



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 111 OF 2011

SOFIA ABDALLA SALIM.....PLAINTIFF

VERSUS

BIASHA ATHUMANI

MUSA ATHUMANI

ARAFATHUMANI.....DEFENDANTS

JUDGEMENT

That the plaintiff avers that Land Parcel Number 1513/67 is registered in the name of Salim Bin Abdalla Bin Sheikh who is deceased and is the grandfather to the plaintiff Sofia Abdalla Salim. That the plaintiff has obtained Limited Grant of letters of administration to represent the estate and to pursue this suit. That plaintiff avers that the defendants have caused to be constructed a house on the suit property. That defendants have neither legal authority, nor documents to show that they own the land neither have they been given authority to construct. That the plaintiff avers that unless the defendants by themselves, agents, servants workers and/or employee are restrained from trespassing, encroaching, constructing and/or dealing in any matter with the plaintiff's parcel number L.R. 1513/67. The plaintiff prays for judgment against the defendant for:-

1. Permanent injunction restraining the defendants by themselves, agent, servant, workers and/or employees from trespassing, encroaching, constructing and dealing with parcel number L.R. 1513/67.
2. Order directing the defendant to demolish the illegally partly built house.
3. Any other or further orders this honourable court may deem fit to grant.
4. Costs of this suit.

DW1, the 2nd defendant testified that his grandmother was a resident of Takaungu within Kilifi County up until her demise in 1976. Upon her demise, his late grandmother left her items as well as her house to his uncle one Mr. Hamisi. The said house belonged to their late grandmother. His late grandmother was married to one Salim Bin Babu who is now deceased. Among the children she begot was one Fatuma Salim who was the wife to Athumani Musa and sister to Hamisi. Fatuma Salim is his mother as well as the mother to the 1st and 2nd defendants.

After his uncle Hamisi's demise in 2004 the plaintiff sent a message that their family house was on the verge of collapsing. My sisters who are the 1st defendant and 3rd defendant herein went to Takaungu so as to view the house and see whether the house was in a repairable state. However, the plaintiff refused to let them carry out renovations on the house. They had no blood relationship with Sofia Salim but were only neighbours. The chief then issued an approval letter dated 9th November, 2012 for the said renovation. The plaintiff however contested the said approval stating that she is the rightful owner of the said house. She also claimed to have a title for the parcel to which the aforesaid house rests upon and placed her reliance on certificate of ownership No. 11439 dated 13/2/1976. That notwithstanding, he commenced the renovation as planned, concluded renovations and tenants moved in.

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 disputed that, Land Parcel Number 1513/67 is registered in the name of Salim Bin Abdalla Bin Sheikh who is deceased and is the grandfather to the plaintiff Sofia Abdalla Salim. That the plaintiff has obtained Limited Grant of letters of administration to represent the estate and to pursue this suit. Be that as it may the defendants maintain that the house on the suit land belonged to their grandmother who died in 1976. It was after their uncle died in 2004 that they were told the house was falling apart and they commenced renovations in 2012. It has come out in evidence that the defendants do not and have not resided on the suit premises. They have no letters of administration to represent their said grandmother. It is their evidence that they have renovated the house and they are now renting the same. The defendants have failed to prove their defence of adverse possession on a balance of probabilities. There is no evidence to show that the title of the suit land was obtained illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

5. Permanent injunction restraining the defendants by themselves, agent, servant, workers and/or employees from trespassing, encroaching, constructing and dealing with parcel number L.R. 1513/67.
6. Order directing the defendants to demolish the illegally partly built house.
7. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 29TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE