



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 79 OF 2013

RONALD WERE MWACHI.....PLAINTIFF

VERSUS

JANE OMUKAMBA

JOSEPH MOYI

MACLEOD ARINGO ANYANZWA

RODAH ANYAZWA

EDWARD LIBOI

JOHN ANYANGU MOYI.....DEFENDANTS

JUDGEMENT

The plaintiff alleges that the deceased father Joseph Mwachi was the owner/proprietor of L.P. No. BUTSOTSO/SHIKOTI/1328. The plaintiff further alleges that the 1st and 2nd defendants claim that their deceased father purchased a portion of land from the L.P. NO. BUTSOTSO/SHIKOTI/328 from the plaintiff's deceased father which allegation they are not aware of and even never consented to the same. The plaintiff avers that the 1st and 2nd defendants carried out succession cause on the land parcel without his consent and or knowledge and were issued with a grant which was then confirmed. The plaintiff further avers that the 1st and 2nd defendants carried out succession on L.P. NO. BUTSOTSO/SHIKOTI/1778 did registration and caused the transfer of the same into their names. The plaintiff avers that the L.P. NO. BUTSOTSO/SHIKOTI/1328 which was the original number was sub-divided by the 1st and 2nd defendants into L.P. NO. BUTSOTSO/SHIKOTI/1778 and registered the land parcel into their names which act rendered them landless. The 3rd and 4th defendants are interfering with the boundary features and or fencing the L.P. NO. BUTSOTSO/SHIKOTI/1778. The plaintiff avers that the defendants brought in somebody who was walking on the L.P. NO. BUTSOTSO/SHIKOTI/1778 with an intention of selling the said land parcel. The plaintiff's prayer to court is for an order of permanent injunction, restraining the defendants, their agents, servants, employees and or anybody acting for and on behalf from cultivating, contracting, instructing, planting crops/sugar cane selling, wasting, transferring and or dealing/interring with the L.P. NO. BUTSOTSO/SHIKOTI/1778.

The defence is that, the 2nd and 6th defendants are children, administrators and beneficiaries of the estate of the late Aggrey Wilson Moyi. Between 1977 and the year 2011 the title remained in the name of the late Aggrey Wilson Moyi. That following the demise of the late Aggrey Wilson Moyi, the 2nd and 6th defendants filed High Court Succession Cause No. 574 of 2003 and upon obtaining the Grant were registered as proprietors of property BUTSOTSO/SHIKOTI/1778 on the 6th January, 2011 by transmission. The confirmed grant has not been subject to any challenge in any court of law. The original title has always been in the name of the late Aggrey Wilson Moyi since and has not been subject to any proceedings. The defendants shall contend and maintain that the suit is time-barred and bad in law and ought to be struck out with costs as the title Butsotso/Shikoti/1778 was acquired in 1977 and remained unchallenged until the demise of the late Aggrey Wilson Moyi in 2002. Sometime in the year 2013, the plaintiff forcefully entered onto the property and evicted 3rd, 4th and 5th defendants who were at the time in possession and cultivating on the property and has constructed illegal structures on the property. The defendants prays that the plaintiff's claim be dismissed with costs and judgment entered in favour of the 2nd and 6th defendants for:-

1. An injunction to restrain the plaintiff by himself, his servants and agents or otherwise howsoever from trespassing, continuing to occupy, constructing, cultivating or any other way interfering with property Butsotso/Shikoti/1778.
2. Possession;
3. General damages for trespass.

4. Costs of suit and counterclaim.

PW1, maintains he was born on that piece of land and he is now 58 years old. He lives on the land with his family to date. PW2 the plaintiff's mother and PW3 his wife, corroborated the plaintiff's case.

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. Hon Justice Munyao Sila 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 the 2nd and 6th defendants are the beneficial owners of land parcel No. BUTSOTSO/SHIKOTI/1778 on the 6th January, 2011 by transmission. 1st, 2nd and 6th defendants state that the suit property was bought by their father one Aggrey Wilson Moyi from the plaintiff's father and he was issued with a title deed in 1977. The family of the 1st, 2nd and 6th defendants then gave permission to the 3rd, 4th and 5th defendants to cultivate the land. Through a confirmation of grant the suit land was bequeathed to the children. The plaintiff states that he resides on the suit land and has no documentary evidence ownership. He is not aware of any sale of the land by his father. He then admits that his father sold part of the land. The 3rd, 4th and 5th defendants used part of the land from 1985 as they had been allowed to do so by his father. The plaintiff admits that he has sold part of the land to other people. The plaintiff states that he has lived on the suit land openly and continuously for a long period of time. The plaintiff now seeks a permanent injunction. The plaintiff has not taken out succession proceedings and seems to be relying on the doctrine of adverse possession. This case has been brought by way of a plaint seeking an injunction. I find that the plaintiff has failed to prove that the title obtained by the 2nd and 6th defendants' father was obtained on the grounds of fraud or misrepresentation to which the person is proved to be a party or that the said 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 the same is dismissed with no orders as to costs. I find that the defendants have proved their counterclaim on a balance of probabilities and I grant the following orders;

1. An injunction to restrain the plaintiff by himself, his servants and agents or otherwise howsoever from trespassing, continuing to occupy, constructing, cultivating or any other way interfering with property Butsotso/Shikoti/1778.

2. Possession.

There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE