



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 409 OF 2017

RICHARD WALALA OGOLLAH.....PLAINTIFF

VERSUS

LUKA NDALUSIA YESWA.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is the absolute registered proprietor of parcel of land No. Butso/Indangalasia/5663 measuring approximately 1.4 Ha with clear demarcated boundaries. The plaintiff avers that he bought the said parcel of land vide an agreement made on 11th September 2014 from the then registered owner Fridah Lubeya Andala at a consideration of Ksh. 1,000,000/= which sum of money was paid in full upon which the vendor transferred the said parcel of land to the plaintiff. The plaintiff avers that when he went to fence the said parcel of land on 22nd February 2015 in the company of a surveyor and other casual workers, the defendant arrived with a panga with hired goons, chased away the plaintiff and his people and maliciously cut the survey tape measure and the plaintiff has since lodged his complaint at Kakamega Police Station vide OB No. 24/23/02/2016. The plaintiff avers that the defendant after chasing away the plaintiff from utilizing his legally acquired property, has taken advantage of his violent character to trespass onto the plaintiff's parcel of land, started utilizing the same thereby subjecting the plaintiff to suffer and continue to suffer irreparable damage. The plaintiff therefore prays for an order of permanent injunction restraining the defendant either personally or through his agents, relatives, assigns or any other person acting under his authority from trespassing, utilizing, alienating and or in any other manner from interfering with the plaintiff's occupation and use of the suit parcel of land No. Butso/Indangalasia/5663. The plaintiff prays that judgment against the defendant for:

- (a) An order of permanent injunction be issued restraining the defendant either personally or through his agents, relatives, servants, assigns and/or any other person acting his authority from trespassing, entering, utilizing and/or in any other manner from interfering with the plaintiff's peaceful use of his parcel of land No. Butso/Indangalasia/5663.
- (b) Costs of this suit.
- (c) Any other relief this honourable court deems fit to grant in the circumstances.

The defendant states that it is the plaintiff who came to invade him with hired goons and wanted to grab the defendant's piece of land that he inherited from his father and which land is the defendant's home since birth and that plaintiff's actions were fraudulent. The defendant further states that if the plaintiff bought land (which is denied) he bought from a fraudster which the plaintiff should lay a claim against and not to the defendant herein. The defendant states that the plaintiff has never been the proprietor of the suit land, is a total stranger to the defendant, has never utilized, and or made any use of the suit land. The defendant states that the plaintiff's title no. Butso/Indangalasia/5663 which is denied was acquired fraudulently by the plaintiff as the defendant inherited the land which reads Butso/Indangalasia/5297 measuring 1.53 Ha still registered in the name of the defendant's father Joshua Yeswa Andala.

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. Butso/Indangalasia/5663. The plaintiff produced the green card PEx3 to show that the suit land was transferred to him. The green card shows that Land parcel No. Butso/Indangalasia/5663 is a sub-division of Land parcel No. Butso/Indangalasia/5297. The plaintiff, PW1 testified that he bought the said parcel of land vide an agreement made on 11th September 2014 from the then registered owner Fridah Lubeya Andala at a consideration of Ksh. 1,000,000/= which sum of money was paid in full upon which the vendor transferred the said parcel of land to the plaintiff. PW2 testified that he witnessed the sale agreement.

DW1 testified that he inherited the suit land from his father. That Land parcel No. Butso/Indangalasia/5297 belonged to his father and he inherited that same. That Fridah Lubeya Andala is his father’s sister and that she subdivided that land and transferred Land parcel No. Butso/Indangalasia/5663 to herself fraudulently. The original suit parcel was divided among the three brothers during his father’s lifetime but he had no money at that time to transfer the suit land into his name. DW2 the defendant’s brother Joab Juma Yeswa corroborated his evidence. This court has perused the documents produced as evidence by the parties. Indeed green card shows that Land parcel No. Butso/Indangalasia/5663 is a sub-division of Land parcel No. Butso/Indangalasia/5297. It also shows that Land parcel No. Butso/Indangalasia/5297 belonged to one Joshua Yeswa Andala and after subdivision in 2013 Land parcel No. Butso/Indangalasia/5663 was registered in the name of his sister Fridah Lubeya Andala. All these facts are not in dispute. I have looked at the burial permit which shows the said Joshua Yeswa Andala did in 2014 which means the subdivision and transfer was done when he was alive. I find no fraud in the said transfer and the subsequent transfer by Fridah Lubeya Andala to the plaintiff. Indeed the search certificate dated 23rd June 2015 (DEx15) clearly shows that the plaintiff is the registered owner of Land parcel No. Butso/Indangalasia/5663, the suit land. 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. An order of permanent injunction be issued restraining the defendant either personally or through his agents, relatives, servants, assigns and/or any other person acting his authority from trespassing, entering, utilizing and/or in any other manner from interfering with the plaintiff’s peaceful use of his parcel of land No. Butso/Indangalasia/5663.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE