



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 34 OF 2015

AGOSTINE MONYI OBOSU.....PLAINTIFF

VERSUS

HELLEN MANJEMO OBOSU.....DEFENDANT

LAWRENCE MMBAIZA LUSKI.....DEFENDANT

JUDGEMENT

The plaintiff avers that he is a son of the 1st defendant and lives and occupies on a portion of land allocated to him by the 1st defendant on land parcel Kakamega/Lumakanda/437 and has extensively developed the said portion of about 3 ½ acres on the ground. The plaintiff avers that sometime in October, 2014, he discovered that the 1st defendant had fraudulently and without the consent of the plaintiff sold a portion of land measuring 2 acres out of land parcel Kakamega/Lumakanda/437 to the 2nd defendant including the portion the plaintiff occupies and has extensively developed and carries on his agricultural activities. On the 23/1/2015, the 2nd defendant forcefully came with a tractor and ploughed the said purchased portion without due regard to the plaintiff's crops already planted on the said portion and hence causing great damage and loss to the plaintiff. The plaintiff avers that the sale of this portion of land by the 1st defendant to the 2nd defendant was illegal as no consent was ever sought from him as a beneficial owner of the said land since he is the one in occupation of that portion. The said illegal acts of the 1st defendant and 2nd defendant have degenerated into this dispute which must be determined first to avoid the chaotic situation now prevailing on the ground. The plaintiff prays for judgment against the defendants jointly and severally for:-

1. An order of declaration that the purported land sale agreement of selling a portion of 2 acres by the 1st defendant to the 2nd defendant on 9/9/2013 without the consent of the plaintiff was illegal.
2. An order restraining the 1st defendant from transferring and or affecting any registration of the 2 acres out of land parcel Kakamega/Lumakanda/437 including the portion occupied and being utilized by the plaintiff/applicant.
3. An order restraining the 2nd defendant from trespassing and interfering with the plaintiff's portion of land he occupies and utilizes on land parcel Kakamega/Lumakanda/437.
4. Costs of this suit.
5. Any other relief this court may deem fit to grant to meet the ends of justice.

The 1st defendant avers that the plaintiff has not yet moved to the 5 acres of land which she gratuitously gave him, but he has planted blue gum trees on the lower part of the land which is the only tangible development on the land. The 1st defendant avers that the plaintiff is still accommodated by her in her homestead where he has a house for himself and his family. The 1st defendant avers that she did not sell part of the land which she allocated to the plaintiff to the 2nd defendant and she only needed consent of the Land Control Board to sell the land not consent of the plaintiff. The 1st defendant avers that the plaintiff has put a caution on the land to make it difficult for her to discharge her contractual obligations to the 2nd defendant who is expecting her to transfer the 2 acre of land to him. The 1st defendant avers that the plaintiff has no legal or beneficial interest in her land and she denies having fraudulently or in any other manner whatsoever deposited him of any interest and she will put him to strict proof thereof. The 1st defendant avers that she is the absolute owner of the land and the plaintiff has no authority to direct her on how to allocate it; if he is not comfortable with the manner in which she is allocating the land he should surrender the gift of 5 acres and move out of the land to a place of his own choice and at his own expense. The 1st defendant avers that the plaintiff has no actionable claim in law against her and she will file an objection to the plaint on a point of law with a view of striking it out.

The 2nd defendant avers that he has occupied the land which the 1st defendant who is the mother of the plaintiff sold to him. The 2nd defendant avers that the plaintiff maliciously damaged the fence which he had erected on the land and he is facing a criminal charge for his unlawful, act at Eldoret Chief Magistrate's Court. The 2nd defendant avers that this suit is intended to frustrate the criminal case at Eldoret.

The 2nd defendant avers that he bought the land from the registered proprietor who has no problem with him and he cannot therefore be restrained from occupying and using the land by the plaintiff who has no legal title to it.

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.”

In the instant case, it is not in dispute that, the 1st defendant is the registered proprietor of land parcel No. Kakamega/Lumakanda/437. It is also not in dispute that that sometime in October, 2014, the plaintiff discovered that the 1st defendant had fraudulently and without the consent of the plaintiff sold a portion of land measuring 2 acres out of land parcel Kakamega/Lumakanda/437 to the 2nd defendant. The plaintiff alleges that the portion of land measuring 2 acres out of land parcel Kakamega/Lumakanda/437 sold to the 2nd defendant includes the portion the plaintiff occupies and has extensively developed and carries on his agricultural activities hence the sale should be declared illegal. DW1 states that she has other children and has allocated them land. The plaintiff lives in her compound and he has also been allocated his part but due to the caution in place she is not able to transfer the land to them. The plaintiff has assaulted her and they have an ongoing criminal case in Eldoret court. She confirms that she is the one who built a house for the plaintiff. I find the 1st defendant truthful and I believe her. The plaintiff is a case of an ungrateful son who is causing the mother a lot of unnecessary problems. The 1st defendant has absolute ownership of that suit land together with all rights and privileges belonging to it. The plaintiff is advised to move to the 5 acres of land which his mother DW1 has gratuitously given him. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. There will be no order as to costs as this matter is between a mother and son.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE