEx2). The plaintiff produced the sale agreement stating that the defendant was buying 1 acre in 2003. That when the land was sub-divided land the defendant acquired a larger portion and never paid the full purchase price but left a balance to Kshs. 3000/= and wants him evicted. That the defendant then sold the land to the interested party. That the church has been there from 2002. That he sold the rest of his land and moved to Uganda. He returned in 2009 and complained. I find that this is a material contradiction in the plaintiff’s testimony. The defendant testified that he bought the land from the plaintiff in 2003 and the title came out with a larger portion which is occupied by the church and he does not mind surrendering the same to the church. After considering all the evidence the court has made the following findings that the interested party aver that it purchased ¼ acre of the suit property North Wanga/Matungu/1823 on 1<sup>st</sup> April, 2002 from the plaintiff (IPEx1). The interested party moved into the property and built a church on the purchased ¼ acre piece. The interested party has since been there in constant possession and use of the ¼ acre of the suit parcel North Wanga/Matungu/1823 of land without force, without secrecy, without permission and without interruption for a period more than 12 years. In 2003 the defendant also purchased a portion of the suit property and instead of having the property sub divided and transferred to all who purchased portions of it, the defendant transferred the entire land parcel North Wanga/Matungu/1823 to himself. The interested party lodged a complaint with the police at Mumias Police Station who preferred criminal charges against the plaintiff and the defendant in Mumias SRMCR No. 987 of 2014. On 7<sup>th</sup> September, 2016 the court convicted the defendant and gave him a suspended sentence to allow him subdivide and transfer what rightfully belongs to the interested party. This has never been done even though the defendant is willing to do so. For these reasons, 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. I find that the counterclaim has been proved on a balance of probabilities and I grant the following orders;

1. The defendant to sub-divide ¼ acre of the portion the interested party/counter claimant is occupying in land parcel North Wanga/Matungu/1823 and the same be registered in the name of the counter claimant within the next 90 (ninety) days from the date of this judgment and in default the deputy Registrar to sign the transfer documents.
2. Each party to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**