



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 4 OF 2013

KHADIJA KHATIOLI OKUTOYI.....PLAINTIFF

VERSUS

JOHN MWANZA KENYATTA

MOHAMMED MUSUNGU OKONGO

MOSES OKALIE..... DEFENDANTS

JUDGEMENT

That at all material times, the plaintiff was the proprietor of L.R. NO. South Wanga/Ekero/977. That the defendants have forcibly entered into an area under the ownership of the plaintiff comprised in the suit land and they have erected permanent structures thereon, which include residential dwellings. That the defendants have also purported to dispose of parts of the suit land to other persons under the pretext that they are the lawful owners of the suit land. The defendants have also gone further to let out the structures they have erected to the public to be used as residences. The plaintiff prays for judgment against the defendants jointly and/or severally for:-

1. An order of eviction against the defendants and all persons claiming interest of the suit land under the defendants.
2. Costs of the suit.

The 1st defendant testified that he is the absolute proprietor of Land parcel No. south Wanga/Ekero/2581 and has not trespassed on the plaintiff's land. The 2nd defendant avers that he is lawfully registered as an absolute proprietor of Land parcel No. South Wanga/Ekero/1234 which he purchased from Shaban Nyongesa Nanjira which he fully developed and the plaintiff is envious and wants to grab the 2nd defendant's land. The 2nd defendant avers that the plaintiff's suit is fatally defective, lacks clarity and certainty and is otherwise an abuse of the court process.

The 3rd defendant avers that the plaintiff had similar dispute with her neighbours in Mumias SRMCC No. 477 of 2005 which she lost and is creating unnecessary dispute with the 3rd defendant, she is a frivolous and vexatious litigant. The 3rd defendant avers that he is the registered absolute proprietor of the whole of that parcel of land known as South Wanga/Ekero/2582. The 3rd defendant avers that in or about December, 2012, the plaintiff trespassed onto the 3rd defendant's land parcel No. south Wanga/Ekero/2582 and started laying claim thereon. That from December, 2012 to date the plaintiff has denied the 3rd defendant access to his land as a result of which the 3rd defendant has and continues to suffer great loss and damage. That the subject matter herein is Land Parcel No. South Wanga/Ekero/2582 situated near Mumias town Lukoya area. The 3rd defendant's counter-claim against the plaintiff for:-

1. An eviction order from Land parcel No. South Wanga/Ekero/2582.
2. A permanent injunction restraining the plaintiff, her agent, servants or employees from trespassing, laying claim or using Land Parcel No. South Wanga/Ekero/2582.
3. Mesne profits from December, 2012 till giving vacant possession at the rate of Ksh. 50,000/= per year.
4. Costs of this suit.

DW4, Shaban Nyongesa Nanjira, testified that he sold one acre of his land to the plaintiff's husband which is Land Parcel No. South Wanga/Ekero/977 and he retained Land Parcel No. South Wanga/Ekero/976 which he sold to other buyers. DW5, states that he is a buyer and registered proprietor of Land Parcel No. South Wanga/Ekero/2153. The interested parties submitted that, the surveyors report confirms that Land Parcel No. South Wanga/Ekero/977 was intact and hence there is no cause of action.

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.”

This court has carefully considered the documentary evidence produced as exhibits. PEx1 the plaintiff’s title deed shows that she is the registered proprietor of L.R. NO. South Wanga/Ekero/977 issued in 2009. From the Surveyors report produced and adopted by the court PEx3 the findings were that L.R. NO. South Wanga/Ekero/977 was intact from their records and had no subdivisions made on it. Be that as it may several parcels were identified and measured within the same parcels of land No. South Wanga/Ekero/977 namely;

1. Land Parcel No. South Wanga/Ekero/1234
2. Land Parcel No. South Wanga/Ekero/1235
3. Land Parcel No. South Wanga/Ekero/1236
4. Land Parcel No. South Wanga/Ekero/2581
5. Land Parcel No. South Wanga/Ekero/1282
6. Land Parcel No. South Wanga/Ekero/1281

DW4, Shaban Nyongesa Nanjira, testified that he sold one acre of his land to the plaintiff’s husband which is Land Parcel No. South Wanga/Ekero/977 and he retained Land Parcel No. South Wanga/Ekero/976 which he sold to other buyers. He did not sell 1 hectre. It is in the surveyors report that non of the subdivisions were generated from Land Parcel No. South Wanga/Ekero/977 yet on the ground they occupy Land Parcel No. South Wanga/Ekero/977. I find that all the above titles are bad titles and ought to be nullified. The plaintiff has good title, she was the initial buyers and holds the title and it is too late in the day for the seller to allege that he sold less land then what the title states. It seems to me DW4, Shaban Nyongesa Nanjira sold the same parcel of land twice. It is a pity the Land Registrar was not enjoined in these proceedings to explain or take responsibility on how the same land parcel on the ground could hold more than one title in their records. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. The following titles being bad titles are to be nullified and are to be cancelled and/or nullified forthwith;

1. Land Parcel No. South Wanga/Ekero/1234
2. Land Parcel No. South Wanga/Ekero/1235
3. Land Parcel No. South Wanga/Ekero/1236
4. Land Parcel No. South Wanga/Ekero/2581

5. Land Parcel No. South Wanga/Ekero/1282

6. Land Parcel No. South Wanga/Ekero/1281

2. The defendants and all persons claiming interest of the suit land namely; Land Parcel No. South Wanga/Ekero/977 as per the existing boundaries are given 12 (twelve) months to vacate the said suit land and in default eviction order to issue forthwith.

For the above reasons I find that the counterclaim has not been established and I dismiss it. As the parties are neighbours there will be no order as to costs.

Orders accordingly.

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

N.A. MATHEKA

JUDGE