



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 124 OF 2015**

**ENOCK ISIAHO MMBAITSA.....PLAINTIFF**

**VERSUS**

**STEPHEN MULINYA ANENE**

**GLADYS SHIKURI.....DEFENDANTS**

**JUDGEMENT**

The plaintiff avers that he is the absolute registered proprietor of the whole of the parcel of land designated as KAKAMEGA/SHIRU/902 measuring approximately 0.6 ha and whose boundaries are clearly demarcated on ground. The plaintiff avers that the defendants herein have without any colour right trespassed onto his parcel of land Kakamega/Shiru/902 and intends to bury the remains of deceased daughter Marta Mulinya who died on Friday 5<sup>th</sup> June, 2009. The plaintiff avers that the 1<sup>st</sup> and 2<sup>nd</sup> defendant herein have without colour right trespassed on to his parcel of land No. KAKAMEGA/SHIRU/902 and the 1<sup>st</sup> defendant has buried thereon remains of his deceased daughter Marta Mulinya who died on Friday 5<sup>th</sup> June, 2009 while both the defendants have constructed thereon houses purported to be their homes and have maliciously destroyed tree plantations thereof and other perennial crops at a value. The plaintiff avers that as the absolute and rightful owner of land registration No. Kakamega/Shiru/902 he is entitled to exclusive, peaceful, unhindered possession and use thereof. The plaintiff claims against the defendant is for an order for permanent injunction perpetually restraining the defendant either by himself or through his employees, servants, relatives, and/or agents from burying the remains of his deceased daughter Marta Mulinya on the suit parcel of land or is alienating, laying claim to, trespassing onto, utilizing, carrying out any work and/or in any manner dealing with LR. NO.KAKAMEGA/SHIRU/902 and or interfering with the plaintiff's peaceful and exclusive ownership, possession or used thereof. The plaintiff claims against the 1<sup>st</sup> and 2<sup>nd</sup> defendant is for an order for permanent injunction perpetually restrained the 1<sup>st</sup> defendant either, by himself or through his employees, servants, relatives, and/or agents from trespassing onto land parcel No. KAKAMEGA/SHIRU/902 and exhumation of the remains of the late Marta Mulinya who was buried onto the suit land on 8<sup>th</sup> June, 2009 and eviction order against the 1<sup>st</sup> and 2<sup>nd</sup> defendants their agents/servants/employees/and/or whosoever from land parcel No. KAKAMEGA/SHIRU/902 and general damages as compensation for tree plantations and other perennial crops which were maliciously destroyed by the defendants and do stop interfering with the plaintiff's peaceful and exclusive ownership, possession or use thereof.

The 1<sup>st</sup> defendant in his statement of defence denies trespassing on the plaintiff's suit property. The 2<sup>nd</sup> defendant states in her pleadings that she is in occupation of about one acre of the suit land by adverse possession and that she has overriding interests of her above mentioned portion and shall crave for portion to be transferred to her under separate title deed.

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 registered owner of land parcel No. KAKAMEGA/SHIRU/902 is the plaintiff. PEx2 is the certificate of title and PEx3 the green card confirming this. PW1 the plaintiff testified that he inherited the land from his father, PEx4 is the certificate of confirmation of grant in Kakamega Succession Cause No. 736 of 2007. This matter was litigated before in Kakamega High Court Civil Appeal No. 49 of 2012 and the matter was referred to the Environment and Land Court (PEx1 is the judgement). The plaintiff gave evidence that he was sent to prison for 10 years in Kakamega High Court Criminal Case no. 24 of 1998 and when he came out found the defendants had invaded his land. The defendants were served but failed to attend court or give any evidence to support their defence. I find that the title held by the plaintiff is good title and see no evidence of fraud, misrepresentation or corrupt scheme by the plaintiff. General damages as compensation for tree plantations and other perennial crops which were maliciously destroyed by the defendants will not be awarded as the same has not been proved. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. A permanent injunction to issue to restrain the 1<sup>st</sup> defendant either, by himself or through his employees, servants, relatives, and/or agents from trespassing onto land parcel No. KAKAMEGA/SHIRU/902 and within the next 6 months from the date of this judgement an exhumation of the remains of the late Marta Mulinya who was buried onto the suit land on 8<sup>th</sup> June, 2009.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants their agents/servants and employees from land parcel No. KAKAMEGA/SHIRU/902 are to vacate the said suit land within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.
3. There will be no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**