



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 366 OF 2014

JOHN NZAKA.....PLAINTIFF

VERSUS

PETER MUNANDI.....DEFENDANT

JUDGEMENT

The plaintiff case is that he is the registered absolute proprietor of land parcel number KAKAMEGA/SHAMBERERE/396 and hence entitled to possess and develop the parcel of land without any interference from any other person under the registered land Act (Cap 300) Laws of Kenya. The defendant herein entered into the plaintiff's parcel of land without any legal right and or permission from the plaintiff and he has refused, neglected and or failed to vacate from the parcel of land despite demand from the plaintiff on several occasions. The defendant has gone ahead and constructed structures on the plaintiff's parcel of land without his permission and or any legal right. The plaintiff avers that the actions of the defendant have interfered with his legal and physical possession of land parcel number KAKAMEGA/SHAMBERERE/396. The plaintiff's claim against the defendant is for an order of eviction of the defendant and his family from land parcel number KAKAMEGA/SHAMBERERE/396. The defendant has refused, neglected and or failed to vacate from land parcel number KAKAMEGA/SHAMBERERE/396 with his family despite demand and notice of intention to sue being served upon himself. The plaintiff prays for judgment against the defendant for the following orders

1. Eviction from land parcel number KAKAMEGA/SHAMBERERE/396
2. Costs of this suit.
3. Any other order the honourable court may deem fit to grant.

PW1 gave evidence that the suit land was his and he produced the title PEx1. The land was his grandfather and he obtained it by going through succession proceedings. He was charged with forgery of the title in the criminal case and he lost the case in both the lower court and on appeal. When he obtained the title the defendant was already living on the land. The defendant he maintains has trespassed on his land.

The defendant stated that the plaintiff acquired suit land parcel number KAKAMEGA/SHAMBERERE/396 through fraud and misrepresentation. The plaintiff is not the beneficiary of the estate of the late Andrea Imbuchi Lukhalo, he had no locus standi to institute the succession proceedings with respect to the deceased's estate and that he carried out the said proceedings secretly without the consent of the rightful representatives. He denied claims that the plaintiff has been in possession of the land since 1994 hence the plaintiff's claim against him is statutorily time barred by virtue of the limitations of actions act. Also that the defendant acquired the suit land from his late father Sinya Munandi who bought it from the original registered owner Andrea Imbuchi Lukhalo and acquired immediate vacant possession. The defendant produced the sale agreements PEx2, the application for consent PEx4 and the proceedings of the criminal case PEx6 and 7 among other documents to prove his 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 registered owner of land parcel number KAKAMEGA/SHAMBERERE/396 is the plaintiff. It is also not in dispute that the defendant resides on the suit land. The issue to be determined in this case is how the plaintiff acquired the title. I have perused the green card DEx3 and it is clear ownership passed to the plaintiff John Nzaka from Imbuchi Lukhalo through succession. However, the plaintiff was not the beneficiary of the estate of Imbuchi Lukhalo. Indeed the plaintiff admits that the late Imbuchi Lukhalo was his grandfather and Wilson Nzaka was his father. However during succession he said he was the son of the late Imbuchi Lukhalo. The plaintiff admits he was charged in Chief magistrates Court Kakamega Criminal Case No 2301 of 2010 and found guilty of forgery of the said title. He appealed in the High Court of Kakamega Criminal Appeal No. 21 of 2012 and the conviction was upheld. I find that the title deed held by the plaintiff was obtained through fraud and misrepresentation to which the plaintiff was a party. The certificate of title has been acquired illegally, unprocedurally and through a corrupt scheme. Indeed that plaintiff in cross examination admitted that he has never used the suit land and does not know if the defendant moved there in 1994. All he confirms is that the defendant currently resides therein. The defendant has produced documentary evidence to show there was a sale agreement of the suit land between his father and the late Imbuchi Lukhalo, who was the original registered proprietor. I concur with the defendant's submissions. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE