



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 1 OF 2014

JACOB NDAMA KISANYAPLAINTIFF

VERSUS

ZADOCK MARK SIMWA

PATRICK SAIDIA BUSHURU

JULIUS BUSHURU DEFENDANTS

JUDGEMENT

The plaintiff avers that at all material times in this case he was and is the registered proprietor of parcel No. South/Kabras/Bushu/3132 measuring approximately 0.9 Ha with clear boundaries demarcated thereon which the plaintiff bought from the 1st defendant. The plaintiff avers that the 2nd and 3rd defendant who are sons of the 1st defendant herein have without any probable cause and or justification trespassed onto the plaintiff's parcel of land No. South/Kabras/Bushu/3132 and constructed thereon structures and the plaintiff's efforts to stop their aforesaid illegal actions has borne no fruits. The plaintiff avers that he has on several occasions approached and pleaded with the 1st, 2nd and 3rd defendants to vacate the said parcel of land No. south Kabras/Bushu/3132 without success. The plaintiff states further that he has on numerous occasions implored the 1st defendant to remove the 2nd and 3rd defendants from plaintiff's land, which 1st defendant has failed and/or ignored. The plaintiff's claim against all the defendants for an order of eviction and permanent injunction. The plaintiff prays for judgment against all the defendants jointly and severally for:-

1. An order of eviction against the 2nd and 3rd defendants herein from parcel of land No. South Kabras/Bushu/3132 as well as an order of permanent injunction restraining the defendants from ever laying claim, trespassing and/or interfering with the plaintiff's peaceful occupation in respect of parcel of land No. South/Kabras/Bushu/3132.
2. Costs and interest.
3. Any other relief the court may fit to grant.

The 1st defendant testified that he sold land parcel No. South Kabras/3132 measuring approximately 0.91 Ha or 2.5 acres and had it transferred to the plaintiff lawfully. That he did so after informing his two children 2nd and 3rd defendants that he has decided to relocate them to another piece of his land parcel S. Kabras/Samitsi/970 which is approximately similar size. That he has offered his two sons (2nd and 3rd defendants) to move to that land which they have refused without giving him reasons. That although he had previously shown the 2nd and 3rd defendants a portion of his land to be cultivated by then, they later disagree and he decided to shift them to another of property. That he did not received Ksh. 20,000/= from 2nd and 3rd defendants at all. That the parcel of land No. S. Kabras/Bushu/3132 should rightfully belong to plaintiff.

The 2nd and 3rd defendants deny trespassing on land parcel No. South Kabras/Bushu/3132 and aver that they have lived on the land since 1998 when the same was given to them by the 1st defendant who is their biological father as a gift. That on or about 1998 when the defendants moved into the land, they constructed their respective homes in which they reside with their families to date. The 2nd and 3rd defendants aver that on 19th July, 2008 they entered into an agreement with their father (1st defendant) who sanctioned their occupation of the land with a promise to process a title deed in their names upon receiving a token of Ksh. 20,000/= which was done on 5th June, 2009 in the office of the Chief Kabras South Location. It is the 2nd and 3rd defendants' contention that pursuant to the payment of the said token to the first defendant, he promised and or initiated the process of subdividing his original title No. South Kabras/Bushu/527 and which process realized a creation of L.R. South Kabras/Bushu/3132 on 29th June, 2009. The plaintiff's claim for eviction of the 2nd and 3rd defendants from their homes standing on L.R. South Kabras/Bushu/3132 is misconceived and the defendants seek declaratory orders against the plaintiff that the 1st defendant did not have a good title to transfer the suit land to the plaintiff. In the counter claim against the plaintiff and 1st defendant,

the 2nd and 3rd defendants also pray for an order against the 1st defendant after cancellation of the plaintiff's title to transfer the suit land to them unconditionally.

This court has considered the evidence and the 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 court 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 suit land L.R. South Kabras/Bushu/3132 is registered in the name of the plaintiff as per the copy of the title PEx2. The plaintiff testified that he bought the land from the 1st defendant and produced the sale agreement PEx1. The 1st defendant testified that he sold land parcel No. South Kabras/3132 measuring approximately 0.91 Ha or 2.5 acres and had it transferred to the plaintiff lawfully. That he did so after informing his two children 2nd and 3rd defendant that he has decided to relocate them to another piece of his land parcel S. Kabras/Samitsi/970 which is approximately similar size. The 2nd and 3rd defendants deny trespassing on land parcel No. South Kabras/Bushu/3132 and aver that they have lived on the land since 1998 when the same was given to them by the 1st defendant who is their biological father as a gift. That they will only move after they are shown an equivalent parcel of land. I find that in the instant case the title was not obtained by fraud or misrepresentation. The certificate of title was not acquired through a corrupt scheme by the plaintiff as the 1st defendant who was the proprietor testified that he sold it to the plaintiff and willingly transferred the same to him. He stated that he sold it for Kshs 400,000/= and was paid in full by the plaintiff. He then went ahead and bought the 2nd and 3rd defendants who are his sons an alternative parcel of land but they refuse to move. I find that the 2nd and 3rd defendants have failed to prove their counter claim on a balance of probabilities and the same is dismissed with no orders as to costs. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The 2nd and 3rd defendants are to vacate from parcel of land No. South Kabras/Bushu/3132 within the next 90 (ninety) days from today's date in default eviction order to issue forthwith.
2. An order of permanent injunction to issue restraining the defendants from ever laying claim, trespassing and/or interfering with the plaintiff's peaceful occupation in respect of parcel of land No. South/Kabras/Bushu/3132.
3. No orders as to costs.

It is so ordered

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

N.A. MATHEKA

JUDGE