



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KAKAMEGA

ELC CASE NO. 471 OF 2014

JOSEPH ANDANJE.....PLAINTIFF

VERSUS

JELIDA NALIAKA MUKAISL.....1ST DEFENDANT

DINAH ASUTSI.....2ND DEFENDANT

AGAITHA KHANDASI AURA 3RD DEFENDANT

JUDGEMENT

The plaintiff's case is that on the 2nd December 2009, the plaintiff entered into an agreement with the 1st defendant to sell and allocate to the plaintiff a portion of land from land parcel No. North Kabras/Malava/3252 measuring 0.80 Ha which was then in her possession as administrator and or had authority to dispose off, having acquired letters of administration. That the 2nd and 3rd defendants being licensed surveyors, offered and were hired by the plaintiff to process the demarcation and transfer transactions to their best of their professional knowledge after properly identifying the parcel of land in question as pointed out by 1st defendant. That on the 10th April, 2010 the 2nd and 3rd defendants presented to the plaintiff land mutilation forms purporting to show that they were registering the plaintiff land out of land parcel north Kabras/Malava/3252 into the plaintiffs name under new title land parcel No. North Kabras/Malava/3708 measuring approximately 0.86 Ha and thereafter the 2nd and 3rd defendant presented title deed No. North Kabras/Malava/3708 to the plaintiff, as evidence of his newly registered title deed. Thereafter 1st, 2nd and 3rd defendants took plaintiff to the purported new land and pointed out boundaries. The plaintiff avers that he was surprised to learn that the 1st, 2nd and 3rd defendants took him to a different parcel of land bearing a different No. Kakamega/Malava/845 in the name of Late Joram Mukaisi Khayiecha and showed to the plaintiff as parcel demarcates, out of title No. 3252 which they knew and or had reason to believe was not the true position of the matter both on land and in the documents. That all 3 defendants intentionally, maliciously and severally and/or jointly deceived the plaintiff of the property which he had purchased at KShs.420,000.00 and paid the full price, by showing him a different piece of land on which succession had not been carried out. The plaintiff states that despite demand and notice to sue the defendants have adamantly refused and/or ignored to rectify the errors by directing the plaintiff to his proper land parcel. The plaintiff further states that he has suffered serious loss as a result of the said action. The plaintiff prays for judgement against the defendants jointly and severally for:

1. An order for the defendants jointly and severally to rectify the errors.
2. To take the plaintiff to his proper land parcel and ensure it is free and vacant for possession by the plaintiff.
3. To compensate plaintiff for permanent developments carried out by the plaintiff on the land wrongly identified by the defendants i.e. the cost of constructing another permanent residential house on the proper land.
4. The rectification of the records.
5. Cost of the suit.

Pw2 testified that he was a witness to the said sale agreement.

The 1st defendant raised a preliminary point of law in her defence that the 1st defendant as described in paragraph 4 of the plaint has no capacity to be sued as she has not acquired letters of administration of the estate of the deceased. The 1st defendant while admitting that she entered into a sale of land agreement with the plaintiff, she denies selling and or disposing off a portion of land parcel registration number North Kabras/Malava/3252 to the plaintiff. The 1st defendant states that if there was any sub division, registration and or transfer of land parcel registration number North Kabras/3252 then the survey exercise was carried out by the 2nd and 3rd defendants with the instructions of the plaintiff. DW1 in her testimony admits that she sold the said land parcel registration number North Kabras/3252 to the plaintiff and has

no objection if he talks the same. DW2 confirmed that the land surveyed was No. 3252 and they processed the same.

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 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 not in dispute that L.R. No. North Kabras/Malava/3708 is registered in the name of the plaintiff. The plaintiff’s case is that on or about 2nd December 2009, the plaintiff entered into an agreement with the 1st defendant to sell and allocate to the plaintiff parcel of land from land parcel No. North Kabras/Malava/3252 measuring 0.80 Ha which was then in her possession as administrator and or had authority to dispose off, having acquired letters of administration. However the defendants took the plaintiff to a different parcel of land bearing a different No. Kakamega/Malava/845 in the name of Late Joram Mukaisi Khayiecha and showed the plaintiff as a parcel demarcated out of title No. 3252 which they knew and or had reason to believe was not the true position of the matter both on land and in the documents. DW1 in her testimony admits that she sold a portion of the said land parcel registration number North Kabras/3252 to the plaintiff and has no objection if he talks the same. DW2 confirmed that the land surveyed was from No. 3252 and they processed the same. I see no opposition in this matter. I find that the plaintiff has proved his case on a balance of probabilities on the issue of ownership. The plaintiff further states that he has suffered serious loss as a result of the said actions and seeks against the defendants damages and loss of earning on the said piece of land, and compensation for permanent developments on the falsely identified land. This was not proved and damages for loss and damage will not be awarded. I therefore grant the following orders;

1. The plaintiff to be given vacant for possession of land parcel registration No. North Kabras/Malava/3708 by the 1st defendant.
2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 8TH DECEMBER 2020.

N.A. MATHEKA

JUDGE