



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC CASE NO. 353 OF 2017

GICHUKI MUCHIRI.....PLAINTIFF

VERSUS

WASIKE WALUNDA

HENRY WALUANDA

RASHID WALUANDA.....DEFENDANTS

JUDGEMENT

The plaintiff avers that at all material times he is the registered proprietor of Land Parcel No. Kakamega/Sango/148. The defendants are sons to one Joshua Waluanda (deceased) and who was the registered proprietor of Land Parcel No. Kakamega/Sango/149 which neighbours the plaintiff's land. On or about the month of February 2010, the defendants jointly and unlawfully trespassed into the plaintiff's land, ploughed about 2 acres and cultivated maize without the plaintiff's consent. The plaintiff avers that the defendants jointly and deliberately ignored the established boundary between the plaintiff's parcel of land and that of land parcel number Kakamega/Sango/149 and they have been using the plaintiff's land unlawfully until 2010 when they harvested the maize. The plaintiff avers that the defendants have been acting with impunity and have perpetually continued to threaten the plaintiff while armed with pangas and other dangerous weapons every time he has made an effort to restrain them from their unlawful acts of trespass to his land. The plaintiff avers that he has made several reports to the Police and the Administration regarding the defendants' act of trespass to no avail. The plaintiff avers that the defendants have now cleared the land and that they intend to plough the land and cultivate the same without his consent and he now seeks an order of injunction against them jointly and severally from any form of interference on the suit land. The plaintiff also seeks a permanent injunction against the defendants jointly and severally restraining them from interference on the suit land in any manner whatsoever. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. A permanent injunction restraining the defendants, their agents, or assigns or servants from interfering with Land Parcel No. Kakamega/Sango/148 in any manner whatsoever.
2. Costs of this suit.
3. Interests.
4. Any other relief the court may deem just to grant.

The defendants aver in their statement that the suit herein is incompetent since the matter in issue is one of boundary dispute and not of trespass and which matter falls under the jurisdiction of a Land Registrar as per the provisions of the Registered Land Act, Cap 300 Laws of Kenya. The defendants aver that they are not the administrators of the estate of the late Joshua Waluanda who was and remains the registered owner of the parcel of land known as Kakamega/Sango/149 and by reason whereof they have been wrongly sued by the plaintiff. The defendants jointly and or severally deny that they have trespassed on to and or encroached on the plaintiff's parcel of land known as Kakamega/Sango/148. The defendants aver that they have been and continue to occupy land parcel No. Kakamega/Sango/149 and which parcel of land has nothing to do with the plaintiff's land parcel No. Kakamega/Sango/148.

This court has carefully considered the evidence and submissions therein. The defendants filed their defence but failed to attend court to give oral evidence. The plaintiff gave evidence way back in 2018 and closed his case and the defendants have been adjourning the defence hearing ever since. 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 that the plaintiff is the registered proprietor of Land Parcel No. Kakamega/Sango/148 and the defendants are his neighbours on Land Parcel No. Kakamega/Sango/149. He stated that on or about the month of February 2010, the defendant jointly and unlawfully trespassed into his land, ploughed about 2 acres and cultivated maize without the plaintiff's consent. PW2 the County Surveyor testified that in 2011 he received a court order to visit the suit parcel in this case. He visited the scene and made his report PEx3 a & b. he found that the defendants had encroached on the plaintiff's land. They marked the boundaries. Both the plaintiff and the defendants had independent surveyors and the litigants were at the scene. PW3 an independent surveyor confirmed PW2's evidence. I

see no reason to doubt the evidence of PW2 and PW3 who are expert witnesses. Their evidence has not been controverted. The statement of defence is a mere denial. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the defendants, their agents, or assigns or servants from interfering with land parcel number Kakamega/Sango/148 in any manner whatsoever.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 9TH DECEMBER 2020.

N.A. MATHEKA

JUDGE