



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 85 OF 2019**

**DR. SHIROYA ALFRED G.M.L.....PLAINTIFF**

**VERSUS**

**ELIAKIM MASAKA SHEUNDA .....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that at all material times he is the registered owner and entitled to the possession of land title No. N/Wanga/Namamali/985 measuring more or less 5 acres. Since May 1998, the defendant by himself, his servants and agents has on several dates wrongfully entered the plaintiff's said piece of land title No. N. Wanga/Namamali/985 and has erected a hut and uprooted the plaintiff's sugar cane growing therein and has thereby prevented the plaintiff from using the same. The defendant wrongfully claims that he has a right to occupy and use the said piece of land by virtue of Kakamega SPMCC No. 827 of 1996 and Mumias Division Tribunal Case No. 2 of 1997 between the defendant and one Moses Ndokhome Shieunda whereunder orders were made in favour of the defendant affecting land title No. N/Wanga/Namamali/984 and the plaintiff's land title No./N.Wanga/Namamali/985. The plaintiff avers that the said orders issued in favour of the defendant in Kakamega SPMCC No. 827 of 1996 and Mumias Division Tribunal, Case No. 2 of 1997 are null and void in so far as they purport to affect his rights over title No. N/Wanga/Namamali/985 and when the plaintiff was not a party to either of the said proceedings. The plaintiff prays for following orders:

1. A declaration that all orders in Kakamega SPMCC No. 827 of 1996 and Mumias Division Tribunal Case No. 2 of 1997 are null and void in so far as they purport to affect the plaintiff's rights over title No. N/Wanga/Namamali/985.
2. A declaration that the defendant is not entitled to enter, remain or use the said piece of land title No. N/Wanga/Namamali/985 or any portion thereof.
3. A permanent injunction to restrain the defendant whether by himself, his servants or agents or otherwise howsoever from entering, or using title No. N/Wanga/Namamali/985 or erecting a hut, uprooting sugar cane or any crop growing hereon.
4. Alternatively, an eviction order of the defendant, his servants or agents from the said title No. N/Wanga/Namamali/985.
5. Damages.
6. Further or other relief.

The defendant avers that the original L.P. N/Wanga/Namamali/58 belonged to their late father Matayo Shihunda which was to be sub-divided into two equal portion with his elder brother Moses Ndukhoma Shihunda. That the plaintiff colluded with his elder brother to buy his portion knowing that he was under age and could not be able to protest the transaction hence defrauding him. The defendant avers that the Mumias Division Tribunal No. 2 of 1997 and the finding is justiable because it ordered that N/Wanga/Namamali/984 & 985 to be sub divided equally with his brother then the plaintiff be given his share of five acres from the portion of Moses Ndokhome.

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 that the plaintiff is the registered proprietors of land title No. N/Wanga/Namamali/985. The plaintiff testified that he purchased the land from one Timothy Asomba Maloba. He produced a copy of the title deed and a copy of the green card as exhibits PEx3 and PEx9. He also produced sugar cane contracts with Mumias Sugar Factory to show he had taken possession (PEx4&5). That in May 1998, the defendant by himself, his servants and agents has on several dates wrongfully entered the plaintiff's said piece of land title No. N. Wanga/Namamali/985 and has erected a hut and uprooted the plaintiff's sugar cane growing therein and has thereby prevented the plaintiff from using the same. DW1 testified that he obtained the suit land by court orders in Kakamega SPMCC No. 827 of 1996 and Mumias Division Tribunal Case No. 2 of 1997 (DEX1). The same has not been appealed against and still stands to date. He confirms that he moved into the said suit parcel in 1998. I have peruse the green card register of the suit land and indeed the original registered proprietor was Moses Ndukhoma Shihunda in 1972. The same was transferred to Erasmus Musonga Wasike in 1972, Johana Okhato Asomba in 1991 and finally the plaintiff in 1995. Indeed when the matter went to the tribunal and later to court in 1996 and 1997 the land was not available. Indeed the plaintiff who was the registered proprietor was never enjoined in the said cases. I find that the plaintiff was an innocent purchaser for value. Indeed from the pleadings in Kakamega civil suit No. 827 of 1996 the defendant was claiming from the brother the said Moses Ndukhoma Shihunda 8 acres from the remaining 11 acres as he acknowledges that the latter had already sold 5 acres. I find that certificate of title held by the plaintiff was not acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff is the absolute and indefeasible owner of land parcel No. N/Wanga/Namamali/985. The prayer for damages will not be awarded as the same has not been established. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that all orders in Kakamega SPMCC No. 827 of 1996 and Mumias Division Tribunal Case No. 2 of 1997 are null and void in so far as they purport to affect the plaintiff's rights over title No. N/Wanga/Namamali/985.
2. A declaration that the defendant is not entitled to enter, remain or use the said piece of land title No. N/Wanga/Namamali/985 or any portion thereof.
3. The defendant whether by himself, his servants or agents or otherwise is to vacate from the suit title No. N/Wanga/Namamali/985 within the next 60 (sixty) days from today's date and in default of order to issue forthwith.
4. No orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 9<sup>TH</sup> DECEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**