



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 138 OF 2013

ISAAK MUTIMBA MACHIOPLAINTIFF

VERSUS

CORNELIUS WABWIRE ZAKARIADEFENDANT

JUDGEMENT

By a plaint dated 16th May 2013, the plaintiff avers that at all material times prior to the institution of this suit the plaintiff was the sole registered owner of land parcel No. NORTH/WANGA/MATUNGU/1722 measuring there on about 4.0 hectares. That on or about 11th March, 2004 the plaintiff entered into a land sale agreement with the defendant and the plaintiff agreed to sell 3 acres of land being part of land parcel No. NORTH/WANGA/MATUNGU/1722 for a consideration of Ksh. 210,000/= (two hundred and ten thousand) which money was paid in full by August, 2004. That subsequently in good faith the plaintiff surrendered title NO. NORTH/WANGA/MATUNGU/1722 for subdivision and issue of new Nos. NORTH/WANGA/MATUNGU/1763 and 1764 in the names of the plaintiff and the defendant respectively. The defendant by intent and ill motive to defraud the plaintiff registered land parcel NO. NORTH/MATUNGU/1764 a subdivision of NORTH/WANGA/MATUNGU/1722 in excess of 3 acres with the collusion of the surveyor as reflected by the mutation forms and the maps the plaintiff now occupies 6 acres of land on the ground covering the homestead of the plaintiff contrary to what was agreed in the land sale agreement. That the continued use of the excess land by the defendant since 2004 by planting cane and maize is an encroachment and forceful retainer and the right of use of the portion he is entitled contrary to the laid down law without consent and or authority from the plaintiff. The plaintiff has approached the defendant severally to amend the anomaly on the map and mutation forms on the ground to reflect 3 acres and not 6 (six) acres and even offered to refund Ksh. 480,000/= (four hundred and eighty thousand) to reverse the agreement and cancel the title, the defendant has adamantly refused and continually persists to occupy the plaintiff's land in excess of 3 acres and continues to have farming activities on the land. The plaintiff claim against the defendant is for an order for.

- a. Resurvey of the land occupied by the defendant on the ground as reflected on the mutation forms and map and the excess of 3 acres be given to the plaintiff by rectifying the mutation forms the map and title No. NORTH/WANGA/MATUNGU1764.
- b. Cancellation of title Nos. NORTH/WANGA/MATUNGU/1763 and 1764 to revert in the original NO. NORTH/WANGA/MATUNGU/1722 in the names of the plaintiff and the defendant be refund Ksh. 480,000/= as agreed between themselves in principle.
- c. An order for mesne profits on sugar farming contracts FIELDS NO. 11510400, MATUNGU FIELD NO. 104, PLOT 16 and FIELD NO. 11502700 MATUNGU 27, PLOT NO. 7 A/C NO. 26358 with Mumias Sugar Co. Ltd.

PW2 confirms that the plaintiff sold three acres to the defendant.

The defendant avers that he is the registered owner of the land parcel No. NORTH WANGA/MATUNGU/1764 measuring 3 acres. The defendant avers that on the 11th March, 2004 he entered into an agreement for sale of the land measuring 3 acres of the land to be hived from land parcel No. NORTH WANGA/MATUNGU/1722 to with the plaintiff herein wherein he paid the said sums to full by august, 2004. The defendant contends that subdivisions were done and his land measuring 3 acres were hived from land parcel number NORTH WANGA/MATUNGU/1722 form NORTH WANGA/MATUNGU/1764 which is registered into his name. That consequently, the defendant herein took possession of the said land with promise by plaintiff to move his houses to the lower part of his land to enable the defendant herein occupy his land measuring 3 acres which he did not to date. The defendant contend that since 2004 to 2012 he was only using and/or occupying land measuring 0.5 ha instead of the 3 acres of land which he is rightly entitled to contrary to the terms and conditions or the land sale agreement dated 11/3/2013. The plaintiff now occupies part of the land comprised in land parcel number NORTH WANGA/MATUNGU/1764 and has since refused, failed and neglected to move out of the same land to date, making it difficult for the defendant to use the said land. That on or about the month of August, 2012, the plaintiff moved into the defendant's land and uprooted his sugarcane and has since planted maize without any color of right whatsoever, on the strength that he wished to purchase back the land at an agreed price of Ksh. 480,000/=. That despite the defendant agreeing to resale back the land to the plaintiff at an agreed price of Ksh. 480,000/= in total, the plaintiff failed, refused and neglected to repay the said amount as agreed by the 1st of October, 2012. It was a term of the said agreement that if the said amount of Ksh. 480,000/= is not paid by the 1st October, 2012, the parties were to renegotiate on the same

terms. That without the knowledge of the defendant, the plaintiff lodged a caution on land parcel number NORTH WANGA/MATUNGU/1764 without any right whatsoever to the utter and sheer disgust of the defendant bonafide legal owner.

The defendant counterclaim against the plaintiff is for an order of eviction of the plaintiff, his agents, servants, families, relatives and/or any other person in occupation of the said parcel of land and on behalf or with permission of the plaintiff or any other person whatsoever and properties from land parcel number NORTH WANGA/MATUNGU/1764. The defendant further counterclaim against the plaintiff is for an order for removal of caution lodged by the plaintiff on the land parcel number NORTH WANGA/MATUNGU/1764 registered in the names of the defendant herein. DW2, who was a witness in the agreement corroborated the defendant's evidence.

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, on or about 11th March, 2004 the plaintiff entered into a land sale agreement with the defendant and the plaintiff agreed to sell 3 acres of land being part of land parcel No. NORTH WANGA/MATUNGU/1722 for a consideration of Ksh. 210,000/= (two hundred and ten thousand) which money was paid in full by August, 2004. It is a finding of fact that the defendant is the registered owner of the land parcel number NORTH WANGA/MATUNGU/1764 measuring 3 acres. The defendant contends that subdivisions were done and his land measuring 3 acres were hived from land parcel number NORTH WANGA/MATUNGU/1722 to form NORTH WANGA/MATUNGU/1764 which is registered into his name (DEX1). That consequently, the defendant herein took possession of the said land with promise by plaintiff to move his houses to the lower part of his land to enable the defendant herein occupy his land measuring 3 acres which he did not do to date. It came out in evidence that the plaintiff approached the defendant severally to amend the anomaly on the map and mutation forms on the ground to reflect 3 acres and not 6 (six) acres and even offered to refund Ksh. 480,000/= (four hundred and eighty thousand). The allegation was that the defendant was occupying more than the three acres. The plaintiff failed, refused and neglected to repay the said amount as agreed by the 1st of October, 2012. I find that this is a case of a seller changing his mind after selling his land and properly executing the sale agreement (DEX3). I see no evidence that the said title held by the defendant was through fraud or misrepresentation to which the person is proved to be a party or that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with costs. I find that the defendant has proved his counter claim and I grant the following orders;

1. The plaintiff, his agents, servants, families, relatives and/or any other person in occupation of the said parcel of land and on behalf or with permission of the plaintiff or any other person whatsoever are given 6 (six) months to vacate from land parcel number NORTH WANGA/MATUNGU/1764 and in default an eviction order to issue forthwith.
2. The caution lodged by the plaintiff on the land parcel number NORTH WANGA/MATUNGU/1764 registered in the name of the defendant herein be removed forthwith.
3. Costs to the defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE