



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 5 OF 2013**

**ADRIANO WESAYA.....PLAINTIFF**

**VERSUS**

**JULIAS NAKAYA KABOLE.....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that he is the absolute proprietor of parcel of land No. Butsotso/Shikoti/6207 measuring approximately 1.95 Ha with clear boundaries demarcated on the ground. The plaintiff avers that he was bequeathed the above parcel of land by his deceased father Jacob Nanyinga who caused the same to be transferred to the plaintiff in 1996. The defendant herein used to lease part of this family land measuring approximately ¼ acres from his father before he died and was using the leased portion of land to cultivate thereon maize and other crops. The plaintiff avers that upon the death of his father in 2001 the defendant had been extended the lease period to 8 more years in the years 2000. The plaintiff avers that upon the expiry of the extended lease period he approached the defendant with a view to stopping his continuous use of the said portion of land as he had encroached on the plaintiff's parcel of land No. Butsotso/Shikoti/6207 but the defendant declined to voluntarily vacate from the said parcel of land. The plaintiff avers that he lodged his complaint before the Area Assistant Chief Shiyunzu sub-location, but the defendant arrogantly refused to heed any advice from the Assistant Chief and on the plaintiff and vowed to continue utilizing the suit parcel of land. The plaintiff avers that he decided to purchase the area map in respect of the jurisdiction of his land above and to his surprise he ascertained that the defendant had caused part of his parcel of land No. Butsotso/Shikoti/6207 to be sub-divided and transferred part of it to himself a portion thereof measuring approximately ½ acre designated as Butsotso/Shikoti/6213. The plaintiff avers that the action of the defendant to cause part of his land to be sub-divided and transferred to him was fraudulent. The plaintiff prays for judgment against the defendant for:-

1. Cancellation of title deed No. Butsotso/Shikoti/6213 issued to the defendant herein as well as subdivision made thereon and registered at the District Surveyor's office Kakamega and the said be amalgamated to the plaintiff's parcel of land No. Butsotso/Shikoti/6207.
2. An order of permanent injunction restraining the defendant either by himself or through his agent and/or servants and /or any other person acting under her direction from interfering with the plaintiff's parcel of Land No. Butsotso/Shikoti/6207.
3. That any other relief this honourable court deems fit and just in the circumstances to grant.
4. Costs of the suit be borne by the defendant.

The defendant avers that the parcel of land was bought by him and he has been in continuous and open occupation of the land from 11<sup>th</sup> February, 1996. The defendant avers that land parcel No. Butsotso/Shikoti/6207 has not been encroached by the defendant and states that the defendant could not vacate land parcel No. Butsotso/Shikoti/6207 as the defendant is not in occupation of the land. The defendant states that the subdivision was done by the deceased registered owner of the land parcel Butsotso/Shikoti/768 to the current resultant parcels and transferred the same to the defendant. The plaintiff's deceased father was the absolute registered owner of land parcel No. Butsotso/Shikoti/768 and the deceased had all rights of subdividing and transferring the land to the defendant. The defendant's counter claim is therefore an order of eviction against the plaintiff and a permanent injunction restraining the plaintiff from trespassing, alienating, wasting, further destroying the boundary features and/or dealing with the defendant's parcel of land Butsotso/Shikoti/6213 in any manner whatsoever.

On the 11<sup>th</sup> November 2020 the plaintiff's suit was dismissed as he had been given the last adjournment and failed to attend court and prosecute his case after being given time allocation. The court proceeded with the counterclaim. This court has carefully considered the evidence in the counter claim 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. Butso/So/Shikoti/6213. DW1, the defendant testified that he bought the suit land and he has been in continuous and open occupation of the land from 11<sup>th</sup> February, 1996. The defendant avers that land parcel No. Butso/So/Shikoti/6207 has not been encroached by the defendant and states that the defendant could not vacate land parcel No. Butso/So/Shikoti/6207 as the defendant is not in occupation of the land. That the plaintiff’s deceased father was the absolute registered owner of land parcel No. Butso/So/Shikoti/768 and the deceased had all rights of subdividing and transferring the land to the defendant. The defendant’s counter claim is therefore an order of eviction against the plaintiff and a permanent injunction restraining the plaintiff from trespassing. I see no evidence of fraud on the part of the defendant in acquiring the suit land. He is an innocent purchaser for value. No evidence has been adduced to controvert this. From the evidence before me I find that the defendant is the absolute and indefeasible owner of the suit land and he acquired the suit land legally. I find that the defendant has proved his counter claim on a balance of probabilities and I grant the following orders;

1. The plaintiff, his agents, servants, workers and or any other person are to vacate the suit Land Parcel No. Butso/So/Shikoti/6213 within the next six (6) months from the date of this judgement and in default eviction order to issue.
2. An order permanently restraining the plaintiff, his agents, servants, workers and or any other person from forcibly entering, encroaching and or trespassing onto the defendant’s Land Parcel known as No. Butso/So/Shikoti/6213.
3. Each party to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15<sup>TH</sup> DECEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**